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[Weekly Reporter, Oct. 28, 1899.]

THE

WEEKLY REPORTER,

1898-99

(FORTY-SEVENTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1898, TO THE 12TH OF AUGUST, 1899.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XLVII.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the forty-seventh volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains a summary of the cases published from the 24th of October, 1898, to the end of August, 1899, in the WEEKLY REPORTER, and in the Law Reports, the Law Journal Reports, and the Law Times Reports.

JUDGES AND LAW OFFICERS

FROM THE 24TH OF OCTOBER, 1898, TO THE 12TH OF AUGUST, 1899.

LORD HALSBURY, LORD CHANCELLOR.

LORD WATSON,
LORD MACNAGHTEN,
LORD MORRIS,
LORD DAVEY,
} LORDS OF APPEAL IN ORDINARY.

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THE LORDS OF APPEAL IN ORDINARY.
LORD HERSCHELL,
LORD HOBHOUSE,
LORD SHAND,
SIR RICHARD COUCH,
} ADDITIONAL JUDGES ORDINARILY ATTENDING.

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SIR ARCHIBALD LEVIN SMITH,
SIR JOHN RIGBY,
SIR JOSEPH WILLIAM CHITTY,
SIR RICHARD HENN COLLINS,
SIR ROLAND VAUGHAN WILLIAMS,
SIR ROBERT ROMER,
} LORDS JUSTICES OF APPEAL.

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SIR JAMES STIRLING.
SIR ARTHUR KEKEWICH.
SIR ROBERT ROMER.
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SIR ROBERT BANNATYNE FINLAY, SOLICITOR-GENERAL.

EDITOR AND REPORTERS.

1898—99.

EDITOR.

MARTIN JOSEPH BLAKE,

BARRISTER-AT-LAW.

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HOUSE OF LORDS		CHARLES HARDMAN GRAFTON, Barrister-at-Law.
PRIVY COUNCIL		CHARLES HARDMAN GRAFTON, Barrister-at-Law.
COURT OF APPEAL (No. I.)		WILLIAM FREDERICK BARRY, FREDERICK GEORGE RÜCKER, FRANCIS OCTAVIUS ROBINSON, and EDWARD G. STILLWELL, Barristers-at-Law.
COURT OF APPEAL (No. II.)		ROBERT CUNNINGHAM MACKENZIE, JAMES IRVINE STIRLING, PAUL STRICKLAND, WARWICK H. DRAPER, WILLIAM S. GODDARD, and WILLIAM SCOTT THOMPSON, Barristers-at-Law.
CHANCERY DIVISION.	*Mr. Justice North*	RICHARD SILLEM, JOHN HUMPHREYS DAVIES, and G. BALDWIN HAMILTON, Barristers-at-Law.
	Mr. Justice Stirling	PAUL STRICKLAND, WARWICK H. DRAPER, WILLIAM SCOTT THOMPSON, and JAMES IRVINE STIRLING, Barristers-at-Law.
	Mr. Justice Kekewich	CHARLES CARRINGTON HENSLEY and ROBERT J. A. MORRISON, Barristers-at-Law.
	Mr. Justice Romer	JOHN FELIX WALEY and RALEGH B. PHILLPOTTS, Barristers-at-Law.
	Mr. Justice Byrne	J. ARTHUR PRICE, RALEGH B. PHILLPOTTS, and NEVILLE TEBBUTT, Barristers-at-Law.
	Mr. Justice Cozens-Hardy	NEVILLE TEBBUTT and JOHN FELIX WALEY, Barristers-at-Law.
	Mr. Justice Wright	CHARLES WALTER MEAD, Barrister-at-Law.
QUEEN'S BENCH DIVISION		Sir SHERSTON BAKER, Bart., and THOMAS REGINALD COLQUHOUN DILL, Barristers-at-Law. WILLIAM ERSKINE REID and CECIL G. WILBRAHAM, Barristers-at-Law. FRANCIS OCTAVIUS ROBINSON and EDWARD G. STILLWELL, Barristers-at-Law.
" (CASES IN BANKRUPTCY)		PAUL M. FRANCKE, Barrister-at-Law.
PROB., DIV., and ADM. DIVISION		(Prob. & Div.)...JOHN GERARD LAING, Barrister-at-Law. (Adm.) .....CHARLES FUHR. JEMMETT, Barrister-at-Law.
CROWN CASES RESERVED		THOMAS REGINALD COLQUHOUN DILL, Barrister-at-Law.

A TABLE

OF

THE NAMES OF CASES

REPORTED AND DIGESTED IN THIS VOLUME,

WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

VOL. XLVII.

NOTE.—In the following Table the cases are arranged in the Alphabetical order of the PLAINTIFFS' names; but for convenience of reference, with respect to cases having double titles—*e.g.*, *In re Smith*, *Brown* v. *Jones*—this Table gives the names of such cases under both titles.

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Adam v British and Foreign Steamship Co. (Limited)	Q.B.D.	—	139	[1898] 2 Q. B. 430; 79 L. T. 31
Adams and Perry's Contract, *In re*	CH.D. STI. J.	326	212	[1899] 1 Ch. 554; 68 L. J. Ch. 259; 80 L. T. 169
Adlington v Conyngham	C.A.	—	151	[1898] 2 Q. B. 492; 79 L. T. 232
African Gold, &c., Co., *In re*. Markham and Darter's case	CH.D. WRI. J.	509	28	[1899] 1 Ch. 414; 68 L. J. Ch. 215; 80 L. T. 282
Agius v Great Western Colliery Co. (Limited)	C.A.	403	49	[1899] 1 Q. B. 413; 68 L. J. Q. B. 312; 80 L. T. 140
Alcoy and Gandia Railway Co. (Limited) v Greenhill	C.A.	—	40	79 L. T. 257
Aldis v City of London Corporation	CH.D. KEK. J	514	130	[1899] 2 Ch. 169; 80 L. T. 683
Alexander v Automatic Telephone Co.	CH.D. HDY, J	—	33	68 L. J. Ch. 514; 80 L. T. 753
Allen, *In re*. Basset v Allen	CH.D. NOR. J.	55	3	[1898] 2 Ch. 499; 79 L. T. 207
——— v Fulham Vestry	Q.B.D.	9	128	79 L. T. 190
———	C.A.	428	128	[1899] 1 Q. B. 681; 68 L. J. Q. B. 450; 80 L. T. 253
——— v Gold Reefs of West Africa (Limited)	CH.D. KEK. J.	568	31	[1899] 2 Ch. 40; 68 L. J. Ch. 540; 80 L. T. 750
Altree v Altree	Q.B.D.	60	18	[1898] 2 Q. B. 267
Andrews, *In re*	Q.B.D.	—	57	68 L. J. Q. B. 683
Anthony, Birrell, Pearse, & Co., *In re*. Doig v Anthony, &c., Co.	CH.D. KEK. J.	—	154	[1899] 2 Ch. 50; 68 L. J. Ch. 414; 80 L. T. 688
Appleby v Horseley & Co.	C.A.	614	119	80 L. T. 853
Apthorpe v Schoenhofen Brewing Co.	C.A.	—	75	80 L. T. 395
Aranco Co. (Limited), *In re*	CH.D. NOR. J.	—	29	79 L. T. 336
Arding v Economic Printing Co.	C.A.	—	93	79 L. T. 622
Ashmore & Co. v Cox & Co.	Q.B.D.	—	41	[1899] 1 Q. B. 436; 68 L. J. Q. B. 72
Astbury, In Goods of	P.D. & A.D.	—	163	80 L. T. 296
Astley v New Tivoli	CH.D. NOR. J.	326	32	[1898] 1 Ch. 151; 68 L. J. Ch. 90; 79 L. T. 541
——— v Tyldesley Coal Co.	Q.B.D.	—	103	68 L. J. Q. B. 252; 80 L. T. 116
Athlumney (Lord), *In re*. Wilson, *Ex parte*	BKCY.	144	16	[1898] 2 Q. B. 547; 79 L. T. 303
Atkinson, *In re*. Waller v Atkinson	C.A.	469	116	[1899] 2 Ch. 1; 68 L. J. Ch. 404; 80 L. T. 505
Attorney-General, *Ex parte*. Higginson & Dean, *In re*	BKCY.	285	14	[1899] 1 Q. B. 325; 68 L. J. Q. B. 198; 79 L. T. 673
Attorney-General v Beech	H.L.	257	72	[1899] A. C. 53; 68 L. J. Q. B. 130; 79 L. T. 565
——— v Carlton Bank	Q.B.D.	650	82	[1899] 2 Q. B. 158; 68 L. J. Q. B. 788
——— v Coulson	Q.B.D.	—	74	[1899] 2 Q. B. 253; 68 L. J. Q. B. 779
——— v De Préville	Q.B.D.	—	73	[1899] 2 Q. B. 238; 68 L. J. Q. B. 832
——— v Furness Railway	Q.B.D.	—	170	[1899] 2 Q. B. 267; 68 L. J. Q. B. 623; 80 L. T. 710
——— v Grey (Earl)	C.A.	37	71	[1898] 2 Q. B. 534; 79 L. T. 235
——— v Hay	Q.B.D.	—	73	[1899] 2 Q. B. 245; 68 L. J. Q. B. 557; 80 L. T. 712
——— v London County Council	Q.B.D.	—	75	[1899] 2 Q. B. 226; 68 L. J. Q. B. 823; 80 L. T. 767

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Attorney-General v London and North-Western Railway Co.	Q.B.D.	—	169	[1899] 1 Q. B. 72; 68 L. J. Q. B. 4; 79 L. T. 412
——— v Merthyr Tydvil Guardians	CH.D. NOR.J.	—	150	80 L. T. 618
——— v Owen	Q.B.D.	—	73	[1898] 2 Q. B. 253
——— v Rufford & Co.	CH.D NOR. J.	405	107	[1899] 1 Ch. 537; 68 L. J. Ch. 179; 80 L. T. 17
——— for Canada v Attorneys-General for Ontario, Quebec, and Nova Scotia	P.C.	—	—	[1898] A. C. 701
——— for New South Wales v Love	P.C.	81	143	[1898] A. C. 679
Auriferous Properties, *In re*	CH.D. WRI J.	75	35	[1898] 2 Ch. 428; 79 L. T. 71
Australian Joint-Stock Bank v Bailey	P.C.	—	66	[1899] A. C. 396
Bagshaw v Pimm	P.D. & A D.	—	164	80 L. T. 360
Bailey v Watson	Q.B.D.	—	45	[1898] 2 Q. B. 270
Baird *In re.* Baird v Staveley-Hill	CH.D. KEK.J.	277	195	
Baker, *In re.* Pursey v Holloway	CH.D. STI. J.	—	210	79 L. T. 343
Bale, *Ex parte.* O'Gorman, *In re*	BKCY.	543	11	[1899] 2 Q. B. 62; 68 L. J. Q. B. 650; 80 L. T. 501
Bangor and North Wales Marine Protection Association, *In re*	CH.D. WRI. J.	695	35	68 L. J. Ch. 521; 80 L. T. 870
Barclay, *In re.* Barclay v Andrew	CH.D. STI. J.	—	195	[1899] 1 Ch. 674; 68 L J. Ch. 383; 80 L. T. 702
Baring v Inland Revenue Commissioners (Revelstoke v Inland Revenue Commissioners)	H.L.	210	80	[1898] A. C. 565
Baring-Gould and Sharkington Combined Pick, Arbitration, *In re*	CH.D. STI. J.	23	37	[1898] 2 Ch. 633; 79 L. T. 185
———	C.A.	564	37	[1899] 2 Ch. 80; 68 L. J. Ch. 429; 80 L T. 739
Barker v Edger	P.C.	—	143	[1898] A. C. 748; 79 L. T. 151
Barnes v Glenton	Q.B.D.	13	104	[1898] 2 Q. B. 223; 19 L. T. 94
———	C.A.	435	104	[1899] 1 Q. B. 885; 68 L. J. Q. B. 502; 80 L. T. 606
Barnett v Laskey	Q.B.D.	—	110	68 L. J. Q. B. 55; 79 L. T. 408
Basset v Allen. Allen, *In re*	CH.D. NOR.J.	55	3	[1898] 2 Ch. 499; 79 L. T. 207
Baster v London and County Printing Co.	Q.B.D.	639	117	[1899] 1 Q. B. 901; 68 L. J. Q. B. 622; 80 L. T. 757
Bateman (Baroness) and Parker's Contract, *In re*	CH.D. KEK. J.	516	54	[1899] 1 Ch. 599; 68 L. J. Ch. 330; 80 L. T. 469
Bath and Wells (Bishop), *In re*	CH.D. NOR. J.	—	177	[1899] 2 Ch. 138; 68 L. J. Ch. 524
Batt & Co.'s Trade-Mark, *In re*	H.L.	—	—	[1899] A. C. 428
Baxter v Holdsworth	C.A.	179	159	[1899] 1 Q. B. 266; 68 L. J. Q. B. 154; 79 L. T. 434
Baxter v Leche	Q.B.D.	—	99	79 L. T. 138
Beall, *In re.* Official Receiver, *Ex parte.*	BKCY.	—	10	[1899] 1 Q. B. 688; 68 L. J. Q. B. 462; 80 L. T. 267
Beardsley v Beardsley	Q.B.D.	284	59	[1899] 1 Q. B. 746; 80 L. T. 51
Bechuanaland Exploration Co. v London Trading Bank (Limited)	Q.B.D.	—	29	[1898] 2 Q. B. 658; 79 L. T. 270
Beeston, *In re.* Board of Trade, *Ex parte*	BKCY.	—	16	79 L. T. 561
———	C.A.	475	16	[1899] 1 Q. B. 626; 68 L. J. Q. B. 344; 80 L. T. 66
Bellinger, *In re.* Durell v Bellinger	CH.D. KEK. J.	—	197	[1898] 2 Ch. 535; 79 L. T. 54
Belton v Busby	Q.B.D.	636	64	
Bence v Shearman	C.A.	350	8	[1898] 2 Ch. 582
Benford v Sims	Q.B.D.	46	7	[1898] 2 Q. B. 641
Bennett, *In re.* Clarke v White	CH.D. NOR. J.	406	135	[1899] 1 Ch. 316; 68 L. J. Ch. 104
——— v Slater	C.A.	82	63	[1899] 1 Q. B. 45; 68 L. J. Q. B. 45; 79 L. T. 324
Benson, *In re.* Elletson v Pillers	CH.D. NOR.J.	264	157	[1899] 1 Ch. 39; 68 L. J. Ch. 5; 79 L. T. 590
Bentinck v Bentinck	CH.D. STI. J.	—	39	80 L. T. 71
Bethel, *In re*	Q.B.D.	—	88	80 L. T. 492
Betty, *In re.* Betty v Attorney-General	CH.D. NOR. J.	—	211	[1899] 1 Ch. 821; 68 L. J. Ch. 435; 80 L. T. 675
Biggs v Hoddinott	C.A.	84	136	[1898] 2 Ch. 307; 79 L. T. 201
Billings v Holloway	C.A.	105	118	[1899] 1 Q. B. 70; 68 L. J. Q. B. 16; 79 L. T. 396
Bing, *Ex parte.* Mason, *In re*	BKCY.	270	14	[1899] 1 Q. B. 810; 68 L. J. Q. B. 466; 80 L. T. 92
Bingley District Council v Midland Railway Co.	Q.B.D.	—	112	80 L. T. 725
Birks, *In re.* Kenyon v. Birks.	CH.D. KEK.J.	374	210	[1899] 1 Ch. 703; 68 L. J. Ch. 319; 80 L. T. 257
Blackmore v White	Q.B.D.	448	42	[1899] 1 Q. B. 293; 68 L. J. Q. B. 180; 80 L. T. 79
Black Point Syndicate (Limited) v Eastern Concessions (Limited)	CH.D. STI. J.	—	69	79 L. T. 658
Blaiberg and Abrahams' Contract, *In re*	CH.D. KEK. J.	634	200	
"Blairmore" Steamship Co. v Macredie	H.L. (SC.)	—	86	[1898] A. C. 593; 79 L. T. 217
Blake v Woolf	Q.B.D.	8	96	[1898] 2 Q. B. 426; 79 L. T. 188
Blandy-Jenkins v Dunraven (Earl)	C.A.	—	153	[1899] 2 Ch. 121
Blount v Whiteley	C.A.	—	15	79 L. T. 635
Board of Trade, *Ex parte.* Beeston, *In re*	BKCY.	—	16	79 L. T. 561

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Board of Trade, *Ex parte*. Beeston, *In re*	C.A.	475	16	[1899] 1 Q. B. 626; 68 L. J. Q. B. 344; 80 L. T. 66
——. Stevens, *In re*	BKCY.	61	11	[1898] 2 Q. B. 495; 79 L. T. 80
Bolton, In Goods of	P.D. & A.D.	—	162	68 L. J. P. 63; 80 L. T. 631
Bonner v Tottenham, &c., Building Society	C.A.	161	92	[1899] 1 Q. B. 161; 68 L. J. Q. B. 114; 79 L. T. 611
Boosey v Whight & Co.	CH.D. STI. J.	554	42	[1899] 1 Ch. 836; 68 L. J. Ch. 379; 80 L. T. 561
Borax Co., *In re*. Foster v Borax Co.	C.A.	—	29	80 L. T. 637
"*Bourgogne*," *La*	H.L.	—	—	[1899] A. C. 431; 80 L. T. 845
Bradford-on-Avon Assessment Committee v White	Q.B.D.	—	148	[1898] 2 Q. B. 630
Brankelow Steamship Co. v Canton Insurance Office	C.A.	611	85	[1899] 2 Q. B. 178; 68 L. J. Q. B. 811
Brazier, In Goods of	P.D. & A.D.	272	165	[1899] P. 36; 68 L J. P. 6; 79 L. T. 472
Brearley v Morley	Q.B.D.	574	100	[1899] 2 Q. B. 121; 68 L. J. Q. B. 722; 80 L. T. 801
Brewer and Hankin's Contract, *In re*	C.A.	—	203	80 L. T. 127
Bristol Tramway Co. v National Telephone Co.	CH.D. NOR. J.	—	194	80 L. T. 836
British Goldfields of Africa (Limited), *In re*	C.A.	552	37	[1899] 2 Ch. 7; 68 L. J. Ch. 412; 80 L. T. 638
Britten v Great Northern Railway Co.	Q.B.D.	—	170	[1899] 1 Q. B. 243; 68 L. J. Q. B. 75; 79 L. T. 640
Brittin v Partridge. Wasdale, *In re*	CH. D. STI. J.	169	198	[1899] 1 Ch. 163; 68 L. J. Ch. 117; 79 L. T. 520
Brock v Harrison	Q.B.D.	541	205	[1899] 1 Q. B. 958; 68 L. J. Q. B. 730; 80 L. T. 568
Brooks v Hamlyn	Q.B.D.	—	87	79 L. T. 734
Broomer v Arthur	P.C.	—	87	[1898] A. C. 777
Broughton v Stamp Duties Commissioners	P.C.	—	142	[1899] A. C. 251; 68 L. J. P. C. 36
Brown, In Goods of	P.D. & A.D.	—	165	80 L. T. 360
—— v Attorney-General	H.L.	—	83	79 L. T. 572
—— v Brown	P.D. & A.D.	—	88	79 L. T. 102
—— v Dunstable (Mayor)	CH.D. HDY, J.	538	113	68 L. J. Ch. 498; 80 L. T. 650
—— v Patch	Q.B.D.	623	64	[1899] 2 Q. B. 892; 68 L. J. Q. B. 588; 80 L. T. 716
"Brunel," The	P.D. & A.D.	288	5	[1899] P. 45; 68 L. J. P. 1; 79 L. T. 527
Brutton v Branson	Q.B.D.	—	45	[1898] 2 Q. B. 219; 79 L. T. 247
Buckinghamshire and Herts County Councils, *In re*	Q.B.D.	—	114	[1899] 1 Q. B. 515; 68 L. J. Q. B. 417; 80 L. T. 85
Buckley & Sons (Limited) v N. Buckley & Sons	C.A.	—	204	[1898] 2 Q. B. 608
Bulli Coal Mining Co. v Osborne	P.C.	545	104	[1899] A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430
"Burma," The	P.D. & A.D.	—	4	80 L. T. 808
—— (No. 2)	P.D. & A.D.	—	183	80 L. T. 839
Burrows v Rhodes	Q.B.D.	—	62	[1899] 1 Q. B. 816; 68 L. J. Q. B. 545; 80 L. T. 591
Bury St. Edmunds (Mayor) v West Suffolk County Council	Q.B.D.	16	111	[1898] 2 Q. B. 246
Butt v Wright. Maddock, *In re*	CH.D. HDY, J.	684	152	
Caddick v Highton	Q.B.D.	668	63	68 L. J. Q. B. 281; 80 L. T. 527
Cahn v Pockett's Bristol Channel Steam Packet Co.	C.A.	422	175	[1899] 1 Q. B. 643; 68 L. J. Q. B. 515; 80 L. T. 269
Calcott and Elvin's Contract, *In re*	C.A.	—	15	46 W. R. 673; [1898] 2 Ch. 460
Callicott, In Goods of	—	—	162	68 L. J. P 67; 80 L. T. 421
Calvert, *In re*. Calvert, *Ex parte* (No. 1).	BKCY.	523	13	[1899] 2 Q. B. 145; 68 L. J. Q. B. 761; 80 L. T. 504
——(No. 2)	BKCY.	—	13	80 L. T. 499
Cameron v Tyler	Q.B.D.	559	205	[1899] 2 Q. B. 94; 68 L. J. Q. B. 759; 80 L. T. 764
Canada Sugar Refining Co. (Limited) v Reg.	P.C.	—	19	[1898] A. C. 735; 76 L. T. 146
Canadian Pacific Railway v Bonsecours Corporation	P.C.	—	19	[1899] A. C. 367; 68 L. J. P. C. 54; 80 L. T. 434
"Carlotta," The	P.D. & A.D.	702	185	[1899] P. 223; 68 L. J. P. 87; 80 L. T 664
Carlton Steamship Co. v Castle Mail Packets Co.	H.L.	65	181	[1898] A. C. 486
Carne's Settled Estates, *In re*	CH.D. NOR. J.	352	177	[1899] 1 Ch. 324; 68 L. J. Ch. 120
Carritt v Godson & Son	Q.B.D.	—	126	[1899] 2 Q. B. 193; 68 L. J. Q. B. 799; 80 L. T. 771
Cartwright v Sculcoates Union	C.A.	—	148	[1899] 1 Q. B. 667; 68 L. J. Q. B. 455; 80 L. T. 450
Castner-Kellner Alkali Co. (Limited) v Commercial Development Corporation (Limited)	C.A.	534	146	[1899] 1 Ch. 803; 68 L. J. Ch. 402; 80 L. T. 476
"Cawdor," The	P.D. & A.D.	—	6	79 L. T. 357
Caxton v Dow	Q.B.D.	—	161	68 L. J. Q. B. 380; 80 L. T. 325

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Cellular Clothing Co. v Maxton	H.L. (SC.)	—	193	[1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809
Chambers v Whitehaven Harbour Commissioners	C.A.	533	123	[1899] 2 Q. B. 132; 68 L. J. Q. B. 740; 80 L. T. 586
Chandler v Smith	C.A.	677	120	
Charnock v Court	CH.D. STI. J.	633	193	[1899] 2 Ch. 35; 68 L. J. Ch. 550; 80 L. T. 564
Charter v Watson	CH.D. KEK. J.	250	135	[1899] 1 Ch. 175; 68 L. J. Ch. 1; 79 L. T. 440
Chatard's Settlement, *In re*	CH.D. KEK. J.	515	157	[1899] 1 Ch. 712; 68 L. J. Ch. 350; 80 L. T. 645
Chesterfield Brewery Co. v Inland Revenue Commissioners	Q.B.D.	320	79	[1899] 2 Q. B. 7; 68 L. J. Q. B. 204; 79 L. T. 559
Chetwynd v Allen	CH.D. ROM.J.	200	134	[1899] 1 Ch. 353; 68 L. J. Ch. 160; 80 L. T. 110
Childers v Childers	P.D. & A.D.	—	51	68 L. J. P. 90
"City of Agra," The	P.D. & A.D.	—	4	[1898] P. 198; 79 L. T. 307
"City of Calcutta," The	C.A.	—	7	79 L. T. 517
City of London Brewery Co. v Inland Revenue Commissioners	C.A.	216	81	[1899] 1 Q. B. 121; 68 L. J. Q. B 62; 79 L. T. 648
Civil, Naval, and Military Outfitters, *In re*	C.A.	233	36	[1899] 1 Ch. 215; 88 L. J. Ch. 164; 80 L. T. 241
Civil Service Musical Instrument Association v Whiteman	CH.D. KEK.J.	—	91	68 L. J. Ch. 484; 80 L. T. 685
Clarke v White. Bennett, *In re*	CH.D. NOR.J.	406	—	[1899] 1 Ch 316; 68 L. J. Ch. 104
Clement et Cie's Trade-Mark, *In re*	CH.D. KEK.J.	407	191	80 L. T. 230
Clews v Grindey. Grindey, *In re*	C.A.	53	195	[1898] 2 Ch. 593; 79 L. T. 105
Clifford v Holt	CH.D. KEK.J.	—	103	[1899] 1 Ch 698; 68 L. J. Ch. 332; 80 L. T. 48
Cockerton v London School Board	C.A.	—	56	[1898] 2 Q. B. 447; 79 L. T. 50
Coleman v Coleman	CH.D. NOR. J.	—	199	79 L. T. 66
——— v North	CH.D. ROM.J.	57	41	
Colless v Minister for Lands	P.C.	—	141	[1899] A. C. 90; 68 L. J. P. C. 9; 79 L. T. 505
"Columbus," The	P.D. & A.D.	—	186	80 L. T. 203
Comber v Leyland	H.L.	—	159	[1898] A. C. 524; 79 L. T. 180
Commissioners of Taxation v Teece	P.C.	—	142	[1899] A. C. 254; 79 L. T. 601
Concessions Acquisition Syndicate (Limited), *In re*	CH.D. WRI. J.	—	27	68 L J. Ch. 49; 79 L. T. 666
Constable and Cranswick, An Arbitration, *In re*	Q.B.D.	—	90	80 L. T. 164
Cook, *In re*. Cripps, *Ex parte*	BKCY.	524	10	[1899] 1 Q. B. 863; 68 L. J. Q. B. 597; 80 L. T. 495
Cooper, In Goods of	P.D. & A.D.	—	164	68 L. J. P. 65; 80 L. T. 632
——— v Belsey	C.A.	443	177	[1899] 1 Ch. 639; 68 L. J. Ch. 258; 80 L. T. 69
——— v Gjers. Gjers, *In re*	CH.D. KEK.J.	535	211	[1899] 2 Ch. 54; 68 L. J. Ch. 442; 80 L. T. 689
Coote v Ford	CH.D. STI. J.	489	156	
———	C.A.	548	156	[1899] 2 Ch. 93; 68 L. J. Ch. 508; 80 L. T 697
Coppen v Dingle	CHD.BYRNE,J	279	—	[1899] 1 Ch. 726; 79 L. T. 693
Cornford v Carlton Bank (Limited)	Q.B.D.	—	44	[1899] 1 Q. B. 392; 68 L. J. Q. B. 196; 80 L. T. 121
Cosier, *In re*. Humphreys v Gadsden (Wheeler v Humphreys)	H.L.	17	210	[1898] A. C. 506
Coughlin v Gillison	C.A.	113	8	[1899] 1 Q. B. 145; 68 L. J. Q. B. 147; 79 L. T. 627
Cowen v Truefitt	CH.D. ROM.J.	29	92	[1898] 2 Ch. 551; 79 L. T. 348
———	C.A.	661	92	
Cowley (Earl) v Inland Revenue Commissioners	H.L.	525	72	[1899] A. C. 198; 68 L. J. Q. B. 435; 80 L. T. 361
Craske v Wade	C.A.	—	152	80 L. T. 380
Crawford v City of London Electric Lighting Co.	Q.B.D.	45	59	
Cree v St. Pancras Vestry	Q.B.D.	—	166	[1899] 1 Q. B. 693; 68 L. J. Q. B. 389; 80 L T. 388
Cripps, *Ex parte*. Cook, *In re*	BKCY.	524	10	[1899] 1 Q. B. 863; 68 L. J. Q. B. 597
Crisp v London County Council	Q.B.D.	—	127	[1899] 1 Q. B. 720; 68 L. J. Q. B. 499; 80 L. T. 654
Cronmire, *In re*. Waud, *Ex parte*	C.A.	—	65	[1898] 2 Q. B. 383
Crosse v Wandsworth Board of Works	Q.B.D.	—	129	79 L. T. 351
Crowly v Bergtheil	P.C.	—	138	[1899] A. C. 374; 68 L. J. P. C. 81; 80 L. T. 428
Croysdale v Sunbury District Council	CH.D. STI.J.	—	113	[1898] 2 Ch. 515; 79 L. T. 26
Cummins v Perkins	CH.D. KEK.J.	138	158	
———	C.A.	214	158	[1899] 1 Ch. 16; 68 L. J. Ch. 57; 79 L. T. 456
Cunard Steamship Co. v Coulson	Q.B.D.	—	76	[1899] 1 Q. B. 865; 68 L. J. Q. B. 554; 80 L. T. 326
Cunliffe Smith v Hankey. Hankey, *In re*	CH.D. NOR.J.	444	3	[1899] 1 Ch. 511; 68 L. J. Ch. 242; 80 L. T. 47
Cunningham, *In re*. Official Receiver, *Ex parte*	BKCY.	—	13	80 L. T. 503

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Darley v Hodgson. Hodgson, *In re*	CH.D.NOR.J.	443	116	[1899] 1 Ch. 666; 68 L. J. Ch. 313; 80 L. T. 276
"Dart," The	P.D. & A.D.	—	187	80 L. T. 23
David and Matthews' Arbitration, *In re*	CH.D. ROM. J.	313	144	[1899] 1 Ch. 378; 68 L. J. Ch. 185
Davidson, *Ex parte*. Davidson, *In re*	Q.B.D.	—	189	[1899] 2 Q. B. 103; 68 L. J. Q. B. 836
Davies v Jones	P.D. & A.D.	—	159	68 L. J. P. 69; 80 L. T. 631
—— v Main Colliery Co.	C.A.	—	120	80 L. T. 674
—— v Parry	CH.D.ROM. J.	429	2	[1899] 1 Ch. 602; 68 L. J. Ch. 346
—— v Rhondda District Council	Q.B.D.	—	7	80 L. T. 696
Dawson, *In re*. Dawson, *Ex parte*	BKCY.	524	12	[1899] 2 Q. B. 54; 68 L. J. Q. B. 668; 80 L. T. 498
Day, *In re*. Sprake v Day	CH.D. NOR.J.	238	209	[1898] 2 Ch. 510; 79 L. T. 436
Debtor, A, *In re*	C.A.	—	—	[1898] 2 Q. B. 576
De Cetto v Hope. Hope, *In re*	CHD.BYRNE,J	536	176	
——	C.A.	641	—	
De Laubanque v De Laubanque	P.D & A.D.	—	51	68 L. J. P. 20; 79 L. T. 708
De Silva v Attorney-General for Trinidad	P.C.	—	195	79 L. T. 130
De Witte v Addison	C.A.	—	138	80 L. T. 207
Dilworth v Land and Income Tax Commissioners	P.C.	337	22	[1899] A. C. 99; 68 L. J. P. C. 1; 79 L. T. 473
Dingle v Coppen	CHD.BYRNE,J	279	133	[1899] 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 693
Dixon v Winch	CH.D. EDY. J.	620	137	
Dobell v Green	Q.B.D.	—	182	80 L. T. 19
Dockrell v Dougall	C.A.	—	99	80 L. T. 556
Doig v Anthony, Birrell, Pearce, & Co.	CH.D. KEK.J.	—	154	[1899] 2 Ch. 50; 68 L. J. Ch. 444; 80 L. T. 688
Donaldson v Mayor, &c., of South Shields	C.A.	—	—	68 L. J. Ch. 162; 79 L. T. 685
Dowling v Dowling	P.D. & A.D.	272	54	[1898] P. 228; 68 L. J. P. 8
Drew v Drew. Drew, *In re*	CH.D. STI. J.	265	208	[1899] 1 Ch. 336; 68 L. J. Ch. 157; 79 L. T. 656
Drincqbier v Wood	CHD.BYRNE,J	252	156	[1899] 1 Ch. 393; 68 L. J. Ch. 181; 79 L. T. 548
Driver, *In re*	BKCY.	—	16	80 L. T. 840
Duckham v Great Western Railway Co.	Q.B.D.	—	172	80 L. T. 774
Duncan, *In re*. Terry v Sweeting	CH.D. ROM.J.	379	—	[1899] 1 Ch. 387; 68 L. J. Ch. 253; 80 L. T. 322
—— v Pope	Q.B.D.	—	6	80 L. T. 120
Dunlop Pneumatic Tyre Co. v Neal	CH.D. NOR.J.	632	145	[1899] 1 Ch. 807; 68 L. J. Ch. 378; 80 L. T. 746
Durell v Bellinger. Bellinger, *In re*	CH.D KEK.J.	—	197	[1898] 2 Ch. 535; 79 L. T. 54
Duxbury v Sandiford	C.A.	—	97	80 L. T. 552
Dymock v Showell's Brewery Co. (Limited)	C.A.	—	94	79 L. T. 329
Eastern Telegraph Co. v Dent	C.A.	—	—	[1899] 1 Q. B. 835; 68 L. J. Q. B. 564; 80 L. T. 459
Eastman Photographic Materials Co. v Comptroller-General of Patents	H.L.	152	192	[1898] A. C. 571; 79 L. T. 195
Eaton v Tapley	Q.B.D.	463	45	[1898] 1 Q. B. 953; 68 L. J. Q. B. 638; 80 L. T. 797
Ecclesiastical Commissioners v Pinney	C.A.	136	55	[1899] 1 Ch. 99; 68 L. J. Ch. 30; 79 L. T. 604
Edwards v Godfrey	C.A.	551	120	[1899] 2 Q. B. 333; 68 L. J. Q. B. 666; 80 L. T. 672
—— v Purnall	Q.B.D.	380	205	[1899] 1 Q. B. 449; 68 L. J. Q. B. 272; 79 L. T. 737
Egan, *In re*. Mills v Penton	CH.D. STI. J.	—	206	[1899] 1 Ch. 688; 68 L. J. Ch. 307; 80 L. T. 153
Eldon (Earl) v North-Eastern Railway Co.	Q.B.D.	—	167	80 L. T. 723
Elam v Martyn	C.A.	212	145	68 L. J. Ch. 123; 79 L. T. 510
Elstson v Pillers. Benson, *In re*	CH.D. NOR. J.	264	157	[1899] 1 Ch. 39; 68 L. J. Ch. 5; 79 L. T. 590
Elliott v London County Council	Q.B.D.	—	127	[1899] 2 Q. B. 277; 68 L. J. Q. B. 837
Ellis v Bedford (Duke)	CH.D. ROM. J.	170	155	[1899] 1 Ch. 494
——	C.A.	385	—	[1899] 1 Ch. 494; 68 L. J. Ch. 289; 80 L. T. 332
—— v Rowbotham	Q.B.D.	—	96	80 L. T. 328
—— v Wadeson & Malleson	C.A.	420	156	[1899] 1 Q. B. 714; 68 L. J. Q. B. 604; 80 L. T. 508
Empire Typesetting Co. v Linotype Co.	C.A.	—	98	79 L. T. 8
England v Webb	P.C.	—	204	[1898] A. C. 758; 79 L. T. 131
Equitable Life Assurance Society, &c. v Bishop	Q.B.D.	556	76	68 L. J. Q. B. 772; 80 L. T. 728
Evans v Evans	P.D. & A.D.	—	50	68 L. J. P. 70
—— v Merthyr Tydfil Council	C.A.	—	23	[1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578
Fearsley v Limehouse Board of Works	CH.D. KEK.J.	—	130	68 L. J. Ch. 344; 80 L. T. 351
Fielding v Morley Corporation	C.A.	295	165	[1899] 1 Ch. 1; 79 L. T. 231
Field Steamship Co. v Burr	C.A.	341	86	[1899] 1 Q. B. 579; 68 L. J. Q. B. 426; 80 L. T. 445

Name of Case.	Court.	Page in W. R. 1898–99.	Column in Digest.	References to Contemporaneous Reports.
Fisher and Grazebrook's Contract, *In re*	CH.D. ROM. J.	58	199	[1898] 2 Ch. 660; 79 L. T. 268
Fitzhardinge (Lord), *In re*. Fitzhardinge v Jenkinson	C.A.	—	72	80 L. T. 376
Flinn & Sons, *Ex parte*	Q.B.D.	697	101	[1899] 2 Q. B. 154; 68 L. J. Q. B. 777
Flowers v Chambers	C.A.	513	122	[1899] 2 Q. B. 142; 68 L. J. Q. B. 648; 80 L. T. 834
Fludyer, *In re*. Wingfield v Erskine	CH.D. ROM. J	5	60	[1898] 2 Ch. 562; 79 L. T. 298
Foster v Borax Co. Borax Co., *In re*	C.A.	—	29	80 L. T. 637
Fox v Newfoundland Government	P.C.	—	140	[1898] A. C. 667
Foxwell v Van Grutten	C.A.	—	207	79 L. T. 617
Fracis v Sea Insurance Co.	Q.B.D.	110	84	79 L. T. 28
Friary v Singleton	CH.D. ROM. J.	93	96	[1899] 1 Ch. 86; 68 L. J. Ch. 13; 79 L. T. 465
———	C.A.	662	96	
Frost & Co, *In re*	CH.D. ROM. J.	27	26	[1898] 2 Ch. 556; 67 L. J. Ch. 691; 79 L. T. 269
———	C.A.	—	—	68 L. J. Ch. 544; 80 L. T. 849
Frost, *In re*. Official Receiver, *Ex parte*	BKCY.	512	13	[1899] 2 Q. B. 50; 68 L. J. Q. B. 663; 80 L. T. 496
Fulford v Blatchford	Q.B.D.	—	108	80 L. T. 627
"Fulham," The	P.D. & A.D.	62	186	[1898] P. 206; 79 L. T. 127
———	C.A.	598	—	[1899] P. 251; 68 L. J. P. 75
Furber, *In re*	CH.D. KEK. J.	184	190	[1898] 2 Ch. 538; 79 L. T. 266
G——, *In re* (No. 1)	C.A.	—	115	[1898] 2 Ch. 324
——(No 2)	CH.D. KEK. J.	491	68	[1899] 1 Ch. 719; 68 L. J. Ch. 374; 80 L. T. 470
Gaden v Newfoundland Savings Bank	P.C.	—	9	[1899] A. C. 281; 68 L. J. P. C. 57; 80 L. T. 329
Gamble, *In re*	Q.B.D.	—	89	[1899] 1 Q. B. 305; 68 L. J. Q. B. 195; 79 L. T. 642
Gannett, *In re*	C.A.	—	184	[1899] P. 230
Garnsey v Flood	P.C.	—	141	[1898] A. C. 687
General Railway Syndicate, *In re*. Whiteley's case	CH.D. WRI. J.	—	36	[1899] 1 Ch. 770; 68 L. J. Ch. 365; 80 L. T. 868
Gentle v Faulkner	Q.B.D.	—	93	68 L. J. Q. B. 848
George and Goldsmiths, &c., Insurance Association, Arbitration between, *In re*	C.A.	471	83	[1899] 1 Q. B. 595; 68 L. J. Q. B. 365; 80 L. T. 248
Gieve, *In re*. Shaw, *Ex parte*	C.A.	616	15	80 L. T. 737
——— The Trustee, *Ex parte*	C.A.	441	65	[1899] 1 Q. B. 794; 68 L. J. Q. B. 509; 80 L. T. 438
Gifford (Lord) v Fitzhardinge (Lord)	CH.D. NOR. J.	618	180	[1899] 2 Ch. 32; 68 L. J. Ch. 529
Gill v Worrall. Rubbins, *In re*	C.A.	—	207	79 L. T. 313
Gjers, *In re*. Cooper v Gjers	CH.D. KEK. J.	535	211	[1899] 2 Ch. 54; 68 L. J. Ch. 442; 80 L. T. 689
"Glanystwyth," The	P.D. & A.D.	—	183	68 L. J. P. 37; 80 L. T. 204
Glasgow Corporation v Glasgow Tramway Co.	H.L. (SC.)	—	95	[1898] A. C. 631
"Glengyle," Owners of v Neptune Salvage Co.	H.L.	—	186	[1898] A. C. 519
Goddard v Midland Railway Co.	Q.B.D.	—	158	80 L. T. 624
Godwin v Prince. Prince, *In re*	CH.D. STI. J.	25	4	[1898] 2 Ch. 225
Goldstone v Williams	CH.D. STI. J.	91	153	[1899] 1 Ch. 47; 68 L. J. Ch. 24; 79 L. T. 373
Gooch v Clutterbuck	C.A.	609	92	[1899] 2 Q. B. 148; 68 L. J. Q. B. 808
Goodbody & Co. and Balfour & Co.'s Arbitration, *In re*	Q.B.D.	—	185	80 L. T. 188
Gordon v Cann	Q.B.D.	269	107	68 L. J. Q. B. 434; 80 L. T. 20
Gosford (Earl) v Irish Land Commission	H.L. (I.)	—	—	[1899] A. C. 435; 68 L. J. P. C. 69
Grand Trunk Railway Co. v Washington	P.C.	—	19	[1899] A. C. 275; 68 L. J. P. C. 37; 80 L. T. 301
Greater London Property Co. v Foot	Q.B.D.	541	128	[1899] 1 Q. B. 972; 68 L. J. Q. B. 628; 80 L. T. 390
Great North-West Central Railway v Charlebois	P.C.	—	20	[1899] A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35
Great Western Railway v London and County Banking Co.	Q.B.D.	—	8	[1899] 2 Q. B. 172
Green, In Goods of	P.D. & A.D.	—	164	79 L. T. 738
——— v Thompson	Q.B.D.	—	68	[1899] 2 Q. B. 1; 68 L. J. Q. B. 719; 80 L. T. 691
Greenwood v Francis	C.A.	230	161	[1899] 1 Q. B. 312; 68 L. J. Q. B. 228; 79 L. T. 624
——— v Leathershod Wheel Co. (Limited)	CH.D. KEK. J.	—	33	80 L. T. 462
Grey v Curtice	C.A.	294	189	[1899] 1 Ch. 121; 68 L. J. Ch. 60; 79 L. T. 713
Griffin, *In re*. Griffin v Griffin	CHD. BYRNE, J	—	8	[1899] 1 Ch. 408; 68 L. J. Ch. 220; 79 L. T. 442
Griffith v Hill. Plant, *In re*	CH.D. KEK. J	183	208	
Grindey, *In re*. Clews v Grindey	C.A.	53	195	[1898] 2 Ch. 593; 79 L. T. 105
Grose-Smith v Bridges. Smith, *In re*	CH.D. NOR. J.	357	177	[1899] 1 Ch. 331; 80 L. T. 218
Groves v Wimborne (Lord)	C.A.	87	61	[1898] 2 Q. B. 402; 79 L. T. 284
Gubboy, In Goods of	P.D. & A.D.	—	165	80 L. T. 808
Gundry, *In re*. Mills v Mills	CH.D. NOR. J.	137	179	[1898] 2 Ch. 504; 79 L. T. 435
Gyde, *In re*. Ward v Little	C.A.	—	21	79 L. T. 261

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Hadfield v Mayor, &c., of Liverpool	Q.B.D.	—	148	80 L. T. 566
Hadley (Felix) v Hadley	CHD.BYRNE,J	238	23	[1898] 2 Ch. 680; 79 L. T. 299
Hale, *In re.* Lilley v Foad	CHD.BYRNE,J	174	136	79 L. T. 468
——.	C.A.	579	136	[1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827
Halifax Commercial Bank and Wood, *In re*	C.A.	194	201	79 L. T. 536
Hall v Cox	C.A.	161	115	[1899] 1 Q. B. 198; 68 L. J. Q. B. 167; 79 L. T. 653
Hall v Snowdon (1)	C.A.	322	151	[1899] 1 Q. B. 593; 68 L. J. Q. B. 363; 80 L. T. 256
—— (2)	C.A.	486	121	[1899] 2 Q. B. 136; 68 L. J. Q. B. 645; 80 L. T. 554
Hampton v Nourse. Nourse, *In re*	CH.D. STI. J.	116	207	[1899] 1 Ch. 63; 68 L. J. Ch. 15; 79 L. T. 376
Handford & Co., *In re*	C.A.	391	13	[1899] 1 Q. B. 566; 68 L. J. Q. B. 386; 80 L. T. 125
Hankey, *In re.* Cunliffe Smith v Hankey	CH. D. NOR. J.	444	3	[1899] 1 Ch. 541; 68 L. J. Ch. 242; 80 L. T. 47
Hannaford v Syms	Q.B.D.	—	188	79 L. T. 30
Harding v Queensland Commissioners of Stamps	P.C.	—	166	[1898] A. C. 769; 79 L. T. 42
Harford v Linskey	Q.B.D.	653	57	[1899] 1 Q. B. 852; 68 L. J. Q. B. 599; 80 L. T. 417
Harper, In Goods of	P.D. & A.D.	—	163	68 L. J. P. 48; 80 L. T. 294
Harris, *In re.* Hasluck, *Ex parte*	BKCY.	544	15	[1899] 2 Q. B. 97; 68 L. J. Q. B. 769; 80 L. T. 499
Harrison and Bottomley, *In re*	C.A.	307	157	[1899] 1 Ch. 465; 68 L. J. Ch. 208; 80 L. T. 29
Harrop v Harrop	P.D. & A.D.	—	53	68 L. J. P. 58; 80 L. T. 171
Hartley, In Goods of	P.D. & A.D.	287	162	[1899] P. 40; 68 L. J. P. 16
Hartley v Maddocks	CH. D. HDY. J.	573	—	[1899] 2 Ch. 199; 68 L. J. Ch. 496; 80 L. T. 755
Hartopp v Hartopp and Akhurst	P.D. & A.D.	—	52	68 L. J. P. 33; 80 L. T. 297
Haslingden and Rochdale Unions, *In re*	C.A.	322	—	[1899] 1 Q. B. 540; 80 L. T. 146
Hasluck, *Ex parte.* Nordman, *In re.*	BKCY.	151	11	
——. Harris, *In re*	BKCY.	544	15	[1899] 2 Q. B. 97; 68 L. J. Q. B. 769; 80 L. T. 499
—— v Clark	C.A.	471	10	[1899] 1 Q. B. 699; 68 L. J. Q. B. 486; 80 L. T. 454
Hastings v Saddler	Q.B.D.	—	97	79 L. T. 355
—— (Lord) v North-Eastern Railway Co.	CHD.BYRNE,J	59	173	[1898] 2 Ch. 674
——.	C.A.	—	—	[1899] 1 Ch. 656; 68 L. J. Ch. 315; 80 L. T. 217
Haylis v Pease	CH.D. STI. J.	370	67	[1899] 1 Ch. 567; 68 L. J. Ch. 222; 80 L. T. 220
Haynes v Doman	C.A.	—	174	[1899] 2 Ch. 13; 68 L. J. Ch. 419; 80 L. T. 569
Heath v Rollason	H.L.	—	50	[1898] A. C. 499; 79 L. T. 1
Heines v Preston	C.A.	—	50	80 L. T. 847
Hemans v Hotchkiss Ordnance Co.	C.A.	276	24	[1899] 1 Ch. 115; 68 L. J. Ch. 99; 79 L. T. 681
Hickling v Fair	H.L. (SC.)	—	206	[1899] A. C. 15; 68 L. J. P. C. 12
Higginson & Dean, *In re.* Attorney-General, *Ex parte*	BKCY.	285	14	[1899] 1 Q. B. 325; 68 L. J. Q. B. 198; 79 L. T. 673
Hill v Crediton District Council	C.A.	—	112	80 L. T. 861
—— v Tottenham District Council	Q.B.D.	—	161	79 L. T. 495
Hirth, *In re.* Trustee, *Ex parte*	BKCY.	192	12	79 L. T. 391
——.	C.A.	243	12	[1899] 1 Q. B. 612; 68 L. J. Q. B. 287; 80 L. T. 63
Hobbs, Hart, & Co. v Grover	C.A.	—	126	[1899] 1 Ch. 11; 68 L. J. Ch. 84; 79 L. T. 451
Hocking, *In re.* Mitchell v Loe	C.A.	114	206	[1898] 2 Ch. 567; 79 L. T. 114, 164
Hoddinott v Newton, Clambers & Co. (Limited)	C.A.	499	117	[1899] 1 Q. B. 1018; 68 L. J. Q. B. 495; 80 L. T. 558
Hodgson, *In re.* Darley v Hodgson	CH. D. NOR. J.	443	116	[1899] 1 Ch. 666; 68 L. J. Ch. 313; 80 L. T. 276
Hodgson, *In re.* Taylor v Hodgson	CH.D. ROM. J.	44	208	[1898] 2 Ch. 545; 79 L. T. 345
Hodson v Pare	C.A.	241	98	[1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13
Holliday v National Telephone Co.	Q.B.D.	203	139	[1899] 1 Q. B. 221; 68 L. J. Q. B. 302; 79 L. T. 593
——.	C.A.	658	139	
Hollis' Hospital Trustees and Hague's Contract, *In re*	CHD.BYRNE,J	691	202	
Holness v Mackay & Davies	C.A.	531	123	[1899] 2 Q. B. 319; 68 L. J. Q. B 724; 80 L. T. 831
Hooley, *In re.* Hooley, *Ex parte* (1)	BKCY.	—	10	79 L. T. 706
—— (2)	BKCY.	—	11	80 L. T. 495
—— Rucker's case	BKCY.	—	10	79 L. T. 306
Hope, *In re.* De Cetto v Hope	CHD BYRNE,J	536	176	
——	C.A.	641	176	
—— v Campbell	H.L. (SC.)	—	212	[1899] A. C. 1
—— v Walter	CH.D. HDY.J.	479	203	[1899] 1 Ch. 879; 68 L. J. Ch. 359; 80 L. T. 355
Hopkins v Hemsworth	CH.D. KEK.J.	26	135	[1898] 2 Ch. 347
Horsey Estate (Limited) v Striger	C.A.	644	94	[1899] 2 Q. B. 79; 80 L. T. 857

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Horton v Bosson	C.A.	—	155	80 L. T. 435
Hubbard & Co. (Limited), *In re*	CH.D. WRI. J.	—	30	68 L. J. Ch. 54; 79 L. T. 665
Hubbuck (Limited) v Wilkinson, &c., (Limited)	C.A.	—	98	[1899] 1 Q. B. 86; 68 L. J. Q. B. 34; 79 L. T. 429
Hume v Record Reign Jubilee Syndicate	CH.D. STI. J.	—	32	80 L.T. 404
Humphery v Conybeare	C.A.	—	62	80 L. T. 40
Humphreys v Gadsden (Wheeler v Humphreys)	H.L.	17	210	[1898] A. C. 506
Hunter v Attorney-General	H.L.	673	22	[1899] A. C. 309; 68 L. J. Ch. 449; 80 L. T. 732
Hunter v Clare	Q.B.D.	394	125	[1899] 1 Q. B. 635; 68 L. J. Q. B. 278; 80 L. T. 197
——— v Jacobson	C.A.	—	151	80 L. T. 641
Huxtable v Huxtable	P.D.& A.D.	—	88	68 L. J. P. 83
"Inchmaree," The	P.D. & A.D.	—	187	68 L. J. P. 30; 80 L. T. 201
Inglis v Robertson	H.L. (SC.)	—	60	[1898] A. C. 616; 79 L. T. 224
Irons v Davis & Timmins (Limited)	C.A.	616	119	[1899] 2 Q. B. 330; 68 L. J. Q. B. 673; 80 L. T. 673
Jack, *In re*. Jack v Jack	CH.D. ROM. J.	—	150	[1899] 1 Ch. 374; 68 L. J. Ch. 188; 80 L. T. 321
Jackson & Co., *In re*	CH.D. KEK. J.	—	27	[1899] 1 Ch. 348; 68 L. J. Ch. 190; 79 L. T. 662
——— v Normanby Brick Co.	C.A.	—	69	[1899] 1 Ch. 438; 68 L. J. Ch. 407; 80 L. T. 482
James v London and County Banking Co. Morris, *In re*	C.A.	324	14	[1899] 1 Ch. 485; 68 L. J. Ch. 299; 80 L. T. 37
Jarman v Hale	Q.B.D.	—	105	[1899] 1 Q. B. 994; 68 L. J. Q. B. 681
Jarvis & Co., *In re*	CH.D. ROM. J.	186	28	[1899] 1 Ch. 193; 68 L. J. Ch. 145; 79 L. T. 727
Jeffery v Stewart	CH.D. NOR. J.	—	203	80 L. T. 17
——— v Weaver	Q.B.D.	638	99	98 L. J. Q. B. 817
Jenkins v Coomber	Q.B.D.	48	18	[1898] 2 Q. B. 168
——— v Merthyr Tydvil Council	Q.B.D.	—	89	80 L. T. 600
Jessop v Huddersfield Industrial Society	Q.B.D.	—	67	80 L. T. 598
John v John	C.A.	52	157	[1898] 2 Ch. 573; 79 L. T 362
Johns v Ware	CH.D. ROM.J.	202	18	[1899] 1 Ch. 359; 68 L. J. Ch. 155; 80 L. T. 112
Johnson v Langley. Langley, *In re*.	CH.D. KEK J.	—	3	68 L. J. Ch. 361
Johnston v Boyes	CH.D. HDY. J.	517	199	[1899] 2 Ch. 73; 68 L. J. Ch. 425; 80 L. T. 488
Johnstone v Crompton & Co.	CH.D. KEK J.	604	132	[1899] 2 Ch. 190
Jones' Divorce Bill	H.L.	—	52	[1899] A. C. 348
Jones, *Ex parte*. Reg. v Entwistle	Q.B.D.	—	48	[1899] 1 Q. B. 846; 80 L. T. 656
———, *In re*. Parker v Lethbridge	CH.D. STI. J.	—	211	79 L. T. 154
——— v Barnett	CH.D. ROM.J.	493	202	[1899] 1 Ch. 611; 68 L. J. Ch. 244; 80 L. T. 408
——— v Biernstein	Q.B.D.	239	91	[1899] 1 Q. B. 470; 68 L. J. Q. B. 270; 80 L. T. 157
——— v Munro	Q.B.D.	109	58	[1899] 1 Q. B. 109; 68 L. J. Q. B. 28; 79 L. T. 500
——— v Ocean Coal Co. (Limited)	C.A	484	118	[1899] 2 Q B. 124; 68 L J. Q. B. 731; 80 L.T. 582
——— v Rowland	Q.B.D.	—	56	80 L. T. 630
——— v Scullard	Q.B.D.	303	125	[1898] 2 Q. B. 565; 79 L. T. 386
Jordeson v Sutton Gas Co.	CH.D. NOR.J.	222	143	[1898] 2 Ch. 614; 67 L. J. Ch. 666; 79 L. T. 478
———	C.A.	—	—	68 L. J. Ch. 457; 80 L. T. 815
Jubilee Sites Syndicate (Limited), *In re*	BKCY.	606	38	[1899] 2 Ch. 204; 68 L. J. Ch. 427; 80 L. T. 869
Jump v Payne	Q.B D.	—	97	68 L. J. Q. B. 607
"Kate," The	P.D. & A.D.	669	183	68 L. J. P. 41; 80 L. T. 423
Kemp v Christmas	C.A.	—	91	79 L. T. 233
——— v Colman	Q.B.D.	—	158	80 L. T. 54
Kennaird v Cory	Q.B.D.	30	191	[1898] 2 Q. B. 578
Kenyon v Birks. Birks, *In re*	CH.D. KEK. J.	374	210	[1899] 1 Ch. 703; 68 L. J. Ch. 319; 80 L. T. 257
Kerry v England	P.C.	—	159	[1898] A. C. 742
King v Henderson	P.C.	157	12	[1898] A. C. 720; 79 L. T. 37
Kingsbury v Walter. Moss, *In re*	C.A.	642	208	
Kingston Cotton Mill Co v Mowat	CH.D. STI. J.	506	1	[1899] 1 Ch 831; 68 L. J. Ch. 390
Kinson Pottery Co. v Poole Corporation	Q.B.D.	607	109	[1899] 2 Q. B. 41; 68 L. J. Q. B. 819
Kitchen v Johnson	Q.B.D.	110	58	[1899] 1 Q. B. 95; 68 L. J. Q B. 11; 79 L. T. 422
Kitson v Ashe	Q B.D.	—	42	[1899] 1 Q. B. 425; 68 L. J. Q. B. 286; 80 L. T. 323
Knights Deep (Limited) v Inland Revenue Commissioners	Q.B.D.	415	80	[1899] 1 Q. B. 345; 68 L. J. Q. B. 125; 79 L. T. 704
Koch v Koch	P.D. & A.D.	—	51	[1899] P. 221; 68 L J. P. 90
Kunski v Kunski	P.D. & A.D.	—	52	68 L. J. P. 18
Kuyper's Policy Trust, *In re*	CH.D. NOR. J	238	116	[1899] 1 Ch. 38; 68 L. J. Ch. 10; 79 L. T. 486

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest	References to Contemporaneous Reports.
Laceby v Lacon & Co. (Limited)	H L.	497	100	[1899] A. C. 222; 68 L. J. Q. B. 480; 80 L. T. 473
Lacy, *In re.* Royal General Theatrical Fund v Kydd	CH.D. STI. J.	664	105	[1899] 2 Ch. 149; 68 L. J. Ch. 488; 80 L. T. 706
Lagerwall v Wilkinson (Limited)	Q.B.D.	—	39	80 L. T. 55
Laing, *In re* Laing v Radcliffe	CH.D. KEK. J.	311	196	[1899] 1 Ch. 593; 68 L. J. Ch. 230; 80 L. T. 228
Lancashire Asylums Board v Manchester Corporation	Q.B.D.	361	111	[1899] 1 Q. B. 759; 68 L. J. Q. B. 320; 80 L. T. 533
—— Insurance Co. v Inland Revenue Commissioners	Q.B.D.	396	81	[1899] 1 Q B. 353; 68 L. J. Q. B. 143; 79 L. T. 731
Landor, *In re*	CH.D. NOR. J.	457	190	[1899] 1 Ch. 818; 68 L. J. Ch. 373; 80 L. T. 643
Langley, *In re.* Johnson v Langley	CH.D. KEK. J.	—	3	68 L. J. Ch. 361
Lesch, In Goods of	P.D. & A.D.	—	162	80 L. T. 170
Ledermann and Tiedemann Frères, *In re*	Q.B.D.	—	161	[1899] 2 Q. B. 66
Leese v Jennings	Q.B.D.	—	102	79 L T. 300
Leman, In Goods of	P.D. & A.D.	—	163	[1898] P. 215
Lever v Bedingfield	C.A.	—	192	80 L. T. 100
Levy v Stogdon	C.A.	—	200	[1899] 1 Ch. 5; 68 L. J. Ch. 19; 79 L. T. 364
Lilley v Foad. Hale, *In re*	CHD. BYRNE, J	174	136	79 L T. 468
——	C.A.	579	136	[1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827
Linforth v Butler	Q.B.D.	141	58	[1899] 1 Q. B. 116; 68 L. J. Q. B. 3; 79 L. T. 498
Liverpool Corporation v Llanfyllin Assessment Committee	C.A.	—	148	[1899] 2 Q. B. 14; 68 L. J. Q. B. 762; 80 L. T. 667
—— School for Indigent Blind, *In re*	CHD BYRNE, J	6	77	[1898] 2 Ch. 669; 79 L. T. 68
Lloyd and Tooth, *In re*	C.A.	—	91	[1899] 1 Q. B. 559; 68 L. J. Q. B. 376; 80 L. T. 394
London, Brighton, and South Coast Railway Co. v Hayward's Heath District Council	Q.B.D.	—	105	80 L. T. 266
London, Chatham, and Dover Railway Co. v Cable	Q.B.D.	—	45	80 L. T. 119
London County Council v Dixon	Q.B.D.	521	126	[1899] 1 Q. B. 496; 68 L. J. Q. B 526; 80 L. T. 232
—— v Holzapfels Co. (Limited)	Q.B.D.	622	147	
London Drapery Stores, *In re*	CH.D. WRI J.	118	37	[1898] 2 Ch. 684; 79 L. T. 592
London and Midland Bank v Mitchell	CH.D. STI J.	602	134	[1899] 2 Ch. 161
London and North-Western and Great Western Joint Railway Cos. v Billington (Limited)	H L.	—	173	[1899] A. C. 79; 68 L. J. Q. B. 162; 79 L. T. 503
London and North-Western Railway Co. v Ogwen District Council	C.A.	—	169	80 L. T. 401
London and Westminster Bank v Inland Revenue Commissioners	Q.B.D.	—	82	68 L. J. Q. B. 787
Long v Fulham Vestry	CH.D. KEK. J.	56	131	
Lowe v Lowe	C.A.	553	53	[1899] P. 204; 68 L. J. P. 60; 80 L. T. 575
Lowe v Pearson	C.A.	193	123	[1899] 1 Q. B. 261; 68 L. J. Q. B. 122; 79 L. T. 654
Lower Rhine Insurance Corporation v Sedgwick	C.A.	261	86	[1899] 1 Q. B. 179; 68 L. J. Q. B. 186; 80 L. T. 6
Lowth v Ibbotson	C.A	506	122	[1899] 1 Q. B. 1003; 68 L. J. Q. B. 465; 80 L. T. 341
Lucky Guss Co, *In re*	CH.D. KEK. J.	—	26	79 L. T. 722
Lund v Liverpool School for Indigent Blind	CHD. BYRNE, J	6	77	[1898] 2 Ch. 669; 79 L. T. 68
Luscombe v Great Western Railway	Q.B.D.	—	168	[1899] 2 Q. B. 313; 68 L. J. Q. B. 711
Lynes v Smith	Q.B.D.	411	97	[1899] 1 Q. B. 486; 68 L. J. Q. B. 275; 80 L. T. 122
Lyons v Wilkins	C.A.	291	193	[1899] 1 Ch. 255; 68 L. J. Ch. 146; 79 L. T 709
M——, *In re*	CH D. STI. J.	267	197	[1899] 1 Ch. 79; 68 L. J. Ch. 86; 79 L. T. 459
Machinnon v Clark	C.A.	19	57	[1898] 2 Q. B. 251; 79 L. T. 83
Macleod v Power	CHD. BYRNE J.	74	155	[1898] 2 Ch. 295; 79 L. T. 67
Maddock, *In re.* Butt v Wright	CH.D. HDY. J	684	152	
Mallet v South-Eastern Railway Co.	Q.B.D.	334	167	[1899] 1 Q. B. 309; 68 L. J. Q. B. 256; 80 L. T. 53
Manchester, &c., Railway Co. v Anderson	C.A.	—	168	[1898] 2 Ch. 394
Markham and Darter's case, African Gold, &c., Co., *In re*	CH.D. WRI. J	509	28	[1899] 1 Ch. 414; 68 L. J. Ch. 215; 80 L. T. 232
Marks v Derrick	Q.B.D.	—	18	80 L. T. 60
Marney v Scott	Q.B.D.	666	140	[1899] 1 Q. B. 986; 68 L. J. Q. B. 786
Marnham v Weaver	CH.D. ROM. J.	—	132	80 L. T. 412
Marrow v Flimby, &c., Coal and Fire-brick Co. (Limited)	C.A.	—	125	[1898] 2 Q. B. 588; 79 L. T. 397
Martin v London County Council	C.A.	—	66	80 L. T. 866
Maryon-Wilson, *In re.* Wilson v Maryon-Wilson	CH.D. KEK. J.	635	74	

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Mason, *In re.* Bing, *Ex parte.*	BKCY.	270	14	[1899] 1 Q. B. 810; 68 L. J. Q. B. 466; 80 L. T. 92
Mather v Lawrence	Q.B.D.	559	56	[1899] 1 Q. B. 1000; 68 L. J. Q. B. 714; 80 L. T. 600
May's Metal Syndicate, *In re.* Smithson's case	CH.D. WRI. J.	—	25	68 L. J. Ch. 46; 79 L. T. 663
McFarlane v Hutton & Co.	CH.D. HDY. J	507	142	[1899] 1 Ch. 884; 68 L. J. Ch. 408; 80 L. T. 486
McKeown v Joint-Stock Institute	CH.D. NOR. J.	—	151	[1899] 1 Ch. 671; 68 L. J. Ch. 390; 80 L. T. 611
McNicholas v Dawson & Sons	C.A.	500	122	[1899] 1 Q. B. 773; 68 L. J. Q. B. 470; 80 L. T. 317
"Mediana," The	C.A.	—	183	68 L. J. P. 26; 80 L. T. 173
Megson, In Goods of	P.D. & A.D.	—	162	80 L. T. 295
Mellor v Tomkinson	C.A.	240	118	[1899] 1 Q. B. 374; 68 L. J. Q. B. 214; 79 L. T. 715
Mercantile Bank of London v Evans	Q.B.D.	—	8	79 L. T. 496
Merchants Fire Office, *In re*	CH.D. WRI. J.	480	37	[1899] 1 Ch. 432; 68 L. J. Ch. 211; 80 L. T. 285
Mersey Docks and Harbour Board, *Ex parte*	C.A.	306	154	[1899] 1 Q. B. 546; 68 L. J. Q. B. 540; 80 L. T. 143
Mersey Docks Board v Hunter	H.L.	—	126	80 L. T. 96
"Merthyr," The	P.D. & A.D.	—	184	79 L. T. 676
Mess v Hay	H.L. (SC.)	—	13	[1899] A. C. 233
Miall v Pearce. Second East Dulwich 745th Starr-Bowkett Building Society, *In re*	CH.D. KEK. J.	408	197	68 L. J. Ch. 196
Midland Railway Co. v Loseby	H.L.	656	172	[1899] A. C. 133; 68 L. J. Q. B. 326; 80 L. T. 93
Middlesex (Sheriff of), *Ex parte.* Thomas, *In re*	C.A.	259	12	[1899] 1 Q. B. 66
Miller, *Ex parte.* Reg. v Glamorgan County Council	Q.B.D.	—	106	[1899] 2 Q. B. 26
Miller & Aldworth v Sharp	CHD. BYRNE, J	268	63	[1899] 1 Ch. 622; 68 L. J. Ch. 322; 80 L. T. 77
Mills v Mills. Gundry, *In re*	CH.D. NOR. J	137	179	[1898] 2 Ch. 504; 79 L. T. 438
——— v Penton. Egan, *In re*	CH.D. STI. J.	—	206	[1899] 1 Ch. 688; 68 L. J. Ch. 307; 80 L. T. 153
Milner, *In re.* Milner v Bray	CH.D. STI. J.	369	151	[1899] 1 Ch. 563; 68 L. J. Ch. 255; 80 L. T. 151
Milsom v Stafford	C.A.	—	62	80 L. T. 590
Minister for Lands v Harrington	P.C.	—	141	[1899] A. C. 408; 68 L. J. P. C. 60; 80 L. T. 604
Mitchell v Loe. Hocking, *In re*	C.A.	114	206	[1898] 2 Ch. 567; 79 L. T. 114, 164
Mohan v Broughton	P.D. & A.D.	—	3	[1899] P. 211; 68 L. J. P. 91
Montgomery v De Bulmes	C.A.	22	154	[1898] 2 Q. B. 420
Montreal Gas Co. v Cadieux	P.C.	—	151	[1898] A. C. 718
Moore Bros. & Co., *In re*	C.A.	401	35	[1899] 1 Ch. 627; 68 L. J. Ch. 302; 80 L. T. 104
Morris, *In re.* James v London and County Banking Co.	C.A.	324	14	[1899] 1 Q. B. 485; 68 L. J. Ch. 299; 80 L. T. 37
——— v Duncan	Q.B.D.	96	89	[1899] 1 Q. B. 4; 68 L. J. Q. B. 49; 79 L. T. 379
Morrison v Trustees Insurance Corporation	C.A.	—	34	68 L. J. Ch. 11; 79 L. T. 605
Moss, *In re.* Kingsbury v Walter	C.A.	642	208	
——— v Hancock	Q.B.D.	698	47	[1899] 2 Q. B. 111; 68 L. J. Q. B. 657; 80 L. T. 693
Mountain v Parr	C.A.	353	117	[1899] 1 Q. B. 805; 68 L. J. Q. B. 447; 80 L. T. 342
Mowat, *In re.* Kingston Cotton Mill Co. v Mowat	CH.D. STI. J.	506	1	[1899] 1 Ch. 831; 68 L. J. Ch. 390; 80 L. T. 406
Mowbray v Appleby	Q.B.D.	—	103	80 L. T. 805
Moxham v Grant	Q.B.D.	282	32	[1899] 1 Q. B. 480; 68 L. J. Q. B. 283; 80 L. T. 356
Muller v Inland Revenue Commissioners	Q.B.D.	—	82	68 L. J. Q. B. 797
Mundy and Roper's Contract, *In re.*	C.A.	226	177	[1899] 1 Ch. 275; 68 L. J. Ch. 135; 79 L. T. 583
Murdock v Heath	Q.B.D.	—	84	80 L. T. 50
Mutoscope and Biograph Syndicate (Limited), *In re*	CH.D. WRI. J.	520	38	[1899] 1 Ch. 896; 68 L. J. Ch. 417
National Bank of Wales, *In re*	CH.D. WRI. J.	—	31	79 L. T. 667
National Society for Distribution of Electricity, &c. v Gibbs	CH.D. HDY. J.	518	145	68 L. J. Ch. 503; 80 L. T. 524
National Telephone Co. v Inland Revenue Commissioners	C.A.	247	78	[1899] 1 Q. B. 250; 68 L. J. Q. B. 222; 79 L. T. 514
Neale v Neale	C.A.	—	179	79 L. T. 629
Needes, *Ex parte.* Reg. v Bird	C.C.R.	112	46	[1898] 2 Q. B. 340; 79 L. T. 156
Newby v Eckersley	C.A.	245	90	[1899] 1 Q. B. 465; 68 L. J. Q. B. 261; 80 L. T. 314
New Ixion Tyre Co. v Spilsbury	C.A.	—	145	[1898] 2 Ch. 484; 79 L. T. 229

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
New London Credit Syndicate (Limited) v Neale	C.A.	—	18	[1898] 2 Q. B. 487; 79 L. T. 323
Newman v Maxwell	CH.D. KEK J.	—	200	80 L. T. 681
New South Wales Commissioners of Taxation v Teece	P.C	—	—	[1899] A. C. 254; 68 L. J. P. C. 8; 79 L. T. 601
New York Breweries Co. v Attorney-General	H.L.	—	78	[1899] A. C. 62; 68 L. J. Q. B. 135; 79 L. T. 568
Nicholas v Nicholas	P.D. & A.D.	—	52	68 L. J. P. 66; 80 L. T. 422
Nicholl v Epping Urban District Council	CH.D. STI. J.	457	110	[1899] 1 Ch. 844; 68 L. J. Ch. 393; 80 L. T. 515
Nix v Nottingham Justices	C.A.	628	100	[1899] 2 Q. B. 294; 68 L. J. Q. B. 854
Nordman, *In re.* Hasluck, *Ex parte*	BKCY.	151	11	
North British Railway Co. (Limited) v Park Yard Co. (Limited)	H.L. (SC.)	—	54	[1898] A. C. 643
North Cheshire and Manchester Brewery Co. v Manchester Brewery Co.	H.L.	—	192	[1899] A. C. 83; 68 L. J. Ch. 74; 79 L. T. 645
North-Eastern Railway Co. v Dalton Overseers	C.A.	581	67	[1899] 1 Q. B. 1026; 68 L. J. Q B. 640; 80 L. T. 587
Northern Creosoting and Sleeper Co. (Limited), *In re*	CHD. BYRNE, J	—	26	79 L. T. 407
North Sydney Investment and Tramway Co. v Higgins	P.C.	481	27	[1899] A. C. 263; 68 L. J. P. C. 42; 80 L. T. 303
Norton v Davison	C.A.	275	176	[1899] 1 Q. B. 401; 68 L. J. Q. B. 265; 80 L. T. 139
Nosotti v Auerback	Q.B.D	—	40	79 L. T. 413
Nourse, *In re.* Hampton v Nourse	CH.D. STI. J	116	207	[1899] 1 Ch. 63; 68 L. J. Ch. 15; 79 L. T. 376
Nutt v Easton	CH.D. HDY. J.	430	135	[1899] 1 Ch. 873; 68 L. J. Ch. 367; 80 L. T. 353
O'Dea v Crowhurst	Q.B.D	—	66	68 L. J. Q. B. 655; 80 L. T. 491
Official Receiver, *Ex parte.* Beall, *In re*	BKCY.	—	10	[1899] 1 Q. B. 688; 68 L. J. Q B. 46[illegible]; 80 L. T. 267
——. Cunningham, *In re*	BKCY.	—	13	80 L T. 503
——. Frost, *In re*	BKCY.	512	13	[1899] 2 Q. B. 50; 68 L. J. Q. B. 663; 80 L. T. 496
——. Hirth, *In re*	BKCY.	192	12	
——.	C.A.	243	12	[1899] 1 Q. B. 612; 68 L. J. Q. B. 287
——. Raynes Park Golf Club (Limited), *In re*	BKCY	499	35	[1899] 1 Q. B. 961; 80 L. T. 388
——. Rhoades, *In re*	BKCY.	432	10	[1899] 1 Q. B. 905; 80 L. T. 493
——.	C.A.	561	10	68 L. J. Q. B. 804; 80 L. T. 742
——. Tankard, *In re*	BKCY.	624	17	[1899] 2 Q. B. 57; 68 L. J. Q. B 670; 80 L. T. 500
O'Gorman, *In re.* Bale, *Ex parte*	BKCY.	543	11	[1899] 2 Q. B. 62; 68 L. J. Q. B. 650; 80 L. T. 501
Oliver v Hinton	CH.D. ROM. J.	—	132	68 L. J. Ch. 94; 79 L. T. 729
Ormrod v Wilkinson. Scowcroft, *In re*	CH.D. STI. J.	—	21	[1898] 2 Ch 638; 79 L. T. 342
Owen's Patent, *In re*	CH.D. STI. J.	180	144	[1899] 1 Ch. 157; 68 L. J. Ch. 63; 79 L. T. 458
Owner of 238 Old Ford-road v Foot	Q.B.D.	541	—	[1899] 1 Q. B. 972; 80 L. T. 390
Oxford and Cambridge Universities v Gill	CH.D. STI. J.	248	155	[1899] 1 Ch. 55; 68 L. J. Ch. 34; 79 L. T. 338
Oxford Music Hall v London County Council	CH.D NOR. J.	297	127	[1898] 2 Ch. 491; 79 L. T 22
Parker v Alder	Q.B.D.	142	6	[1899] 1 Q. B. 20; 68 L. J. Q. B. 7; 79 L. T. 381
—— v Lethbridge. Jones, *In re*	CH.D. STI. J.	—	211	79 L. T. 154
Parker-Jervis, *In re.* Salt v Locker	CH.D. KEK. J.	147	71	[1898] 2 Ch. 643; 79 L. T. 403
Parr's Banking Co. v Yates	C.A.	42	103	[1898] 2 Q. B. 460; 79 L. T. 321
Parsons' Patent, *In re*	P.C.	—	146	[1898] A. C. 673
Paterson, In Goods of	P.D. & A.D.	—	165	79 L. T. 123
Pease, In Goods of	P.D. & A.D	—	164	80 L. T. 295
—— v Lowden	Q.B.D.	--	43	[1899] 1 Q. B. 386; 68 L. J. Q. B. 239; 79 L. T. 672
Pelly and Jacob's Contract, *In re*	CH.D. NOR. J	—	202	80 L. T. 45
Pemberton v Barnes	CH.D. NOR. J.	444	210	[1899] 1 Ch. 544; 68 L. J. Ch. 192; 80 L. T. 181
—— v Hughes	C.A.	354	51	[1899] 1 Ch. 781; 68 L. J. Ch. 281; 80 L. T. 369
Peninsular and Oriental Steam Navigation Co. v Lee	Q.B.D	—	76	79 L. T. 118
Penny v Wimbledon Urban District Council	C.A.	565	140	[1899] 2 Q. B. 72; 68 L. J. Q. B. 794; 80 L. T. 615
Perpetual Executors, &c., of Australia (Limited) v Swan	P.C.	—	204	[1898] A. C. 763; 79 L. T. 148
Perrins v Bellamy	C.A.	417	196	[1899] 1 Ch. 797; 68 L. J. Ch. 397; 80 L. T. 478
Perry v Dixon	P.D. & A.D.	—	152	80 L. T. 297
Perry and Adams' Contract, *In re*	CH.D. STI. J.	326	—	[1899] 1 Ch. 554
Perry Almshouses, *In re.* Ross's Charity, *In re*	C.A.	197	20	[1899] 1 Ch. 21; 68 L. J. Ch. 66; 79 L. T. 366

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Phillips v London School Board	C.A.	—	56	[1898] 2 Q. B. 447; 79 L. T. 50
——— v Probyn	CH.D. NOR. J.	—	179	[1899] 1 Ch. 811; 68 L. J. Ch. 401; 80 L. T. 513
——— v Stephens	Q.B.D.	—	87	79 L. T. 280
Pickworth, *In re.* Snaith v Parkinson	C.A.	—	212	[1899] 1 Ch. 642; 58 L. J. Ch. 324; 80 L. T. 212
Pilkington v Gray	P.C.	—	206	[1899] A. C. 401; 68 L. J. P. C. 63
Plant, *In re.* Griffith v Hill	CH.D. KEK. J.	183	208	
Plaskitt v Eddis	CH.D. NOR. J.	—	160	79 L. T. 136
Plymouth Union v Axminster Union	H.L.	33	150	[1898] A. C. 586; 79 L. T. 4
Powell v Brown	C.A.	145	121	[1899] 1 Q. B. 157; 68 L. J. Q. B. 151; 79 L. T. 631
——— v Kempton Park Racecourse Co.	H.L.	585	64	[1899] A. C. 143; 68 L. J. Ch. 392; 80 L. T. 538
——— v Marshall, Parkes, & Co.	C.A.	419	198	[1899] 1 Q. B. 710; 68 L. J. Q. B. 477; 80 L. T. 509
Power, *In re.* Power v Howell	CH.D. KEK. J.	183	73	
Prescott v Lee	Q.B.D.	139	59	[1899] 1 Q. B. 102; 68 L. J. Q. B. 79; 79 L. T. 447
———	C.A.	690	—	[1899] 2 Q. B. 273
Preston (Mayor) v Biornstad. "Ratata," The	H.L.	156	186	[1898] A. C. 513
Price v Marsden	C.A.	274	119	[1899] 1 Q. B. 493; 68 L. J. Q. B. 307; 80 L. T. 15
Prince, *In re.* Godwin v Prince	CH.D. STI. J.	25	4	[1898] 2 Ch. 225
"Prins Hendrik," The	P.D. & A.D.	—	183	68 L. J. P. 86; 80 L. T. 838
Printers', &c., Protection Society. *In re*	CHD. BYRNE, J.	619	193	[1899] 2 Ch. 184; 68 L. J. Ch. 537
Pritchett v English and Colonial Syndicate (Limited)	C.A.	577	154	68 L. J. Q. B. 801
Pryke v Hill	Q.B.D.	—	103	79 L. T. 738
Pursey v Holloway. Baker, *In re*	CH.D. STI. J.	—	200	79 L. T. 343
Purves v "Straits of Dover" Steamship Co.	C.A.	630	188	[1899] 2 Q. B. 217
"Queen of the River" Steamship Co. v Thames Conservators	Q.B.D.	685	190	
Quick, In Goods of	P.D & A.D.	—	165	68 L. J. P. 64; 80 L. T. 808
Quilliam, In Goods of	P.D. & A.D.	—	163	68 L. J. P. 17; 79 L. T. 472
Railway Time Tables Publishing Co., *In re.* Welton's case	C.A.	138	25	[1899] 1 Ch. 108; 68 L. J. Ch. 50; 79 L. T. 679
Raphael, *In re.* Salomon, *Ex parte*	CH.D. KEK. J.	330	189	[1899] 1 Ch. 853; 68 L. J. Ch. 309; 80 L. T. 226
"Ratata," The. Preston (Mayor) v Biornstad	H.L.	156	186	[1898] A. C. 513
Ratcliffe, In Goods of	P.D. & A.D.	—	161	68 L. J. P. 47; 80 L. T. 170
———, *In re*	CH.D. KEK. J	—	196	[1898] 2 Ch. 352
Rawlinson v Scholes	Q.B.D.	—	1	79 L. T. 350
Rayment, *In re.* Trustee, *Ex parte*	BKCY.	—	9	80 L. T. 807
Raynes Park Golf Club (Limited), *In re.* Official Receiver, *Ex parte*	BKCY.	499	35	[1899] 1 Q. B. 961; 68 L. J. Q. B. 529; 80 L. T. 388
Rees v Thomas	C.A.	504	123	[1899] 1 Q. B. 1015; 68 L. J. Q. B. 539; 80 L. T. 578
Reeves & Son (Limited). *In re*	CH.D. KEK. J.	—	25	[1899] 1 Ch. 184
Reg. v Bird. Needes, *Ex parte*	C.C.R	112	46	[1898] 2 Q. B. 340; 79 L. T. 153
——— v Buckinghamshire Justices	Q.B.D.	315	198	
——— v Comptroller-General of Patents.	C.A.	567	146	[1899] 1 Q. B. 909; 68 L. J. Q. B. 568; 80 L. T. 777
——— v Davey	Q.B.D.	—	89	[1899] 2 Q. B. 301; 68 L. J. Q. B. 675; 80 L. T. 798
——— v Ellis	C.C.R.	188	48	[1899] 1 Q. B. 230; 68 L. J. Q. B. 103; 79 L. T. 532
——— v Entwistle. Jones, *Ex parte.*	Q.B.D.	—	48	[1899] 1 Q. B. 846; 68 L. J. Q. B. 580; 80 L. T. 656
——— v Francis. Walton, *Ex parte*	Q.B.D.	—	129	68 L. J. Q. B. 609
——— v Gardner	C.C.R.	77	46	[1899] 1 Q. B. 150; 68 L. J. Q. B. 42; 79 L. T. 358
——— v Glamorgan County Council. Miller, *Ex parte*	Q.B.D.	—	106	[1899] 2 Q. B. 26
——— v Hobbs	C.C.R.	79	63	[1898] 2 Q. B. 647; 79 L. T. 160
——— v Kent Justices	Q.B.D.	—	108	80 L. T. 622
——— v London Justices	Q.B.D.	316	148	[1899] 1 Q. B. 532; 68 L. J. Q. B. 383; 80 L. T. 286
——— v London and North-Western Railway Co.	C.A.	—	170	[1899] 1 Q. B. 921; 68 L. J. Q. B. 685; 80 L. T. 782
——— v Lowndes	Q.B.D.	—	—	[1899] 1 Q. B. 577; 68 L. J. Q. B. 318; 80 L. T. 532
——— v Manchester Justices	Q.B.D.	410	100	[1899] 1 Q. B. 571; 68 L. J. Q. B. 358; 80 L. T. 531
——— v Nicholson	Q.B.D.	—	102	68 L. J. Q. B. 715
——— v Northallerton County Court Judge	C.A.	68	11	[1898] 2 Q. B. 680; 68 L. J. Q. B. 24; 79 L. T. 327

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Reg. v Northallerton County Court Judge	H.L.	—	11	[1899] A. C. 439
—— v Powell. Williams, *Ex parte*	Q.B.D.	—	107	[1899] 1 Q. B. 396; 68 L. J. Q. B. 274; 80 L. T. 184
—— v Rhodes	C.C.R.	121	46	[1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360
—— v Saunders	C.C.R.	—	46	[1899] 1 Q. B. 490; 68 L. J. Q. B. 296; 80 L. T. 28
—— v Senior	C.C.R.	367	47	[1899] 1 Q. B. 283; 68 L. J. Q. B. 175; 79 L. T. 562
—— v Spilsbury	Q.B.D.	—	47	[1898] 2 Q. B. 615; 79 L. T. 211
—— v Stewart and Olsen	Q.B.D.	445	187	[1899] 1 Q. B. 964; 68 L. J. Q. B. 582; 80 L. T. 660
—— v Tristram	Q.B.D.	639	54	[1898] 2 Q. B. 371; 80 L. T. 414
—— v Warwickshire and Worcestershire Justices	C.A.	134	99	[1899] 1 Q. B. 59; 68 L. J. Q. B. 109; 79 L. T. 393
—— v Williams	C.C.R.	—	47	79 L. T. 739
—— Yorkshire (North Riding) County Council	Q.B.D.	205	61	[1899] 1 Q. B. 201; 68 L. J. Q. B. 93; 79 L. T. 521
Revelstoke (Lord) v Inland Revenue Commissioners (Baring v Inland Revenue Commissioners)	H.L.	210	80	[1898] A. C. 565; 79 L. T. 227
Rhoades, *In re*. Official Receiver, *Ex parte*	BKCY.	432	10	[1899] 1 Q. B. 905; 68 L. J. Q. B. 536; 80 L. T. 493
——	C.A.	561	—	68 L. J. Q. B. 804; 80 L. T. 742
Rhymney Steamship Co. (Limited) v Iberian Ore Co. (Limited)	C.A.	—	181	79 L. T. 240
Ribble Joint Committee v Halliwell	Q.B.D.	—	175	[1899] 1 Q. B. 27; 68 L. J. Q. B. 20; 79 L. T. 696
Rickman, *In re*. Stokes v Rickman	CH.D. STI. J.	—	178	80 L. T. 518
"Rijnstroom," The	P.D. & A.D.	—	5	80 L. T. 422
Riley v Hall	CH.D. STI. J.	—	137	79 L. T. 244
Ritchie v Larsen	Q.B.D.	413	187	[1899] 1 Q. B. 727; 68 L. J. Q. B. 335; 80 L. T. 259
Ritson v Ritson	C.A.	213	144	[1899] 1 Ch. 128; 68 L. J. Ch. 77; 79 L. T. 455
Roberts v Gwyrfai District Council	CH.D. KEK.J.	376	109	[1899] 1 Ch. 583; 68 L. J. Ch. 233; 80 L. T. 107
Robinson v Heuer	C.A.	34	40	[1898] 2 Ch. 451; 79 L. T. 281
—— v Sunderland Corporation	Q.B.D.	—	110	[1899] 1 Q. B. 751; 68 L. J. Q. B. 330; 80 L. T. 262
Rochdale and Haslingden Arbitration, *In re*	C.A.	322	105	[1899] 1 Q. B. 540; 68 L. J. Q. B. 531; 80 L. T. 146
Rondace v Zobel	P.C.	—	—	[1899] A. C. 258; 68 L. J. P. C. 47; 79 L. T. 602
Ross's Charity, *In re*. Perry Almshouses, *In re*	C.A.	197	20	[1899] 1 Ch. 21; 68 L. J. Ch. 66; 79 L. T. 366
Rowlands v Miller	Q.B.D.	687	188	[1899] 1 Q. B. 735; 68 L. J. Q. B. 338; 80 L. T. 290
Roxburghe Press, *In re*. Spiers and Bevan's case	CH.D. WRI. J.	281	24	[1899] 1 Ch. 210; 68 L. J. Ch. 111; 80 L. T. 280
Royal College of Surgeons of England, *In re*	C.A.	452	70	[1899] 1 Q. B. 871; 68 L. J. Q. B. 613; 80 L. T. 611
Royal General Theatrical Fund v Kydd. Lacy, *In re*	CH.D. STI. J.	664	105	[1899] 2 Ch. 149, 68 L. J. Ch. 488; L. T. 706
Rubbins, *In re*. Gill v Worrall	C.A.	—	207	79 L. T. 313
Rucker's case. Hooley, *In re*	BKCY.	—	10	79 L. T. 306
Rumboll v Nunnery Colliery Co.	C.A.	—	120	80 L. T. 42
S——, *In re*	C.A.	—	115	[1898] 2 Ch. 392; 67 L. J. Ch. 453
St. Donat's Settled Estates, *In re*	CH.D. NOR.J.	—	178	97 L. T. 542
St. Louis Breweries v Apthorpe	Q.B.D.	334	74	79 L. T. 551
St. Margaret's and St. John's Vestries v Hoskins	Q.B.D.	649	128	68 L. J. Q. B. 840
St. Mary, Battersea v County of London, &c., Electric Co.	C.A.	—	130	[1899] 1 Ch. 474; 68 L. J. Ch. 238; 80 L. T. 31
St. Mary, Islington, Vestry v Hornsey Local Board	CH.D. KEK.J.	—	128	80 L. T. 746
St. Saviour (Vicar of) v Westgate Parishioners	P.D. & A.D.	—	54	[1898] P. 217
Salomon, *Ex parte*. Raphael, *In re*	CH.D. KEK.J.	330	189	[1899] 1 Ch. 853; 68 L. J. Ch. 309; 80 L. T. 226
Salt v Locker. Parker-Jervis, *In re*.	CH.D. KEK.J.	147	71	[1898] 2 Ch. 643. 79 L. T. 403
Salton v New Beeston Cycle Co.	CH.D. HDY. J.	462	37	[1899] 1 Ch. 775; 68 L. J. Ch. 370; 80 L. T. 521
Salt Union v North Staffordshire Railway Co.	C.A.	4	172	[1898] 2 Q. B. 435; 79 L. T. 16
Sandgate District Council v Kent County Council	H.L.	—	106	79 L. T. 425
Santley v Wilde	CHD. BYRNE, J	297	136	[1899] 1 Ch. 747; 80 L. T. 154
Savary v Savary	C.A.	—	52	79 L. T. 607

Name of Case.	Court.	Page in W. R. 1898–99.	Column in Digest.	References to Contemporaneous Reports.
Saxon Steamship Co. (Limited) v Union Steamship Co. (Limited)	Q.B.D.	—	182	68 L. J. Q. B. 58; 79 L. T. 486
Scarr, In Goods of	P.D. & A.D.	—	163	80 L T. 296
Schraml v Schraml	P.D. & A.D.	—	51	68 L. J. P. 47; 80 L. T. 328
Scowcroft, *In re.* Ormrod v Wilkinson	CH.D. STI. J.	—	21	[1898] 2 Ch. 638; 79 L. T. 342
Sea Insurance Co. v Blogg	C.A.	71	87	[1898] 2 Q. B. 398
Seaman v Lee	Q.B.D.	—	77	68 L. J. Q. B. 593
Seaton v Burnand. Seaton v Heath	C.A.	487	84	[1899] 1 Q. B. 782; 68 L. J. Q. B. 631; 80 L. T. 579
Second East Dulwich 745th Starr-Bowkett Building Society, *In re.* Miall v Pearce	CH.D. KEK. J.	408	197	68 L. J. Ch. 196; 79 L. T. 726
Sefton (Earl), *In re*	LUN.	49	115	[1898] 2 Ch. 378
Séminaire (Le) de Quebec v Limoilou Corporation	P.C.	—	19	[1899] A. C. 288; 80 L. T. 331
Sen Sen v Britten	CH.D. STI. J.	358	191	[1899] 1 Ch. 692; 68 L. J. Ch. 250; 80 L. T. 278
Sharp v Jackson	H.L.	—	—	[1899] A. C. 419; 80 L. T. 841
Shaw, *Ex parte.* Gieve, *In re*	C.A.	616	15	80 L. T. 737
Shaw v Herts County Council	C.A.	—	165	[1899] 2 Q. B. 282
Shelbourne & Co. v Law Investment, &c. (Limited)	Q.B.D.	—	83	[1898] 2 Q. B. 626; 79 L. T. 278
Sheriff of Middlesex, *Ex parte.* Thomas, *In re*	C.A.	259	17	[1899] 1 Q. B. 460; 79 L. T. 356
Shipway v Broadwood	C.A.	—	160	[1899] 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11
Shorey, *In re.* Smith v Shorey	CHD. BYRNE, J	188	3	79 L. T. 349
Shorthouse v Shorthouse	C.A.	—	53	79 L. T. 366
Shortt v Robinson	Q.B.D.	—	6	68 L. J. Q. B. 352; 80 L. T. 261
Simcoe v Pethick	C.A.	—	67	[1898] 2 Q. B. 555; 79 L. T. 432
Simmons v White	C.A.	513	120	[1899] 1 Q. B. 1005; 60 L. J. Q. B. 507; 80 L. T. 344
Sitwell v Worrall	CHD. BYRNE, J	—	42	79 L. T. 86
Sixth West Kent Mutual Building Society v Hills	CHD. BYRNE, J	647	18	[1899] 2 Ch. 60; 68 L. J. Ch. 476
Smith, *In re.* Grose-Smith v Bridges	CH.D. NOR. J.	357	177	[1899] 1 Ch. 331; 68 L. J. Ch. 198; 80 L. T. 218
——— v Lancashire and Yorkshire Railway Co.	C.A.	146	122	[1899] 1 Q. B. 141; 68 L. J. Q. B. 51; 79 L. T. 633
——— v Shorey. Shorey, *In re*	CHD. BYRNE, J	188	3	79 L. T. 349
——— v Smith	P.D. & A.D.	—	51	79 L. T. 124
———	CH.D. ROM. J.	223	209	[1899] 1 Ch. 365; 68 L. J. Ch. 333; 80 L. T. 113
Smithson's case. May's Metal Syndicate, *In re*	CH.D. WRI. J.	—	25	68 L. J. Ch 46; 79 L. T. 663
Smyth v Reg.	P.C.	—	204	[1898] A. C. 782; 79 L. T. 199
Snaith v Parkinson. Pickworth, *In re*	C.A.	—	212	[1899] 1 Ch. 642; 68 L J. Ch. 324; 80 L. T. 212
"Snark," The	P.D. & A.D.	398	183	[1899] P. 74; 68 L. J. P. 22; 80 L. T. 25
Softlaw v Welch	C A.	626	116	
Solicitor, A, *In re*	Q.B.D.	575	188	80 L. T. 729
Solomon v Cropper	Q.B.D.	—	77	79 L. T. 301
Soltau's Settled Estates, *In re*	CH.D. NOR. J.	—	176	68 L. J. Ch. 39; 79 L. T. 335
South African Breweries (Limited) v King	CH.D. KEK. J.	681	39	[1899] 2 Ch. 173; 68 L. J. Ch. 530
Southampton Tramways Co. v Southampton Corporation	Q.B.D.	—	194	80 L. T. 236
Southwark and Vauxhall Water Co. v Hampton District Council	C.A.	177	111	[1899] 1 Q. B. 273; 68 L. J. Q. B. 207; 80 L. T. 1
——— v Wandsworth Board of Works	C.A.	107	127	[1898] 2 Ch. 603; 79 L. T. 132
Spicer v Spicer	P.D. & A.D.	271	164	[1899] P. 38; 79 L. T. 707
Spiers and Bevan's case. Roxburghe Press, *In re*	CH.D. WRI. J.	281	24	[1899] 1 Ch. 210; 68 L. J. Ch. 111; 80 L. T. 280
Spilsbury v Reg.	P.C.	—	65	[1899] A. C. 392; 68 L. J. P. C. 66; 80 L. T. 602
Spitzel v Chinese Corporation (Limited)	CH.D. STI. J.	—	34	80 L. T. 347
Sprake v Day. Day, *In re*	CH.D. NOR. J.	238	209	[1898] 2 Ch. 510
Stamford Union v Bartlett. Watson, *In re*	CH.D. STI. J.	359	147	[1899] 1 Ch. 72; 68 L. J. Ch. 21
Stanford v Williams	Q.B.D.	—	144	80 L. T. 490
Stanley v English Fibres Industries	Q.B.D.	—	8	68 L. J. Q. B. 839
Stanley v Stanley	P.D. & A.D.	272	51	[1898] P. 227; 68 L. J. P. 7; 79 L. T. 104
Starey v Graham	Q.B.D.	392	147	[1899] 1 Q. B. 406; 68 L. J. Q. B. 257; 80 L. T. 185
Statham v Brighton Marine Palace and Pier Co.	CH.D. ROM. J.	185	26	[1899] 1 Ch. 199; 68 L. J. Ch. 172; 80 L. T. 73
Stegmann v O'Connor	Q.B.D.	—	38	80 L.T. 234
Stephenson v Rogers (Limited)	Q.B.D.	—	101	80 L. T. 193
Steuart v Bristol Steamship Co.	Q.B.D.	—	—	[1898] 2 Q. B. 430; 79 L. T. 31
Stevens, *In re.* Board of Trade, *Ex parte*	BKCY.	61	11	[1898] 2 Q. B. 495; 79 L. T. 80

Name of Case.	Court.	Page in W. R. 1898–99.	Column in Digest.	References to Contemporaneous Reports.
Stewart, Rogers, & Co v British and Colonial Association	Q.B.D.	—	28	68 L. J. Q. B. 14; 79 L. T. 494
Stockport Ragged Schools, *In re*	C.A.	166	22	[1898] 2 Ch. 687; 68 L. J. Ch. 41; 79 L. T. 507
Stoke Parish Council v Price	CH.D. NOR. J.	663	107	68 L. J. Ch. 447; 80 L. T. 643
Stokes v Rickman. Rickman, *In re*	CH.D. STI. J.	—	178	80 L. T. 518
Strickland v Williams	C.A.	—	154	[1899] 1 Q. B. 382; 68 L. J. Q. B. 241; 80 L. T. 4
Sturrock v Littlejohn.	Q.B.D.	—	152	68 L. J. Q. B. 165
Styles v Middle Temple Society	Q B.D.	383	77	68 L. J. Q. B. 157; 79 L. T. 700
Sutton v Goodrich	Q.B.D.	—	208	80 L. T. 765
Swayne v Inland Revenue Commissioners	Q.B.D.	300	80	[1899] 1 Q. B. 335; 68 L. J. Q. B. 234; 80 L. T. 56
Sweetland v Turkish Cigarette Co.	Q.B.D.	511	45	80 L. T. 472
Sykes v Son v Sowerby District Council	Q.B.D.	560	113	[1899] 1 Q. B. 979; 68 L. J. Q. B. 652; 80 L. T. 392
Tankard, *In re*. Official Receiver, *Ex parte*	BKCY.	624	17	[1899] 2 Q. B. 57; 68 L. J. Q. B. 670; 80 L. T. 500
Taylor v Hodgson. Hodgson, *In re*.	CH.D. ROM.J.	44	208	[1898] 2 Ch. 545; 79 L. T. 345.
Terry v Sweeting. Duncan, *In re*	CH.D. ROM.J.	379	—	[1899] 1 Ch. 387; 68 L. J. Ch. 253; 80 L. T. 322
Thetford Corporation v Norfolk County Council	C.A.	1	106	[1898] 2 Q. B. 468; 79 L. T. 315
Thomas, *In re*. Sheriff of Middlesex, *Ex parte*	C A.	259	12	[1899] 1 Q. B. 460; 68 L. J. Q. B. 245; 79 L. T. 356
———. The Trustee, *Ex parte*	C.A.	—	17	80 L. T. 62
——— v Devonport Corporation	Q.B.D.	—	43	79 L. T. 418
Thompson v London County Council.	C.A.	433	155	[1899] 1 Q. B. 840; 68 L. J. Q. B. 625; 80 L. T. 512
Thorneycroft's Patent, *In re*	P.C.	—	146	[1899] A. C. 415; 68 L. J. P. C. 68
Tiedemann and Ledermann Frères, *In re*.	Q.B.D.	—	161	[1899] 2 Q. B. 66; 68 L. J. Q. B. 852
Tiessen v Henderson	CH.D. KEK.J.	459	34	[1899] 1 Ch. 861; 68 L. J. Ch. 353; 80 L. T. 383
Tilling v Blythe.	C.A.	273	157	[1899] 1 Q. B. 557; 68 L. J. Q. B. 350; 80 L. T. 44
Tréford, In Goods of	P.D. & A.D	—	162	[1899] P. 247; 68 L. J. P. 82
Trotter, *In re*. Trotter v Trotter	CH.D. BYRNE, J	477	206	[1899] 1 Ch. 764; 68 L. J. Ch. 363; 80 L. T. 647
Tweed, *Ex parte*	C.A.	—	189	[1899] 2 Q. B. 167; 68 L. J. Q. B. 794
Twickenham District Council v Munton	CH.D. STI. J.	328	114	[1899] 1 Ch. 168; 68 L. J. Ch. 96; 79 L. T. 544
———.	C.A.	660	114	
Tynemouth Corporation v Attorney-General	H.L.	—	43	[1899] A. C. 293; 68 L. J. Q. B. 752; 80 L. T. 633
Underwood v Barker	C.A.	347	174	[1899] 1 Ch. 300; 68 L. J. Ch. 201; 80 L. T. 306
Union Bank of Australia v Murray-Aynsley	P.C.	—	9	[1898] A. C. 693
Union Credit Bank v Mersey Docks Board	Q.B.D.	—	198	[1899] 2 Q. B. 205; 68 L. J. Q. B. 842
United Realization Co. v Inland Revenue Commissioners	Q.B.D.	381	81	[1899] 1 Q. B. 361; 68 L. J. Q. B. 218; 79 L. T. 556
United States of America v Pelly	Q.B.D.	332	62	
Vale v Moorgate-street, &c., Buildings (Limited)	CH.D. HDY. J.	—	96	80 L. T. 487
Vanda v Newcastle (Mayor, &c., of)	P.C.	—	138	[1899] A. C. 246; 68 L. J. P. C. 39; 79 L. T. 600
Vickery v Great Eastern Railway Co.	Q.B.D.	—	124	79 L. T. 121
Viditz v O'Hagan	CH.D. HDY. J.	571	69	80 L. T. 794
Violet Gold Mining Co, *In re*	CH.D. KEK. J.	—	36	68 L. J. Ch. 535; 80 L. T. 684
Vogan & Co. v Oulton	Q.B.D.	—	49	79 L. T. 384
"Vortigern," The	C.A.	437	182	[1899] P. 140; 68 L. J. P. 49; 80 L. T. 382
"Vulcan," The	P.D. & A.D.	123	5	[1898] P. 222
Wade v Wade	CH.D. KEK. J.	43	73	[1898] 2 Ch. 276
"Waikato" (Owners of Cargo on) v New Zealand Shipping Co.	C.A.	—	180	[1899] 1 Q. B. 56; 68 L. J. Q. B. 1; 79 L. T. 326
Wall v London and Northern Assets Corporation (No. 1)	C.A.	219	24	[1898] 2 Ch. 469; 68 L. J. Ch. 248; 79 L. T. 249
——— (No. 2)	CH.D. NOR. J.	—	35	[1899] 1 Ch. 550; 80 L. T. 70
Wallace v Evershed	CH.D. HDY. J.	—	133	[1899] 1 Ch. 891; 68 L. J. Ch. 415; 80 L. T. 523
Waller, *In re*. White v Scoles	CH.D. KEK. J.	182	209	68 L. J. Ch. 107; 79 L. T. 723
———.	C.A.	563	—	68 L. J. Ch. 526; 80 L. T. 701
——— v Atkinson. Atkinson, *In re*	C.A.	469	116	[1899] 2 Ch. 1; 68 L. J. Ch. 404; 80 L. T. 505
Walshaw v Mayor, &c., of Brighouse.	C.A.	600	109	[1899] 2 Q. B. 286; 68 L. J. Q. B. 828
Walton, *Ex parte*. Reg. v Francis	Q.B.D.	—	129	68 L. J. Q. B. 609
Wandsworth Board of Works v Pretty	Q.B.D.	256	129	[1899] 1 Q. B. 1; 68 L. J. Q. B. 193
Ward v Little. Gyde, *In re*	C.A.	—	21	79 L. T. 261

Name of Case.	Court.	Page in W. R. 1898-99.	Column in Digest.	References to Contemporaneous Reports.
Warwick v Graham	Q.B.D.	—	89	[1899] 2 Q. B. 191; 80 L. T. 773
Wasdale, *In re.* Brittin v Partridge	CH.D. STI. J.	169	188	[1899] 1 Ch. 163; 79 L. T. 520
Watson, *In re.* Stamford Union v Bartlett	CH.D. STI. J.	359	147	[1899] 1 Ch. 72; 68 L. J. Ch. 21; 79 L. T. 462
Watson v Petts (No. 1)	C.A.	68	151	[1899] 1 Q. B. 54; 68 L. J. Q. B. 249; 79 L. T. 330
——— (No. 2)	Q.B.D.	—	44	[1899] 1 Q. B. 430; 80 L. T. 21
Waud, *Ex parte.* Cronmire, *In re*	C.A.	—	65	[1898] 2 Q. B. 383
Wauton v Coppard	CHD.BYRNE,J	72	21	[1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467
Webb v Fagotti	C.A.	—	201	79 L. T. 683
Weir v Girvin	Q.B.D.	365	180	[1899] 1 Q. B. 193; 68 L. J. Q. B. 170; 79 L. T. 596
Welton's case. Railway Time Tables Publishing Co., *In re*	C.A.	138	25	[1899] 1 Ch. 108; 68 L. J. Ch. 50; 79 L. T. 679
West v Williams.	C.A.	308	134	[1899] 1 Ch. 132; 68 L. J. Ch. 127; 79 L. T. 575
West Lancashire Rural Council v Ogilvy.	Q.B.D.	363	114	[1899] 1 Q. B. 377; 68 L. J. Q. B. 215; 80 L. T. 162
West London Syndicate v Inland Revenue Commissioners	C.A.	125	78	[1898] 2 Q. B. 507; 79 L. T. 289
Westmacott v Westmacott	P.D. & A.D	—	51	68 L. J. P. 63; 80 L. T. 631
Westmoreland (Earl) v New Sharlstone Colliery Co.	C.A.	—	131	80 L. T. 846
Wheeler v Humphreys (*In re* Cosier. Humphreys v Gadsden)	H.L.	17	210	[1898] A. C. 506
White v Headland's Electric Battery Co.	C.A.	273	44	[1899] 1 Q. B. 507; 68 L. J. Q. B. 354; 80 L. T. 442
——— v Morley.	Q.B.D.	583	127	[1899] 2 Q. B. 34; 68 L. J. Q. B. 702; 80 L. T. 761
——— v Scoles. Waller, *In re*	CH.D. KEK.J.	182	209	79 L. T. 723
———	C.A.	563	—	68 L. J. Ch. 526; 80 L. T. 701
Whitefriars Financial Co. (Limited), *In re*	CH.D. KEK. J.	—	25	[1899] 1 Ch. 184; 68 L. J. Ch. 79; 79 L. T. 546
Whiteley's case. General Railway Syndicate, *In re*	CH.D. WRI. J.	—	36	[1899] 1 Ch. 770; 68 L. J. Ch. 365; 80 L. T. 868
Whiteley Exerciser Co. v Gamage	CH.D. NOR. J.	296	36	[1898] 2 Ch. 405; 79 L. T. 20
Wiggins v Hudson	P.D. & A.D.	—	162	80 L. T. 296
Williams, *Ex parte.* Reg. v Powell.	Q.B.D.	—	107	[1899] 1 Q. B. 396; 80 L. T. 184
——— v Birmingham Battery Co.	C.A.	680	124	[1899] 2 Q. B. 338
——— v London and North-Western Railway	Q.B.D.	—	171	[1899] 2 Q. B. 197; 80 L.T. 803
——— v Macdonald	Q.B.D.	701	102	[1899] 2 Q. B. 308; 68 L. J. Q. B. 678; 80 L. T. 758
——— v Williams	CH.D. KEK. J.	—	143	68 L. J. Ch. 528
Williamson v Norris	Q.B.D.	94	101	[1899] 1 Q. B. 7; 68 L. J. Q. B. 31; 79 L. T. 415
Wilson v Maryon-Wilson. Maryon-Wilson, *In re*	CH.D. KEK. J.	635	74	
Wilson, *Ex parte.* Athlumney (Lord), *In re*	BKCY.	144	16	[1898] 2 Q. B. 547; 79 L. T. 303
Windsor (Mayor, &c., of) v Taylor	H.L.	—	191	[1899] A. C. 41; 68 L. J. Q. B. 87; 79 L. T. 450
Wingfield v Erskine. Fludyer, *In re*	CH.D. ROM. J.	5	60	[1898] 2 Ch. 562; 79 L. T. 298
Wix v Rutson	Q.B.D.	—	94	[1899] 1 Q. B. 474; 68 L. J. Q. B. 298; 80 L. T. 168
Wohlgemuthe v Coste	Q.B.D.	—	44	[1899] 1 Q. B. 501; 68 L. J. Q. B. 373; 80 L. T. 529
Wolverton (Lord) v Attorney-General	H.L.	97	82	[1898] A. C. 535; 79 L. T. 58
Wood v Middleton	CH.D. STI. J.	—	196	79 L. T 155
——— v Walsh & Sons	C.A.	504	118	[1899] 1 Q. B. 1009; 68 L. J. Q. B. 492; 80 L. T. 345
Woodham v Atlantic Transport Co	C.A.	105	121	[1899] 1 Q. B. 15; 68 L. J. Q. B. 17; 79 L. T. 395
Woolf v Hamilton	C.A.	70	64	[1898] 2 Q. B. 337; 79 L. T. 49
——— v Woolf	CH.D. KEK. J.	181	152	[1899] 1 Ch. 343; 68 L. J. Ch. 82; 79 L. T. 725
Wrexham, Mold, &c., Railway Co., *In re* (No. 1)	CH.D. ROM. J.	172	167	[1898] 2 Ch. 666; 68 L. J. Ch. 28; 79 L. T. 463
———	C.A.	464	167	[1899] 1 Ch. 440; 68 L. J. Ch 270; 80 L. T. 130
——— (No. 2)	CHD.BYRNE,J	—	171	68 L. J. Ch. 115; 80 L. T. 649
Wright, In Goods of	P.D. & A.D.	—	163	79 L. T. 473
Wyatt v Palmer	C.A.	549	158	[1899] 2 Q. B. 106; 68 L. J. Q. B. 709; 80 L. T. 639
Wynnstay Collieries v Edwards	Q B.D.	—	117	79 L. T. 378
X——, *In re.* X—— v Y——	C.A.	345	68	[1899] 1 Ch. 526; 68 L. J. Ch. 265; 80 L. T. 311
"Ydun," The	P.D. & A.D.	—	166	[1899] P. 236

Name of Case.	Court.	Page in W. R. 1898–99.	Column in Digest.	References to Contemporaneous Reports
Yabbicom v King	Q.B.D.	318	106	[1899] 1 Q. B. 444; 68 L. J. Q. B. 560; 80 L. T. 159
Young v Waller	P.C.	—	141	[1898] A. C. 661

THE

WEEKLY REPORTER,

1898-99.

Court of Appeal.

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 25.

THETFORD CORPORATION *v.* NORFOLK COUNTY COUNCIL. (a.)

Local government—County council—Costs of quarter sessions—Boroughs having population under 10,000—*Salary of recorder and clerk of the peace—Salary of clerk to borough justices in petty sessions*—12 *&* 13 *Vict. c.* 18, *s.* 1—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 35, 38, 84.

Where a borough, with a population of less than 10,000, *has a separate court of quarter sessions and a separate commission of the peace, the Local Government Act,* 1888, *has not transferred the obligation of paying the salaries of the recorder, of the clerk of the peace, and of the clerk to the borough justices in petty sessions, from the borough to the county council.*

Ex parte Kent County Council and Borough of Sandwich, [1891] 1 *Q. B.* 389, 39 *W. R. Dig.* 114. *and* In re Herefordshire County Council, [1895] 1 *Q. B.* 43, 43 *W. R. Dig.* 101, *overruled.*

Appeal from the judgment of Wills, J.

The borough of Thetford was a borough containing, according to the census of 1881, a population of less than 10,000, and was situate for administrative purposes within the county of Norfolk. It had a separate court of quarter sessions presided over by a recorder, and there was a clerk of the peace.

Before and since the Local Government Act, 1888, the salaries of the recorder and of the clerk of the peace were paid out of the borough fund. The borough had also a separate court of petty sessions, and the clerk to the borough justices in petty sessions was paid a salary out of the borough fund. The courts of quarter and petty sessions were held at the Guildhall, and the plaintiffs had paid the expenses incurred in connection therewith.

The plaintiffs contended that by the Act of 1888 the liability for the above expenses was transferred to the defendants, and they claimed a declaration to that effect; and they also claimed to be reimbursed the expenses so paid by them.

Wills, J., refusing to follow the decision of a Divisional Court (consisting of Stephen and Vaughan Williams, JJ.) in *Ex parte Kent County Council and Borough of Sandwich,* [1891] 1 Q. B. 389, 39 W. R. Dig. 114, held that the obligation of paying the above expenses had not been transferred to the county councils. He also held, following the decision in *In re Herefordshire County Council,* [1895] 1 Q. B. 43, 43 W. R. Dig. 101, that the obligation of paying the salary of the clerk to the borough justices in petty sessions had been transferred to the county council, but that the arrears of salary recoverable must be limited to six months, having regard to the power of making county rates.

The plaintiffs appealed, and the defendants gave cross-notice of appeal.

Crump, Q.C., and *Le Riche* (*Rufus Isaacs, Q.C.* with them), for the plaintiffs.

Sir R. T. Reid, Q.C., and *W. Wills,* for the defendants.

The statutes and arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 25.—A. L. SMITH, L.J., read the following judgment: The main question to be determined in this case is whether the corporation of the borough of Thetford or the county council of the county of Norfolk are liable to pay the salaries of the recorder of Thetford and of the clerk of the peace of that borough. There is also a question raised by cross-appeal as to the payment of the salary of the clerk to the petty sessions holden in and for that borough, which I will deal with separately. There is no doubt that prior to the passing of the Local Government Act, 1888, the corporation of Thetford, which was a quarter sessions borough, was liable to pay the salaries of its recorder and clerk of the peace, and for that purpose might have recourse to the borough fund. The Municipal Corporations Act, 1882, s. 140, and schedule 5, part 1, is clear as to this, and it is wholly unnecessary to go back to the Municipal Corporations Act of 1835, or prior thereto, as we were invited to do by counsel. The sole point we have to determine as to the salary of the recorder and clerk of the peace is this—Has the Local Government Act, 1888, taken off the shoulders of the corporation of Thetford the obligation of paying its recorder and clerk of the peace and transferred the obligation on to the shoulders of the county council of the county of Norfolk? This entirely depends upon what is to be found in the Local Government Act, 1888, and, without travelling into what I conceive to be matters irrelevant to what I have to decide, I will point out as concisely as I can how the matter stands. By the Local Government Act, 1888, the boroughs of England and Wales were dealt with for certain purposes in three classes. The first class consists of boroughs which contained a population of not less than 50,000 on the 1st of June, 1888, or were counties in themselves. These are called "county boroughs." The second class consists of quarter sessions boroughs, not being county boroughs, which contained a population of 10,000 and upwards according to the census of 1881. These I will call the larger boroughs. And the third class consists of quarter sessions

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

boroughs, which contained a population of less than 10,000 according to the census of 1881. These I will call the smaller boroughs. The borough of Thetford falls within this last class of boroughs. It is clear that the Legislature had a reason for splitting up the boroughs of England and Wales into these three classes, but why it did so is not for me to speculate upon or determine; it is sufficient to say that upon reading sections 31, 35, and 38 of the Act of 1888 it is manifest that the Legislature has done so. Now, as regards this first class of boroughs—*i.e.*, the county boroughs—sections 31-34 of the Act are made to apply to them, and to them alone. I have not to consider the why and the wherefore the special provisions of these four sections are made applicable to this class of boroughs and not to the other two classes of boroughs, but that they are so applied is clear, and I have nothing more to to say upon this matter, especially as the borough of Thetford does not fall within this class. I now come to the second class of boroughs, to which, and to which alone, section 35 with all its sub-sections applies. This section commences: "In the case of a quarter sessions borough not being one of the boroughs named in the third schedule to this Act," that is, not being a county borough, "but containing a population of 10,000 or upwards, the following provisions shall . . . apply." Then come special and specific provisions applicable to this class of borough, and in my opinion to this class alone. By sub-section 5 of this 35th section it is enacted: "The payment of the costs of assizes and sessions shall be a general county purpose for which the parishes in the borough"—obviously, in my opinion, meaning the larger boroughs—"may be assessed to county contributions, and all costs of prosecutions mentioned in section 169 of the Municipal Corporations Act, 1882, shall be paid out of the county fund." So far as this sub-section 5 of section 35 is inconsistent with section 169 of the Municipal Corporations Act, 1882, it repeals it; see especially section 126 of the Local Government Act, 1888. It is said that this sub-section relieves the larger boroughs from payment of their recorders and clerks of the peace. It may or may not do so. I have not to decide the point, for I have only to deal with the corporation of Thetford, which is not larger but a smaller borough. I now come to what I have to decide—viz., whether, by reason of section 38 of the Act of 1888, the corporation of Thetford is relieved from paying its recorder and clerk of the peace, and whether this burden is cast upon the county council of the county of Norfolk. Section 38, which has application to the smaller boroughs alone, is wholly dissimilar in its provisions from section 35 of the Act, which has application to the larger boroughs alone. Why the Legislature has determined to deal differently with the three classes of boroughs, as I have before said, it is not for me to speculate upon; it has done so. This section 38 enacts that "Where a borough having a separate court of quarter sessions contained according to the census of 1881 a population of less than 10,000"—which is the case of the borough of Thetford—"(1) there shall be transferred to the county council the powers, duties, and liabilities of the council and justices of the borough" relating to pauper lunatic asylums, to coroners, to analysts, to reformatory and industrial schools, to fish conservancy, of explosives, and also to the Highways and Locomotives Act, 1878. Power is given by this section for the council of the borough to apply to the county council to declare certain roads in the borough to be main roads. By sub-section 5 of section 38 it is enacted that "the area of the borough shall for the purposes of the above-mentioned Acts and all other administrative purposes of the county council be included in the county as if the borough had not a separate court of quarter sessions, and accordingly shall be subject to the authority of the county council and the county coroners, and may be annexed by the county council to a coroner's district of the county, and the parishes in the borough shall be liable to be assessed to all county contributions." The administrative purposes mentioned in the section have nothing to do with judicial functions of the borough. Administrative purposes are not judicial functions. It will be noticed that the salaries of recorders and clerks of the peace in section 38, which deals with the smaller boroughs, are in no way touched or dealt with; they are left to be paid as they were before the passing of the Local Government Act, 1888—*i.e.*, by the corporations of the smaller boroughs. By sub-sections 7 and 8 of section 38 power is given to the council of any borough of less than 10,000 inhabitants according to the census of 1881, whether a quarter sessions borough or not, to petition her Majesty to revoke the grant of a court of quarter sessions to the borough, and also to revoke the grant of a commission of the peace for the borough. It was argued on behalf of the borough that the Legislature must have meant to place the payment of salaries of the recorder and clerk of the peace of the smaller boroughs upon the county, because it had done so in the case of the larger boroughs (whether it has or not I do not decide), and because by sub-section 5 of section 38 Thetford, a smaller borough, is made liable to be assessed to all county contributions, and therefore it should be held that, if the transfer of the burden of paying the recorder and clerk of the peace to the county council cannot be found in section 38 of the Act, which it clearly cannot be, sub-section 5 of section 35 must be pressed into the service and construed as a general provision not limited to the larger boroughs, as in my opinion it unquestionably is, and made applicable to the smaller boroughs as well. It is said, if this be not done, the Act would work injustice, and therefore this sub-section 5 of section 35 should be so read. With all submission to the late Mr. Justice Stephen and to my brother Vaughan Williams, who, in the case of *Ex parte Kent County Council*, held that sub-section 5 of section 35 was to be read as a general provision applicable to both the larger and smaller class of boroughs, I cannot agree. To hold so would, in my opinion, be doing such violence to the provisions and framework of the Act as no court would be justified in doing, even if the suggested imputations upon the legislation be well-founded, which I am by no means convinced of. The special provisions of sub-section 5 of section 35 applicable to the larger boroughs are, in my judgment, purposely omitted from section 38, which is applicable to the smaller boroughs. The special provisions of sub-section 5 of section 38 are, as was pointed out by Sir Robert Reid, such as to tax the borough for the expenses of the county, and not the county for the expenses of the borough; and yet it is now said by the borough that the true reading of the Act is that the county should pay these expenses (salaries of recorder and clerk of the peace) of the borough. It is, too, significant that the Legislature in this section 38 has given to the smaller boroughs an easy way out of these difficulties, if they do not desire to continue to pay their recorder and clerk of the peace when made liable to county contributions; for they may, under sub-section 7 of section 38, petition her Majesty to revoke the grant of a court of quarter sessions and also the grant of a commission of the peace. This right is not given, it will be seen, to the larger boroughs. As to the suggestion that the borough of Thetford is unable by reason of the Act of 1888 to pay out of its borough fund the salary of its

recorder and clerk of the peace, I cannot find that it is well-founded, and do not agree with it. The construction of section 38 of the Act of 1888 appears to me to be clear, and, in my judgment, nowhere in that section nor anywhere else in the Act of 1888 can it be found that the obligation of the borough of Thetford to pay its recorder and clerk of the peace has been taken from the borough and transferred to the county council of Norfolk. Section 36 in no way deals with the liability of a corporation and has no bearing on this case. I agree with my brother Wills that the liability of the corporation to pay its recorder and clerk of the peace has not been transferred by the Act of 1888 to the county council, and I am of opinion that the appeal of the corporation of Thetford from his judgment should be dismissed.

I now come to the cross-appeal of the county council as to whether the borough of Thetford or the county council of the county of Norfolk is liable to pay the salary of the clerk to the borough justices in petty sessions holden in and for the borough of Thetford. My brother Wills has followed and agreed with the case of *In re Herefordshire County Council*, where a Divisional Court held, following the case of *Cornwall County Council* v. *Truro Town Council*, 63 L. J. M. C. 60, which was a borough with a population of over 10,000, that the salary of the clerk to borough petty sessions had since the Act of 1888 to be paid by the county council, and not by the borough. The correctness of this decision is now challenged in this court, and we have to say if it be rightly decided. The way in which it is said that the county council and not the borough is liable to pay the salary of the clerk to the petty sessions of the borough is this. First of all, the Act of 1849 (12 & 13 Vict. c. 18) is referred to, which is "An Act for the holding of petty sessions of the peace in boroughs," not in counties. This Act, after reciting that "petty sessions of the peace are holden in and for certain divisions of the several counties of England and Wales, called petty sessional divisions, and important duties have lately been assigned to the justices attending at such petty sessions and to their clerks by certain Acts of Parliament, and it is desirable to declare and enact that the sittings of justices of the peace . . . in and for every . . . borough . . . having a separate commission of the peace . . . shall be deemed a petty sessions of the peace within the meaning of such Acts," enacts that "every sitting and acting of justices of the peace . . . in and for any . . . borough . . . having a separate commission of the peace . . . within England and Wales . . . shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any Acts of Parliament already made or hereafter to be made having relation to such petty sessions or to any business to be transacted thereat." It is not suggested that any Act prior to the Act of 1849 places the appointment and payment of a salaried clerk to a borough petty sessions in the county council, and it is not denied that prior to the passing of the Act of 1888 the borough appointed and paid the salaried clerk to its own petty sessions. It is, however, said that the Local Government Act of 1888 changes all this, and that section 84 is the section which effects this. Section 84, sub-section 1, of the Act of 1888 runs thus: "(1) The salaried clerk of every petty sessional division shall be from time to time appointed and removed as heretofore. (2) The county council shall pay to the salaried clerks of petty sessional divisions such salaries" as by this sub-section are enacted, and the standing joint committee are substituted for quarter sessions justices and the local authority respectively. It is true that by the Act of 1849 the borough bench is made a petty sessional division—that is, so far as this is concerned, they are placed on a par with county petty sessions; but with what salaried clerks is section 84 of the Act of 1888 dealing? Now, it will be seen that section 3, sub-section (X.), of the Act of 1888, which is the transfer section to the county council, deals, amongst other things, with salaried clerks of county justices, but not with salaried clerks of borough justices. Section 84 of the Act of 1888 also, in my opinion, deals with the salaried clerks of county petty sessional divisions, and not with the salaried clerks of a borough petty sessional division, and for these reasons. Section 84 is part of a group of sections commencing with section 83, which group is headed "Officers." Section 83 refers to county and not to borough officers; this is clear. The joint committee (appointed under section 30) mentioned in this section, as also in section 84, is composed of an equal number of county justices and county councilmen. This committee cannot interfere with the judicial functions of a larger or smaller borough. Section 84, which follows section 83, deals, in my judgment, with exactly the same class of salaried clerks as section 83—*i.e.*, salaried clerks of county petty sessional divisions, and not with salaried clerks of borough petty sessional divisions. The words "Every petty sessional division" in section 84, according to the context and whole scope of the Act, mean, in my opinion, a county and not a borough petty sessional division. It will be seen that by section 84 (2) the appointment as well as the removal of the salaried clerk mentioned in the section is expressly left where this had been prior to the passing of the Act—that is, the appointment and removal of a county petty sessional salaried clerk is left with the county authority. If this sub-section applied to a borough petty sessions salaried clerk, which, I think, it does not, then the appointment and removal of a borough petty sessional salaried clerk is left with the borough authority. Sub-section 2 of section 84 also appears to throw light upon this, for by it the joint committee, composed as above-mentioned of county men, is introduced to deal with the "officers" mentioned in sections 83 and 84. What has such a committee to do with a borough officer, to whose selection, appointment, and removal they are strangers, and advisedly kept strangers, by the Act, though it is now said they are by reason of the Act to pay his salary? I do not see the object or sense of this, and, in my opinion, it is not the true construction of the Act. In my judgment section 84 of the Act of 1888 does not apply to borough petty sessions salaried clerks at all, and, therefore, does not shift the payment of such salaried clerks on to the county council. In my judgment, the corporation of Thetford is liable to pay the salary of its own clerk to its own borough petty sessions, as it was before the passing of the Act of 1888, and this obligation is not by the Act cast upon the county of Norfolk; and the case of *In re Herefordshire County Council* was not rightly decided; and, consequently, this appeal by the county council must be allowed. I have heard nothing about a point apparently taken in the court below, but not taken here, as to the salary of the clerk of the justices acting as visitors of licensed houses for lunatics in the borough of Thetford, and I therefore say nothing about it. As the county council has succeeded in this appeal and cross-appeal, first as respondents, and secondly as appellants, they must have their costs of each appeal both here and below.

RIGBY, L.J., read a judgment concurring with the above.

VAUGHAN WILLIAMS, L.J., also read a judgment agreeing with the above, stating that after consideration he had come to the conclusion that the decision of Stephen, J., and himself in *In re Kent County Council and Borough of Sandwich* was wrong.

Appeal dismissed; cross-appeal allowed.

Solicitors for the plaintiffs, *Ford, Lloyd, Bartlett, & Michelmore*, for *J. Houchen*, Thetford.

Solicitors for the defendants, *Sharpe, Parker, & Co.*, for *C. Foster*, Norwich.

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 12, 1898.

SALT UNION (LIMITED) *v.* NORTH STAFFORDSHIRE RAILWAY CO. (*a.*)

Railway—Traffic—Rates—Rebate—Goods received at private siding—Station accommodation and terminal services—Burden of proof—Railway and Canal Traffic Act, 1894 (57 & 58 *Vict. c.* 54), *s.* 4.

On an application to the railway commissioners to determine a rebate upon rates under section 4 *of the Railway and Canal Traffic Act*, 1894, *the applicants proved that they delivered goods to the respondent railway company at a siding which belonged to themselves and not to the railway company, and that they had been charged rates by the railway company; but they did not prove that the rates so charged included any charge for station accommodation or terminal services. Their case was that they had sufficiently raised a presumption that they had been charged for station accommodation and terminal services.*

Held, by A. L. Smith *and* Rigby, L.JJ., *that the application failed on the ground that the applicants had not satisfied the* onus *which lay upon them of making out the* primâ facie *case which they undertook to establish.*

Held, by Vaughan Williams, L.J., *that the application failed on the ground that it was clear that the rates charged did not include charges for station accommodation or terminal services; but,* quære, *whether the* onus *was upon the applicants to show that the railway company had charged for station accommodation or terminal services.*

Appeal from a judgment of the Court of the Railway and Canal Commission on an application under section 4 of the Railway and Canal Traffic Act, 1894.

The applicants, the Salt Union (Limited), were manufacturers of salt carrying on business at various places in Cheshire upon premises adjacent to the line of the respondents, the North Staffordshire Railway Co., and connected therewith by means of sidings which belonged to, and were situate upon the premises of, the applicants, and which did not belong to the respondents.

The applicants consigned salt from each of their said sidings for carriage over the railway of the respondents and delivery at stations or sidings situate in some cases upon the respondent's railway, and in other cases upon railways of other companies. The contracts and charges for the carriage of the salt were made with and paid to the respondents.

The salt was always loaded into trucks belonging to the applicants, and at the initial terminus the applicants did not make use of any accommodation at a terminal station, nor did the respondent company perform any duties at a terminal station.

The applicants claimed to be entitled to an allowance or rebate from all rates upon such salt traffic charged to them by the respondent company in respect that the company did not provide station accommodation for such traffic.

A dispute having arisen with reference to such allowance or rebate, the applicants applied to the commissioners to determine what would be a reasonable and just allowance or rebate.

The respondent company in their answer alleged that no station or terminal service or any other charge whatever in respect of the initial terminus was included in the rates charged to the applicants, and that the applicants were not entitled to any allowance or rebate.

On the hearing of the application Wright, J., delivered the judgment of the commissioners in favour of the respondent company on the ground that the applicants had failed to give any evidence that a terminal charge in respect of the initial terminus was included in the rates charged to the applicants, or any evidence of a comparable rate by which the matter might be tested.

The applicants appealed.

C. A. Cripps, Q.C. (*R. Whitehead* with him), for the applicants.—Section 4 of the Railway and Canal Traffic Act, 1894, is as follows: "Whenever merchandize is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandize as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate." On the true construction of that section all that the applicants had to prove, in order to bring their case within the section, was that their goods had been received by the company at a siding which did not belong to the company, and that the company had charged them rates, and that the company had not provided station accommodation or performed terminal services. It was not necessary for them to show affirmatively that the rates which had been charged included charges for station accommodation or terminal services. The company ought to be called upon to show that the rates did not include any such charges. The learned judge had been wrong in practically nonsuiting the applicants.

Littler, Q.C., and *Ernest Moon*, for the respondent company.

A. L. SMITH, L.J.—I am of opinion that this appeal must be dismissed. This is an application by a trading company under section 4 of the Railway and Canal Traffic Act, 1894 by which, as I understand the matter and read the section, they ask the commissioners to grant them a rebate from rates charged to them by the respondent railway company, on the ground that they have been charged for station accommodation which has not been provided and for terminal services which have not been rendered, because the applicants did not require such station accommodation or services, as their goods were delivered to the railway company from their own private sidings. The applicants argue that the true construction of the section is, that, though the trader does not show that he has paid one penny for station accommodation or terminal services, yet he is

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

entitled to carry in his case before the commissioners and prove that he had his own siding and that he did not require or have station accommodation or terminal services from the railway company, and on proof of that alone he can call upon the railway company to prove a negative—viz., that they have not charged him for station accommodation or terminal services. But an application under this section is for a rebate, that is, as it seems to me, a rebate from that which the trader has been charged. I cannot think that the construction put upon the section by the applicants is a true one. In my judgment the meaning is this: that where the trader, either by reference to a comparable rate or by any other evidence, makes out a *primâ facie* or presumptive case that he has been charged wrongly for station accommodation or terminal services, the railway commissioners may call upon the railway company to answer that *primâ facie* or presumptive case. But I cannot see that, where the applicant merely brings himself, as it seems to me, half within the section—*i.e.*, proves that he has not had station accommodation provided for him or terminal services rendered to him, but does not prove that he has been charged one single penny more than he ought to have been by the company, the company can be called upon to answer a case which has not been made out against them. I entirely agree with the construction which was put upon this section by my brother Collins in the case of *Corporation of Birmingham* v. *Midland Railway Co.*, 9 Ry. & Can. Traff. Cas. 165.

RIGBY, L.J.—The question turns upon the construction of section 4 of the Railway and Canal Traffic Act, 1894. I cannot read the section as if the words "in respect that the railway company does not provide station accommodation or perform terminal services" were not there, and as if the words were "in respect that the railway company has charged for station accommodation or terminal services." On the language used it appears to me to be open to an applicant who brings himself within the words of the section to prove his claim to a rebate in any way he can, and I see no reason why he should not prove his claim without showing that the company have charged him for station accommodation and terminal services. But an applicant must make out a *primâ facie* case somehow, and the way in which the applicants here chose to make out their case was by raising the presumption that they had been charged for station accommodation and terminal services. The *onus* was upon them, and the learned judge held that they had not produced any evidence to support that presumption. In that I think he was right. But I do not think that the section confines the applicant to proving that the rate which he has been charged includes a charge for station accommodation or terminal services.

VAUGHAN WILLIAMS, L.J. — As I understand, Wright, J., in this case, and Collins, J., in *Corporation of Birmingham* v. *Midland Railway Co.* have both decided clearly that, where a trader comes before the railway commissioners to invite them to exercise their jurisdiction under section 4 of the Railway and Canal Traffic Act, 1894, it is part of the *onus* which is thrown upon the applicant to give *primâ facie* evidence that he is being charged by the railway company in respect of duties as to which the company have been relieved by reason of a siding or branch railway having been provided by him and not by the company. A. L. Smith, L.J., entirely agrees with their view. I therefore feel very great difficulty in arriving at a different conclusion, but I think it is my duty to express my opinion as to the construction of this section. The scope of the section, according to my view, is to provide not only for the past, but for the future, and I think the meaning is this—that, where there is a private siding or a private railway, and the railway company and the trader who owns the private siding or private railway cannot agree as to what the rate shall be, or whether the rate, which is proposed to be charged by the company or which has actually been charged by the company, is a just rate, then the commissioners shall fix the rate. I do not feel at all certain that, when the trader proves that he owns a private siding, and that he consigns goods by the railway, and that a charge is made on him by the railway company, he is not entitled to ask the commissioners to determine what is a just allowance or rebate to be made for the fact that the railway company have not had the trouble or expense of providing station accommodation or terminal services. However, on the ground that the facts of this case show clearly that the railway company have not charged anything for station accommodation or terminal services, I am of opinion that the decision appealed against is right. I only wish to express the inclination of my opinion that an applicant brings himself within this section when he proves that his merchandize has been received or delivered by the railway company at a siding or branch railway not belonging to the company, and that a dispute has arisen between him and the railway company as to the allowance or rebate to be made from the rates charged to him.

Appeal dismissed.

Solicitors for the applicants, *Neish, Howell, & Macfarlane.*

Solicitors for the railway company, *Burchell & Co.*

High Court of Justice.

Chan. Div. Romer, J. — August 3, 11, 1898.

In re FLUDYER.
WINGFIELD *v.* ERSKINE. (*a.*)

Executor—Retainer—Following assets—Retainer for debt of deceased without notice of debt of higher degree.

An executor who pays creditors without notice of the existence of a creditor of higher degree is not liable to account at the instance of that creditor for the sums so paid. Retainer of the amount of a debt out of a deceased person's estate by the executor is payment at law, and he is therefore not liable to refund if an enforceable debt of higher degree, of which he had no notice, should afterwards appear to be due.

Blake *v.* Gale, 34 *W. R.* 555, 32 *Ch. D.* 571, *distinguished.*

Summons.

By an indenture of the 2nd of July, 1877, certain funds, representing proceeds of sale of family estates or money liable to be laid out in the purchase of real estate, to which Sir John H. Fludyer, baronet, was entitled as tenant for life under a settlement of the 29th of January, 1822, and Charles Fludyer was entitled as tenant in tail, were disentailed and limited to such uses as Sir John H. Fludyer and Charles Fludyer should jointly appoint.

In July, 1879, a sum of £65,000 was raised out of the settled funds and paid to Charles Fludyer.

By an indenture of re-settlement of the 3rd of

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

June, 1880, and made between the said Sir John H. Fludyer of the first part, the said Charles Fludyer of the second part, and the plaintiffs of the third part, the settled funds comprised in and assured by the disentailing deed of the 2nd of July, 1877, were limited to the uses upon and for such trusts and purposes, and subject to such terms and provisoes, agreements, and declarations as the said Sir John H. Fludyer and Charles Fludyer should by deed jointly from time to time appoint, and subject thereto to uses in strict settlement, under which Sir John H. Fludyer was tenant for life in possession, with remainder to the use of Charles Fludyer for life, and then to his first and other sons in tail, with remainder to the use of Arthur J. Fludyer, with remainders over.

Further sums of £42,000 and £5,000 were subsequently raised out of the settled funds, by means of the joint appointment, and paid to Charles Fludyer.

In January, 1895, Charles Fludyer died without issue, having by his will devised and bequeathed all his real and personal estate, property, and effects unto and to the use of the defendant, whom he also appointed sole executrix. This will was duly proved by the defendant, the estate being worth about £3,200. The defendant paid some of the debts, including one to her sister of £1,000, and retained the balance as part satisfaction of a debt of her own of £2,181, which was owing to her from Charles Fludyer at the time of his death.

In August, 1896, Sir John H. Fludyer died, and the settled fund devolved upon Sir Arthur J. Fludyer, the present baronet, as tenant for life under the said re-settlement of 1880.

The succession duty which became payable on the death of Sir John H. Fludyer on the said several sums of £65,000, £42,000, and £5,000, was not commuted and paid prior to the same being made over to Charles Fludyer, and on the death of Sir John H. Fludyer the Crown claimed payment of succession duty from the plaintiffs as the trustees of the settlement of June, 1880. The plaintiffs' contention was that this succession duty should be borne and paid out of the estate of Charles Fludyer in priority to other creditors against his estate, including the defendant, as a Crown debt.

Farwell, Q.C., and *Ingpen*, for the plaintiffs.—The trustees are primarily liable to pay this duty, but are entitled to the Crown's priority if they pay: *In re Churchill, Manisty* v. *Churchill*, 36 W. R. 805, 39 Ch. D. 174. The estate of Charles Fludyer is liable to pay this succession duty to the extent of the assets, and the defendant ought to have paid this debt before paying any of the ordinary creditors. The defendant might have retained her own debt as against creditors of equal degree, but not as against a Crown debt. The amount retained by an executor in payment of his own debt, or share of the estate, can be recovered, because it remains in his hands as part of the estate: *Blake* v. *Gale*, 34 W. R. 555, 32 Ch. D. 571, p. 577, and to the extent of the sum retained the defendant must pay this debt of higher rank which now falls due.

Levett, Q.C., and *Leverson*, for the defendant.—At the date of Charles Fludyer's death, the claim for succession duty had not and could not have been made. The defendant can plead *plene administravit* without notice, and had a right to retain her own debt, not having at that time any notice of any debts of superior degree: Williams on Executors, 9th ed. pp. 879 and 884. If the plaintiffs' contention is right, then an executor is the only person who cannot get safely paid.

Cur. adv. vult.

Aug. 11.—ROMER, J.—Since the case of *Harman* v. *Harman*, 2 Show. 492, it has been considered settled law that an executor who pays creditors without notice of the existence of a creditor of higher degree is not liable to account at the instance of that creditor for the sums so paid.

In the case before me the defendant distributed her testator's estate in paying his debts (including a debt due to herself which she retained out of the assets) without notice of the debt which the plaintiffs now seek to enforce, in good faith, and without undue haste. It is admitted these payments are good as against the plaintiffs, except as to the retained debt, but with regard to that the plaintiffs contend that the defendant must be considered to have the amount of that debt in her hands as executrix, for which she is liable to account. I cannot see the justice of this contention, and think it unsound. Why should her debt when paid be treated differently from the other debts paid by her? It would be very unfair as against the executrix that she should be held always liable to refund, if an enforceable debt of higher degree, of which she had no notice, should afterwards appear to be due. It appears to me the simple answer to the plaintiffs' contention is that the debt in question is not in the hands of the defendant as executrix. She has been paid it, just as the other creditors have been paid their debts. Retainer is payment at law. If any authority was wanted for this it is supplied by the decisions that an executor under the plea of *plene administravit* can put in evidence retainer by him of his own debt: Williams on Executors, 9th ed., p. 1851.

There is no authority or principle that I can see which supports the plaintiffs' claim. The plaintiffs referred to the case of *Blake* v. *Gale*, where executors who were also some of the residuary legatees had retained their own shares of residue, and were at the instance of creditors made liable to account for the shares of residue retained by them as being still in their hands. But that case is quite distinguishable. A legatee is a volunteer, and assets paid to him can be followed by a creditor; a creditor is not a volunteer, and a creditor of higher degree has no right, because of that position only, to follow assets in the hands of an executor retained by him in discharge of his own debt. For these reasons I decide against the plaintiffs. The form of order will be: The court being of opinion that Charles Fludyer's estate has been fully administered, dismiss this summons with costs.

Judgment for the defendant.

Solicitors, *Arnold & Henry White; Upton, Atkey, & Co.*

Chan. Div. } July 2.
Byrne, J. }

LUND v. THE LIVERPOOL SCHOOL FOR THE INDIGENT BLIND. (a.)

Income tax—Special Act—Salary payable without deduction or abatement for taxes—Right to deduct income tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 102, *Schedule E, rr.* 1, 6—*Special Act* (10 *Geo.* 4, *c. xv.*), *ss.* 22, 26.

An officer of a charity was entitled under a special Act of Parliament to receive a salary of not less than £300, nor exceeding £500, without deduction or abatement

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

for taxes. At the date of the special Act no income tax was payable.

Held, with regard to a person appointed to the office after the passing of the Income Tax Act of 1842, *that the persons liable to pay the salary were bound to deduct the income tax therefrom.*

Summons.

This was a summons to determine the liability of the governors and wardens of a certain charity in Liverpool and the Chapel of the Blessed Virgin Mary thereto belonging to deduct income tax in respect of the salary of a chaplain. The facts of the case were as follow: By a special local Act, 1829 (10 Geo. 4, c. xv.), provision was made for establishing and governing an institution in Liverpool, called the "School for the Indigent Blind at Liverpool," for incorporating the subscribers thereto, and also for regulating and supporting a chapel attached to the said institution.

By this Act the governing body of the school was incorporated under the name of "The President, Vice-Presidents, Treasurer, and Members of the Liverpool School for the Indigent Blind."

Section 22 of the Act, after enacting that a certain clergyman therein mentioned should be first chaplain of the said chapel, provided that "the next presentation and the future patronage for disposition, nomination, and appointment, and right of presentation to the said chapel shall for ever appertain, belong to, and be vested in the mayor of the town of Liverpool, the senior alderman of the said town, and two of the vice-presidents of the said institution or charity for the time being specially appointed to join in making such nomination or appointment according to the provisions of this Act, or in such of them as shall be members of the United Church of England and Ireland."

Section 26 provides "that for the maintenance of the chaplain for the time being of the said chapel the persons who shall be wardens thereof for the time being in pursuance of the Act and their successors shall, by and out of the rents of the pews erected therein, yearly and in every year well and truly pay or cause to be paid to such chaplain, as may be directed by the said committee, a sum not less than £300, nor exceeding £500, of lawful English money without any deduction or abatement for taxes or otherwise howsoever on the first day of January and on the first day of July in each year, by even and equal portions, and the money so to be paid shall be allowed to such wardens in their accounts, and a due apportionment of the said salary shall from time to time be made between the executors and administrators of any chaplain of the said chapel dying in the interval before the half-yearly days of payment and the successor of such chaplain so dying for and in respect of the half-year wherein such death shall happen.

Section 34 provides "that after payment of the said stipend, salaries, or wages, hereinbefore authorised to be paid by the said chapelwardens of the said chapel, the residue of all moneys received by them in anywise arising from the said chapel shall be paid over from time to time to the treasurer for the time being of the said institution or charity to be applied under the direction of the said committee in defraying the expenses of any alterations or repairs to the said chapel, or in augmenting the stipends of the chaplain, organist, clerk, or sexton of the said chapel, or in any such manner, for the benefit of the said institution or charity in such manner as shall seem best to the said committee."

The Act also (section 26) gives remedies for the recovery of the salary, including power to go before the bishop of the diocese and to obtain a sequestration of profits, or to sue by action of debt.

The income tax imposed in the year 1806 (46 Geo. 3, c. 65) had expired at the date of the passing of the Act, and was not re-imposed until 1842 (5 & 6 Vict. c. 35).

The plaintiff in the action was appointed to the post of chaplain in 1884 at a salary of £500 a year.

Up to a date shortly prior to the commencement of the action the chaplain had received the salary in full and had himself paid the income tax. The chapel authorities' attention had then been drawn to the fact that it was their duty to deduct the duty from the salary. The chaplain thereupon submitted that he was entitled to receive his salary in full, and that it was consequently the duty of the wardens to pay the tax for him and to pay him the salary in full.

Hughes, Q.C., and *Sampson*, for the plaintiff.—It is true that at the date of 10 Geo. 4, c. xv., there was no income tax payable. The only tax which this Act can be supposed to have contemplated by the Act is the Income Tax. [They referred to the Income Tax Act (5 & 6 Vict. c. 35), s. 102.] The liability of the wardens to pay the salary in full and to make no deduction for income tax arose not from any contract, but from a special and local Act of Parliament. Under the words of section 22 the income tax ought to be paid by the the wardens. They referred to *Festing* v. *Taylor*, 10 W. R. 246, 3 B. & S. 217; *Lord Lovat* v. *Duchess of Leeds*, 10 W. R. 397, 2 Dr. & Sm. 62; *Seward* v. *Owner of "The Vera Cruz,"* 33 W. R. 477, 10 App. Cas. 59. The words of the special Act are clear, and the chaplain's salary must be determined under that Act. Nothing in any subsequent Act has in any way altered or abrogated his right to be paid his salary in full without any deduction in respect of any tax.

Eve, Q.C., and *Stuart Deacon*, for the defendants (the charity).—The question is one of contract. A contract was entered into between the chaplain and the charity after the income tax had become payable. Practically the matter was determined by the arrangement made between the chaplain and governors when the former was appointed.

Hughes, Q.C., in reply.—There was no contract in the case. The plaintiff was appointed to perform certain duties under the special Act.

BYRNE, J.—The claim of the plaintiff in this action is, that under the Act 10 Geo. 3, c. xv., he is entitled to be paid his salary of £500 without any deduction in respect of income tax from it by those who had appointed him.

The Act of Parliament under which a chaplain could be appointed in this institute was passed in the year 1829. At that date no income tax was payable. Section 26 arranges for the payment of the salary of a chaplain—[His lordship read the section.]—and provides that it shall be payable "without any deduction or abatement for taxes or otherwise howsoever." This Act, although a special, was a public Act of Parliament. The Income Tax Act was passed in 1842, and by that Act the payment of income tax is imposed upon such a salary as this is. The chaplain was appointed by resolution of the body entitled to appoint him, I think in 1884, at a salary of £500. That appointment involved a determination of what the salary of the chaplain was to be, because the Act of Parliament only gives limits within which the salary must range. That determination of the amount of the salary appears to me to amount to a contract between the parties appointing the chaplain

and the chaplain himself. The Income Tax Act of 1842 distinctly provides that the duties chargeable under the Act in respect of such salaries as the present shall be detained and stopped out of the same or out of any money which shall be paid upon such salaries, or for arrears thereof, whenever the same shall happen, and be applied to the satisfaction of duties (not otherwise paid) in the manner directed by this Act. Since his appointment up to the present time the chapel authorities have paid the chaplain the sum of £500 in full and out of that he has himself paid the duty, as indeed he was bound to do. Defendants now say that they ought to detain the duty out of the salary. To the chaplain it makes no difference. It is a matter of collection. It is for the convenience of collection and to ensure payment that the hand to pay the money is made in this case the payer instead of the payee. But it is said that inasmuch as the special Act of Parliament provides that the salary, whether it is £300 or more than £300, or whether it amounts to £500 or any intermediate sum, is to be paid without any deduction or abatement for taxes. They cannot say that they are not to deduct, because the later Act of Parliament says they are to detain it, which is the same thing; but that it is equivalent to saying that if any future Act of Parliament shall compel them to make deductions for taxes, they shall be liable to pay a further sum, equivalent to the amount of the tax, so as to make up the full sum of £500 to the chaplain. I do not think that this is the true effect of this legislation and of the bargain that has been entered into between the parties. I think the effect of it is this, that the Act of 1842 provides machinery imposing a duty upon the trustees to deduct or detain money from payments which would otherwise be made in full. That duty is imposed upon them by an Act of Parliament, and they cannot refuse to perform it. Therefore it seems to me that inasmuch as it does not impose an additional burden upon the chaplain, for, as I have said, if he were paid the £500 without any deduction he would have to pay the income tax himself, it being a personal tax, I think that the true result of it is that the chaplain is not entitled to be paid £500 and not to recoup the governing body that which they are obliged to pay, and which the Act of Parliament says they are to pay by way of detention of his salary. Therefore I so hold.

Solicitors, *Stone, Fletcher, Hull, & Stone*, Liverpool.

Q. B. Div.
(Wright and Darling, JJ.) } July 14, 1898.

BLAKE & CO. *v.* WOOLF. (*a.*)

Landlord and tenant—Premises let to tenants—Damage to tenant's goods by overflow from landlord's cistern—Employment of plumber—Negligence of plumber—Liability of landlord for damage.

The plaintiffs took from the defendant the ground-floor of premises of which the defendant was the owner, and at the top of which the defendant had a cistern from which the premises were supplied with water. The water had been laid on when the plaintiffs became tenants, and the plaintiffs took their supply of water from the cistern. The plaintiffs discovered a leakage from the cistern, and gave the defendant notice of it, and requested him to remedy it. The defendant employed a competent plumber to remedy the defect; but, through the negligence of the plumber, the defect in the cistern was not remedied, the result being that the water overflowed, flooded the plaintiffs' rooms, and damaged their goods.

Held, that, in the absence of negligence or wilfulness on the part of the defendant, the defendant was not responsible for the negligence of the plumber whom he had employed, and that he was therefore not liable to the plaintiffs.

Appeal from the judgment of the deputy-judge of the City of London court.

The facts were as follows: The defendant was the owner and landlord of premises in Wood-street, Cheapside. He had a cistern on the fourth floor and had laid on water to the premises, and the whole of the premises was supplied with water from this cistern. The plaintiffs took from the defendant, and became tenants of, the ground-floor and basement of the premises after the water had been laid on. The cistern was upon the premises when the plaintiffs became tenants, and the plaintiffs took their supply of water from the defendant's cistern. On a certain Friday a leakage from the cistern was discovered, and on the same day the plaintiffs gave notice to the defendant to have it remedied. The defendant on the same day gave orders that it should be attended to, and his clerk employed and instructed a plumber to set the cistern right. The plumber undertook to set the matter right, but through his negligence the cistern was not, on the Friday, set right, and the defect was not remedied, with the consequence that when the plaintiffs' premises were opened on the Monday morning it was found that the water from the cistern had overflowed and flooded the plaintiffs' rooms and damaged their goods.

The plaintiffs then brought this action to recover £15 for the damage so caused to their goods.

The judge was of opinion that the defendant was not guilty of any negligence in employing the plumber he had employed to set the matter right, and he was also of opinion that the mischief was in fact caused by the negligence of the plumber in not having remedied the defect when he was called in on the Friday; and he held that, in point of law, it became the absolute duty of the defendant, when he received notice of the defect, to have the defect remedied, and that, not having done so, he was liable to the plaintiffs for the damage to the goods, and he gave judgment for the plaintiffs, with leave to the defendant to appeal.

The defendant appealed.

Ritter, for the defendant.—Upon the facts as found by the learned judge there was no evidence of any negligence on the part of the defendant, and he was therefore not liable for the damage. He employed a competent plumber to set the matter right, and he could do no more than that, and the judge has expressly found that he was guilty of no negligence in employing the plumber whom he employed. That being so, the defendant is not liable: *Carstairs* v. *Taylor*, 19 W. R. 723, L. R. 6 Ex. 217. [WRIGHT, J., referred to *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602, 29 W. R. Dig. 112, and *Ross* v. *Fedden*, L. R. 7 Q. B. 661, 20 W. R. C. L. Dig. 53.] The cases show that the defendant is not liable for the negligence of the independent contractor. [He was stopped.]

H. Tindal Atkinson, for the plaintiffs.—The defendant, as between himself and his tenants, was bound to keep the cistern in repair, and when he received notice of the defect he was bound, and it became his absolute duty, to set the matter right. The relation of landlord and tenant existed between the parties, and that gave the plaintiffs a right of quiet enjoyment for the infringement of which the

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

defendant is liable. He is also liable on another ground—namely, that he has brought this water upon his premises, and if it escapes and does damage—as it has escaped and has done damage in this case—then on that ground the defendant is liable: *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, 17 W. R. H. L. Dig. 17. In this case the negligence of the plumber, whom the defendant had the selection of, and whom he employed, must be taken to be the negligence of the defendant himself, and renders the defendant liable: *Miller* v. *Hancock*, 41 W. R. 578, [1893] 2 Q. B. 177. The employment of an independent contractor makes no difference in the liability of the defendant, and he is liable for the negligence of such contractor: *Hardaker* v. *Idle District Council*, 44 W. R. 323, [1896] 1 Q. B. 335; *Hughes* v. *Percival*, 31 W. R. 725, 8 App. Cas. 443; *Dalton* v. *Angus*, 30 W. R. 191, 6 App. Cas. 740; *Tarry* v. *Ashton*, 24 W. R. 581, 1 Q. B. D. 314. In such cases it makes no difference whether the duty is a statutory one or one which is not imposed by statute, as in some of these cases the duty was not a statutory duty. [WRIGHT, J., referred to *Gill* v. *Edouin*, 71 L. T. Rep. 762, and 72 *Ib.* 579, 43 W. R. Dig. 124.]

WRIGHT, J.—(After stating the facts, his lordship proceeded:) Mr. Tindal Atkinson has not based his case upon any contractual liability arising from the relation of landlord and tenant between these parties; and in fact there was no evidence before us of the terms of the tenancy. The question then is, what is the position at common law? Apart from any contractual liability, I think the rule of common law is that as laid down in *Rylands* v. *Fletcher*, that a person who occupies any land has, *primâ facie*, a right not to have his premises invaded by any injurious matter which may be on his neighbour's land otherwise than in the ordinary course of nature. That general rule has some exceptions, one of which is, that where a person uses his land in an ordinary and reasonable way and damage results to an adjoining property, without wilfulness or negligence, no liability attaches for such damage. Here the bringing of this water upon these premises was, in my opinion, a reasonable and ordinary user of the premises, and if water escapes and does damage, without any negligence on the part of the owner of the cistern, then the owner is not liable to the occupier for the damage done. There is another exception to the general rule laid down in *Rylands* v. *Fletcher*, that where the party who has sustained the damage has consented to the dangerous matter being brought upon the premises. In such a case he cannot recover. When the plaintiffs took these premises from the defendant the cistern was there and the water already laid on, and the plaintiffs consented to take their water supply from this cistern. They must, therefore, be taken to have consented to the water being upon the premises in the way in which it was kept there by the defendant. Instances of this occur in such cases as *Anderson* v. *Oppenheimer*, *Carstairs* v. *Taylor*, *Ross* v. *Fedden* and *Gill* v. *Edouin* Is such circumstance the defendant would not be liable unless the damage was caused by his wilful default or neglect. Is there enough to show negligence here? In my opinion, there is not. The defendant did all any man could do to remedy the defect, as he employed a skilled plumber to put the cistern right, and it was through the negligence of this plumber, or his servants, that the damage was caused. It has been argued for the plaintiffs that where the performance of such a duty as this is concerned, a person cannot get rid of his liability by employing an independent contractor I know of no authority which establishes that doctrine. In *Hughes* v. *Percival* and *Dalton* v. *Angus*, and the other cases cited, there was an infringement of an absolute right, and that was the ground of the defendant's liability. There is no such absolute right in this case, which seems to me to fall within the exceptions specified in *Rylands* v. *Fletcher*. Under these circumstances the ordinary rule applies here, that a person is not liable for the acts of an independent contractor, as the duty is not a statutory one, in which case the person who performs it is liable whether he delegates the performance of the duty to an independent contractor or not. The test is, was there negligence on the part of the defendant? I think there was not, and on that ground I think the judgment of the learned judge cannot be sustained.

DARLING, J.—I agree.

Appeal allowed; leave to appeal refused.

Solicitors for the appellant, *H. Dade & Co.*

Solicitors for the respondents, *Phelps, Sidgwick, & Biddle.*

Q. B. Div.
(Day and Ridley, JJ.) June 17.

ALLEN AND OTHERS (*Appellants*) *v.* THE VESTRY OF THE PARISH OF FULHAM (*Respondents*). (*a.*)

Metropolis Management Acts—New street—Liability of adjoining owners—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

In 1875 *a private company constructed a road upon and through agricultural land, and for many years afterwards it remained bounded by market-gardens on either side. In* 1876 *a local authority took over the road and made it up and kept it in repair as a road suitable for light traffic, but no channelling or curbing was done. In* 1890 *houses were erected on the east side of the road, and in* 1896 *houses were built on the west side. In* 1897 *the vestry passed a resolution that the road should be paved under the provisions of* 18 & 19 *Vict. c.* 120 *and* 25 & 26 *Vict. c.* 102, *and the costs be apportioned among the adjoining owners. The owners thereupon objected on the ground that the street was not a "new street" within section* 105 *of* 18 & 19 *Vict. c.* 120, *and that the vestry having taken over and laid out the road in* 1876 *were estopped from exercising their power of paving it again under the provisions of the above Acts and throwing the cost upon the adjoining owners. The magistrate held the road had not become a "new street" in* 1877, *but that it became a "new street" for the first time after the erection of houses, and that the vestry had power to pave it under the provisions of section* 105, *and he ordered the adjoining owners to pay the cost of so doing.*

Held, that the question whether the road had become a "new street" was a question for the magistrate to decide, and that he having found as a fact that it had become a "new street," the court could not review the decision.

The more expensive modern paving with wood may be ordered by the local authority.

Generally speaking, the correct guide as to whether a street is a "new street" within section 105 *is that there should be houses erected on each side of it.*

Special case.

This was a case stated by R. O. B. Lane, Esq., stipendiary magistrate, sitting at the West London police-court.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The case stated as follows:—

(1) The vestry of the parish of Fulham is the successor of the Fulham District Board of Works, which board was dissolved by the Metropolis Management Amendment Act, 1885 (48 & 49 Vict. c. 33); section 3 of which Act incorporated the said vestry and invested it with all such powers and subjected it to all such provisions as if it had been named in Part II. of Schedule A of the Metropolis Management Act, 1885.

(2) The appellants William Gilbert Allen and Henry George Norris are jointly owners within the meaning of the said Acts of certain premises forming, bounding, and abutting on the said Wandsworth Bridge-road section 4, and the appellants Richard Bolton Silles and Alfred Heaver are respectively owners of other premises forming, bounding, or abutting on the said road.

(3) Wandsworth Bridge-road, of which Wandsworth Bridge-road section 4 is a part, forms a means of approach on the north side to Wandsworth Bridge, and extends from the northern abutment of the said bridge to the King's-road in the parish of Fulham. Such bridge together with the said road was made pursuant to the Wandsworth Bridge Act, 1864 (27 & 28 Vict. c. ccxxxviii.), by the Wandsworth Bridge Co. incorporated by such Act for the purpose of constructing the said bridge and road.

(4) By section 62 of the Wandsworth Bridge Act, 1864, it was enacted that from and after the time at which the said road was completed it should be deemed a public highway and should be deemed one of the parish highways of the parish of Fulham and should accordingly be repairable by the Fulham District Board of Works in like manner as any other highway of that parish from time to time should be repairable by them.

(5) The Wandsworth Bridge-road was, pursuant to the Wandsworth Bridge-road Act, 1864, made by the said company in August, 1873, upon and through agricultural land which for many years preceding had been used as and for the purposes of market gardens, and after being so made it continued to be bounded on both sides throughout its entire length by market gardens until the erection of the houses hereinafter mentioned. In the aforesaid month the company applied to the Fulham District Board of Works to take over the maintenance and repair of the said road. The said road, however, having been made so inefficiently by the company as to be dangerous and in fact impracticable as a road, the said board by resolution of the 11th of August, 1873, declined to "accept the charge of the said road, until it was completely channelled, curbed, and paved and the carriage-way properly made up and drained." After protracted negotiations and litigation between the company and the said board, the company finally admitting their liability for the better completion and repair of the road but repudiating any liability for channelling or kerbing, the matter was in the year 1876 arranged between the parties upon the terms of the agreement in the next paragraph hereof stated. At this date the methods of road making and road repair were less elaborate than, especially as regards new streets, they have since become, and, in the parish of Fulham at least, there was little practical difference in the treatment in these respects applied to mere highways, as distinguished from streets formed by houses and streets in the latter sense, whether new or old.

(6) By an agreement dated the 14th of September 1876, the Fulham District Board of Works agreed with the said company, in consideration of the sum of £1,750 paid by the company to the board, to complete and put in repair the said Wandsworth Bridge-road and to make it in all respects fit for the purposes of a public highway within the meaning of the Wandsworth Bridge Act, 1864, and also to repair and (if necessary) complete the sewer under the same (which sewer had been previously constructed by the company). And by such agreement the said board agreed from the date thereof to undertake the liability of repairing the said road as imposed upon them by the Wandsworth Bridge Act, 1864, and to exonerate and save harmless the said company from all liability, claims, and demands in respect of the future repairs thereof.

(7) In 1877 the said board of works made up the carriage-way of the said road with flints rolled in over a foundation of hard core, the work being completed in July of that year. This was the method then adopted universally throughout the said parish in the case of highways not being house-built streets. In the case of house-built streets the same method of making up was often adopted where the traffic was light, but where the traffic was comparatively heavy they were made up with granite—*i.e.*, macadamed. After an interval of some ten or twelve months the said carriage-way was repaired with granite, and this process has been repeated by the local authority from time to time down to the year 1897. Practically nothing in the way of making up was done to the footways of the road. No channelling or kerbing was done, that work not having been allowed for in the said £1,750 received from the company. In making up new streets under section 105 of the Act of 1855 the said board of works at the time in that paragraph referred to invariably insisted on channelling and kerbing. The traffic in the said road during the years 1877 and 1878 consisted wholly of comparatively slight through traffic, no houses having then existed there. It has of late years very considerably increased. Treating the work done to the road as aforesaid in the years 1877 and 1878 as practically one operation I find that, except for the omitted channelling and kerbing, the said carriage-way was made up and repaired in a permanent manner and in the same mode and to the same extent as new streets with a similar amount of traffic were dealt with at that period under the aforesaid 105th section.

(8) There were no buildings upon the land adjoining the Wandsworth Bridge-road until the year 1890. In that year houses were erected on the east side. None were erected on the west side until the year 1895. In that year and in 1896 houses were built on the west side. On the 24th of February, 1897, the vestry of the parish of Fulham passed with reference to the said Wandsworth Bridge-road section 4 the following resolution—viz.: "That whereas Wandsworth Bridge-road section 4, in the parish of Fulham, being a new street, is not paved to the satisfaction of this vestry, and it is deemed by them to be necessary and expedient that the same should be so paved. It is hereby resolved and ordered that the said street be taken to and paved under the provisions of the 18th and 19th Vict. c. 120, and the 25th and 26th Vict. c. 102, that the surveyor's plans and estimate be approved and adopted, that the estimated costs of the said paving works be apportioned upon the owners of the houses or land abutting or abounding upon the said street, at the proportions and in the amounts as set out in the apportionment hereby made, approved, and sealed with the official seal of the vestry, and the officers instructed to take the necessary steps for collecting the apportioned amounts within fourteen days.

(9) The estimate referred to in the said resolution makes provision for the paving of the carriage-way of the said road with wooden blocks laid upon a concrete foundation and it is the intention of the vestry so to

pave the said carriage-way. The expense of so paving the said carriage-way will exceed the expense of paving it with macadam. On the other hand wood paving is more durable, is cleaner, and diminishes the annoyance of noise to the occupiers of the houses in the street.

(10) Demand having been made by the vestry of Fulham of the appellants for payment of the amounts apportioned upon them respectively, and default having been made in payment of the said amounts the summonses were issued. Upon the hearing of the said summonses it was admitted on both sides that (subject to a question of the competency of the vestry to pave with wood at the expense of the frontagers) the decision depended upon the date at which the said road became a new street, I find that it was not formed or laid out for building as a street.

(11) It was contended on behalf of the vestry that Wandsworth Bridge-road section 4 became for the first time a new street when buildings were erected upon the land adjoining it, and that upon such buildings being erected the vestry had, under section 105 of the Metropolis Management Act, 1855, power to require the adjoining owners to pave the said road, notwithstanding the facts as to the making up and repair thereof hereinbefore stated. It was also contended that wood-paving was "paving" within the meaning of the Local Management Acts, 1855 and 1862.

(12) On behalf of the appellants it was contended that Wandsworth Bridge-road was a "new street" within the meaning of the Metropolis Management Acts when it was made by the Wandsworth Bridge Co., and that it having in 1877 and 1878, pursuant to the requirements of the vestry, been with the exception of the flagging of the footpaths and of the channelling and kerbing of the carriage-way as well and sufficiently paved as streets with similar traffic were then required to be paved prior to their being taken over by the vestry under section 105 of the Metropolis Management Act, 1855, the vestry had no power thereafter to require the whole of the said road to be again paved at the expense of the adjoining owners by virtue of that section: That under the provisions of the special Acts hereinbefore set out the vestry became liable to repair and maintain the said road in the condition in which it was after it had been made up and paved in 1877, and could not get rid of such liability by requiring it to be paved in 1877, and could not get rid of such liability by requiring it to be paved under section 105 of the Metropolis Management Act, 1855. And that, assuming the vestry had power to require the said road to be paved under the last-mentioned section, it had no power thereunder to require the carriage-way of the said road to be made up at the expense of the adjoining owners with wooden blocks laid upon a concrete foundation in the manner in which it was intended by the vestry to make it up.

The learned magistrate was of opinion: (1) That the said road had not become and was not in 1877 or 1878 a new street within the meaning of section 105 of the Metropolis Management Act, 1862; (2) that it became a new street for the first time after the erection of houses therein and was a "new street" within the meaning of the said Acts on the 24th of February, 1897; (3) that the vestry was not prevented by anything contained in the special Acts or by anything it had done previously to the 24th of February, 1897, for requiring the said road to be paved under section 105 of the Metropolis Management Act, 1855; (4) that wood paving was "paving" within the aforesaid Acts. He accordingly ordered the appellants respectively to pay to the said vestry the sum mentioned in the summons against them or him with costs.

The question for the opinion of the court was whether the aforesaid findings and decision were right in law.

Macmorran, Q.C. (*Glen* with him), for the appellants.—This is not a "new street" within the meaning of section 112 of the Metropolis Management Act, 1862. It was a new street when it was taken over from the bridge company and made up by the vestry. That body has therefore no power to now require the road to be made up at the expense of the frontagers: *Vestry of St. Giles, Camberwell* v. *Hunt*, 56 L. J. M. C. 65, 35 W. R. Dig. 131. [Counsel was here stopped.]

Macaskie, for the respondents.—A distinction must be drawn as the rights and liabilities of a vestry under the Metropolis Management Act in the case of "highways" and "new streets." When the Wandsworth Bridge Act was passed it was provided that the road should be repairable by the vestry *quâ* a highway. Here then was a road which the respondents were bound to keep in repair. This road has now become a "new street" owing to the fact that houses have been built along it: see *Pound* v. *Plumstead Board of Works*, 20 W. R. 177, L. R. 7 Q. B. 183, where Blackburn, J., says that the Legislature use the word street in its ordinay, natural, and popular sense, and mean a place with continuous houses on each side of it, And further on he says, "Where a highway, which was not a street in the popular sense of the word, but merely a country lane, became a street by the building of houses continuously on each side of it, it then became a new street within the meaning of the statute, and the board had a right to pave it and charge the expense upon the owners of the adjoining houses." There must therefore be houses erected in order to constitute a new street. The requisite number of houses is a fact for the magistrate to decide. In *Robinson* v. *The Local Board of Barton-Eccles*, 32 W. R. 249, 8 App. Cas. 798, it was held that the expression "new street" was not confined to streets constructed for the first time. Also in the case of *The Vestry of St. Giles, Camberwell* v. *Crystal Palace Co.*, 40 W. R. 648, [1892] 2 Q. B. 33, it was held that an ancient county highway which became a new street in the ordinary and popular sense of the term by the erection of buildings fronting it is a "new street" within the terms of section 105 of the Metropolis Management Act, 1855. In the case of *Davis* v. *Board of Works for Greenwich District*, [1895] 2 Q. B. 219, 43 W. R. Dig. 118, it was held that an old turnpike road which subsequently became a new street in the popular sense by the erection of buildings alongside it was within section 105, and the fact that temporary repairs had previously been done to it by the district board did not prevent them from exercising the powers given by the section. Counsel also referred to *St. Mary, Battersea* v. *Palmer*, 45 W. R. 110, [1897] 1 Q. B. 220.

Glen, in reply, contended that the cases cited were distinguishable from the present case. The vestry having made up this road as a street cannot afterwards call upon the frontagers to pay the expenses of making it up again. This is not a "new street" within section 105: *Arter* v. *Vestry of Hammersmith*, 45 W. R. 398, [1897] 1 Q. B. 646.

DAY, J.—This is one of those cases which I find always present very considerable difficulty, and the ordinary difficulties which one expects to meet with in cases of solving problems which are raised by the definitions given in Acts of Parliament are enhanced

in this particular case by the peculiar history of the particular roadway in question, or street as it may be called.

The definition which we have to deal with in this Act of Parliament is the definition of "street," and again "new street," and I cannot derive assistance of any sort or kind from the definition clause. A definition clause is framed to be of some assistance in coming to a conclusion, or in coming to an interpretation, of the words which are defined. But the definition clause in this case gives me no assistance of any sort or kind whatever.

The history of this case is certainly peculiar. The road or street, whatever it may be called, leads from Wandsworth Bridge up to the neighbourhood of Fulham. It is a road which never can have been laid out as a road with the intention of its being used as a highway, because there is little or no through traffic on the road, but it presents all the appearance of an intended street laid out in what has been for many years a comparative wilderness, on which builders intend, when circumstances favour their operations, to erect houses. That has been the condition of this road for a very long period. It has undergone many vicissitudes. Originally the road was made as far back as 1864 by the bridge company. That company, however, seemed to have relieved themselves of their liabilities by not discharging them for a good many years, and at last, in the year 1876, the vestry took over the road and undertook to repair it and keep it in good condition. They appear to have done that, and to have kept it in good condition having regard to the knowledge which prevailed as to the keeping up of roads in what was considered at that time a thoroughly good condition. Whether they did all that is now done in streets can very well be doubted, because we have been told that the practice as to streets has been altered very much since that time, greater knowledge and more experience has been acquired and brought to bear on the repairing of streets, and streets are now much better repaired than they used to be. That is stated in the case, and I have no doubt it is perfectly true. They say they did it sufficiently for light traffic, and as in those days there was little or no traffic at all a very little amount of repair would have put the road in good repair for the traffic which presented itself. They did that, and somewhere about £1,750 was paid to them by the bridge company. They put the place into repair and they exonerated the company from all liability to keep the road in repair in the future. They took the road into their own hands such as it was. As I have said, it must have looked at that time very much like an intended street. Nothing else appeared to be wanting in it except the building of houses in the locality. That state of things remained until February, 1897, when the authorities determined to have the place put into a thoroughly good condition by the frontagers.

Accordingly the matter was brought before the magistrate, and he investigated the matter, and he has found that it became a street at some period between now and the time when the original bargain was made between the company and the vestry, and he has made an order upon those frontagers to contribute sums of money for the purpose of making it suitable according to modern ideas of a well-developed street. It has had wood paving laid down, and it will enjoy many other privileges in the future if they can get the money from the frontagers. It is a relief to me to find that in several of the cases that have been cited the responsibility for all this seems to rest more upon the magistrate than it does upon this court. The magistrate has found as a fact that it has become a street, but how or why I do not exactly know, except it be by suggesting that people have taken the buildings there. The building tendency has extended out to this place. Houses are springing up there, and the finding of the magistrate on the question of fact seems to me the best interpretation I can put, not only upon the statute, but also upon the previous decisions.

This is a question of fact for the magistrate, and on the question of fact I am not to review his decisions; therefore I must come to the same conclusion myself. The magistrate has found that it has become a street, and that it was not a street formerly; that is to say, it was not a street in 1876, when the repairs were done and the original bargain was made, but that it had become a street by February, 1897. I presume his finding must be a question of fact, and is not to be doubted. There is no question of law in this case upon which the magistrate can be said to have gone wrong. It is purely a question of fact for him. He has more knowledge of the locality than we can possibly have, and he has found that this is a new street, and has made this order. That being so, I do not see any reason why we should disturb his finding.

RIDLEY, J.—I am of the same opinion, and I have very little to add. The facts seem to be that a road or carriage-way was made up first in 1877, at which period there was no house which adjoined it on either side. It was, however, a high road or communication between a street at one end and the bridge at the other. Until 1895 no houses were built alongside it, but in that year, and in the subsequent year, 1896, houses appeared on both sides of the road. That having taken place, in 1897 the vestry of the parish of Fulham proceeded to treat it as a new street, and the magistrate has held that, it being a new street within the meaning of the Act of Parliament, they have a right to call upon the frontagers to contribute towards the expense of paving it.

Now, it appears to me that, according to the decisions which have been given upon the sections contained in the Metropolis Management Act, the magistrate's decision, so far as we are able to judge of it, is an accurate one, because in those decisions, beginning with the case of *Pound* v. *The Plumstead Board of Works*, and continuing through a series of decisions (one or two undoubtedly on the analogous Act—namely, the Public Health Act of 1875, but most of them on this very Act of Parliament), it has been held that a highway which has been repaired as a highway may become a street as soon as houses in a continuous line, to use one phrase, have been put on one side of it, or possibly on both; not, indeed, that it is necessary that the houses should be continuous from one end to the other, because that phrase has been dealt with in a way showing that the magistrate is to deal with the facts bearing on each particular case, and to say whether there are sufficient houses or buildings adjoining to the road in question to make it, in common parlance, a street, and that is the matter of fact with which he has to deal. It appears to me that the chief guidance that we can get from the decisions is this, that it requires, in order to be a new street, that there should be houses on each side of it; not, indeed, that it is an absolute and complete guide which you can follow without hesitation in every case, although it is, generally speaking, a correct guide. There is an exception, indeed, which Mr. Glen has hit upon, and which I believe is sufficiently clear to enable us to treat it as an exception standing by itself, in which case there may be a road which might be a new street, although there were no houses along it.

That appears to be suggested by the judgment of Cave, J., in the case of *Arter* v. *The Vestry of Hammersmith*, which has been quoted where undoubtedly he uses this phrase: "No doubt if a piece of land were newly laid out for the purpose of being used as a street, and were not repairable by the public at large, it would be a new street although there were no houses along it." I think in that case he must have been alluding to the frequent case of where an estate is being laid out for building purposes, roads are laid out throughout it, and where plots for houses to be built on are also adjoining the road. In such a case as that it may be that that would be, in proper and ordinary language, called a "new street," and that a magistrate would have been right in so dealing with it, although there were no houses adjoining it. But that, I think, must, if we read the other authorities, be treated as an exceptional case. I do not find that it was the case in this road because the period of time which elapsed between the laying out of this road, if you take it from 1864 onwards, is a long period of years before the houses began first to appear, and even if you take 1877 as the date of the formation of the road, then there were eighteen years passed, or more, before the houses began to appear.

I think, therefore, it is not a case which at all can be treated as analogous to that which was in the mind of that learned judge when he gave that judgment, and I am the more sure of that because when I read the rest of his judgment I see that he is treating this matter upon the same lines as we are doing to-day. He goes on to say: "Or again, if an old road has houses built along its side, with access to it, and thereby is converted into what is popularly understood by the term 'street,' it would be a 'new street' within the Act." All this was met by Mr. Glen very ingeniously by saying that because in 1877 the Fulham Board of Works made up the carriageway of the road in the same mode and to the same extent as new streets on which there was a fair amount of traffic were dealt with at that period, that therefore it became a new street. I think that that is a fallacy. That was mere repair of the road. You cannot by repairing a road in the way usual at the time make it into a street when it is not a street according to the definition which I have been endeavouring to give.

For these reasons I entirely agree with the learned magistrate, and I think the learned magistrate, whose discretion it is (within certain limit, of course) to find whether a particular road or street is to be treated as a "new street" or not, has properly exercised his discretion in this case.

Appeal dismissed, with costs.

Solicitor for appellants, *Walter M. Willcocks.*

Solicitor for respondents, *T. Blanco White.*

Q. B. Div. (Lord Russell of Killowen, C.J.) April 29; May 23, 1898.

BARNES AND ANOTHER v. GLENTON AND OTHERS. (a.)

Statute of Limitations—Loan of money—Loan secured by transfer of mortgage—Payment of interest by co-trustees—Money "charged upon land"—Statute of Limitations applicable—Personal liability of borrower—Real Property Limitation Act, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8—*Limitation Act,* 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Mercantile Law Amendment Act,* 1856 (19 *&* 20 *Vict. c.* 97), *s.* 14.

The defendants, as trustees of a will, were indebted to one Maria Barber, in whom certain mortgages of land had become vested in trust for the testator, and for the purpose of paying off this debt the plaintiffs agreed to advance to the defendants a sum of money on the security of the mortgages, and the transaction was carried out as follows: By deeds executed in 1882 *Maria Barber assigned the mortgages to the plaintiffs, and on the same day a deed was executed, to which Maria Barber, the defendants, and the plaintiffs were parties; and this deed, after reciting the transfers of the mortgages and that the plaintiffs had, at the request of the defendants, advanced to them the sum in question, provided that the moneys advanced by the plaintiffs should be a first charge upon the transferred mortgage securities, and that the plaintiffs might either allow the moneys secured by the several mortgages to remain as invested or might realize them. but they were not to proceed against the mortgaged premises without the consent of the defendants, such consent to be refused only in case the defendants themselves paid off the claim of the plaintiffs. This deed contained no express covenant by the defendants to repay the money. Immediately after the execution of this deed in* 1882 *the defendant L. retired from the trust. Interest was paid from time to time by the remaining trustees up to* 1896. *In* 1897 *the present action was brought by the plaintiffs to recover the balance due upon the loan for principal and interest.*

Held, (1) *that the defendants were personally liable to repay although there was no express covenant by them in the deed of* 1882 *to repay the advance;* (2) *that the money advanced was "secured by mortgage or otherwise charged upon or payable out of land" within section* 8 *of the Real Property Limitation Act,* 1874; *that that Act, and not the statute* 21 *Jac.* 1, *c.* 16, *was the Statute of Limitations that applied to the case, and that therefore the defendant L., who had retired from the trust, was not entitled to the benefit of section* 14 *of the Mercantile Law Amendment Act,* 1856, *and that the payments of interest by the other defendants kept the debt alive against him.*

Further consideration before Lord Russell of Killowen, C.J.

The facts were thus stated in the written judgment of the learned judge:

The claim of the plaintiffs as endorsed on the writ is "for money lent due under a deed dated the 9th of September, 1882." The defendants were the trustees of the will of Lewis Glenton, who died in 1873, the defendant Maria Glenton, widow of the testator, being a beneficiary under that will. The material facts are these: One Fairless Barber had acted as solicitor for the testator and for the defendants as trustees, and certain mortgages for sums amounting to £3,095 15s. 5d. had been transferred to Barber as trustee for Lewis Glenton. Fairless Barber died in 1881, and such mortgages thereupon became vested in Maria Barber, his widow, who was devisee under and executrix of his will. At the time of Barber's decease the estate of Lewis Glenton was indebted to him in a considerable sum for services rendered by him as solicitor to Lewis Glenton and to the trustees and also for money advanced. The defendants as trustees of Lewis Glenton's estate, with the object of paying off the moneys so due to Fairless Barber's estate and for other purposes in connection with their trust, entered into negotiations with the plaintiffs for the advance of a sum of £1,650 upon the security of the mortgages before mentioned. The negotiations resulted in the plaintiffs agreeing to make the advance. The transaction was carried out

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

thus: By four deeds executed on the 9th of September, 1882, Maria Barber assigned the mortgages in question to the plaintiffs The only parties to these deeds were Maria Barber and the defendants. They contain no covenant for repayment by Maria Barber of the moneys advanced. Indeed, it was expressly agreed that she should come under no personal liability. On the same 9th of September, 1882, a deed or declaration of trust was afterwards executed, to which Maria Barber, the defendants (not described as trustees), and the plaintiffs were parties. It recited the four transfers already referred to; that as to the principal moneys they belonged in equity as to part to Maria Barber and as to the balance to the defendants; that the plaintiffs had, at the request of the defendants, advanced to them £1,650, part of which had been applied in payment of a portion of the moneys secured by the transferred mortgages, which belonged to Maria Barber, and the balance paid to the defendants, and that it had been agreed that the repayments of such moneys and interest should be secured in the manner thereafter mentioned. The deed then provided (1) that the moneys advanced by the plaintiffs should be a first charge upon the transferred mortgage securities; (2) that the plaintiffs might either allow the moneys secured by the several mortgages to remain as invested or might call in and realize them, and as to any money received for interest should, after retaining interest on their advance, pay any balance to the defendants or the survivors or survivor or other the trustees for the time being of Lewis Glenton's will, but no step was to be taken against the mortgaged properties or the persons entitled to redeem without the consent in writing of the defendants or other the trustees of Lewis Glenton, but such consent was only to be refused in case the trustees within three months after application made to them paid off the claim of the plaintiffs. It is only necessary further to say that, subject to the claim of the plaintiffs, the mortgage securities were dealt with as the property of the defendants or other the trustees of Lewis Glenton. The deed contained no express covenant by the defendants to repay the plaintiffs their advance. Immediately after the execution of this deed the defendant Lewis retired from the position of trustee. Interest was paid from time to time up to March, 1896. After crediting the sum of £352 0s. 9d. received on account of principal, the sum of £1,368 15s. 7d. for principal and interest remained unpaid at the date of the writ—namely, the 12th of April, 1897.

Section 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), provides: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given."

Section 14 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), provides: "In reference to the provisions of the Acts 21 Jac. 1, c. 16, s. 3, and of 3 & 4 Will. 4, c. 42, s. 3, and of the 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, . . . no such co-contractor or co-debtor . . . shall lose the benefit of the said enactments or any of them so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors . . ."

Dickens, Q.C., and *H. Manisty*, for the plaintiffs.—There are two points, and the first has reference to all the defendants, but the second has reference to the defendant Lewis alone. In the first place, the defendants have incurred a personal liability, although in the deed of 1882 there was no express covenant to repay. The money was advanced to the defendants at their request, and there is at common law an implied promise to repay whether the money is secured by mortgage or not: *Yates* v. *Aston*, 4 Q. B. 182. All the defendants are therefore liable personally. In the second place, it is said for the defendant Lewis that, as he retired from the trust in 1882, he is not liable upon the ground that the loan created a simple contract debt only, and therefore came within the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, and that, that being so, he came within the protection given by section 14 of the Mercantile Law Amendment Act, 1856. But the loan or advance by the plaintiffs was not within the statute 21 Jac. 1, c. 16, s. 3, but was within section 8 of the Real Property Limitation Act, 1874. The money advanced was money "secured by mortgage, or otherwise charged upon or payable out of land," within the meaning of section 8; and not being within the 21 Jac. 1, c. 16, s. 3, the provisions of section 14 of the Mercantile Law Amendment Act do not apply, and the defendant Lewis cannot have the benefit of those provisions. The period of limitation, therefore, is twelve years from the last payment of interest in 1896, and the payments of interest made by the remaining trustees are available to keep the debt alive against all the defendants, including the defendant Lewis: *In re Frisby*, 38 W. R. 65, 43 Ch. D. 106; *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511; *In re Stephens*, 43 Ch. D. 39, 38 W. R. Dig. 116.

D. J. Edwards (*Alfred Roscoe* with him), for the defendant Glenton.—It depends on the circumstances of each case whether there is a personal liability. Here the facts show that there was no such personal liability, as it is plain that the money was advanced by the plaintiffs solely on the security of the mortgaged premises, and that they looked for repayment to the mortgaged premises alone.

C. A. Russell, Q.C. (*Rufus Isaacs* with him), for the defendant Lewis.—Whatever may be the liability of the other defendants, the defendant Lewis is not liable. He retired from the trust in 1882, and the payments of interest made by the other defendants do not avail against him if section 14 of the Act of 1856 applies. We submit that it does apply. In the first place, the loan was not money "secured by any mortgage," or money "otherwise charged upon or payable out of any land" within section 8 of the Act of 1874. The only security for the advance was the fact that the plaintiffs, having become transferees of these mortgages, had the right when the money came into their hands under those mortgages to re-imburse themselves for the advance. Section 8 of the Act of 1874, therefore, does not apply, and the debt being really a simple contract debt came within the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, and therefore sec-

tion 14 of the Mercantile Law Amendment Act 1856, in express terms applies and protects the defendant Lewis. In the next place, even if section 8 does apply, section 3 of the statute of James also applies, and if there be two Statutes of Limitation applying to the same subject-matter, then the more stringent—in this case the statute of James—is to prevail. Therefore in either view section 14 of the Act of 1856 applies.

Manisty in reply.

Cur. adv. vult.

May 23.—Lord RUSSELL OF KILLOWEN, C.J., read the following judgment: [His lordship stated the facts, and proceeded:] In this state of facts two points were raised by the defendants. The first was that the plaintiffs had advanced the moneys solely on the security of the mortgages, and that there was no personal liability on any of the defendants to repay. The other point applied to the case of the defendant Lewis only. It was contended for him that the six years' limitation of actions applied and was a defence; that the liability here, if any, was for a simple contract debt within the meaning of the statute of 21 Jac. 1, c. 16, s. 3, and as Lewis had had nothing to do with the trust since 1882 he was within the protection of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 13), and that therefore the payments made by his co-contractors or co-debtors, the other defendants, did not keep the debt alive as against him. I have now to determine these questions. As to the first, I have arrived at the conclusion, after a careful consideration of the correspondence and deeds, that it was intended the defendants should undertake, and that the defendants did undertake, a personal liability. The correspondence before the advance was made was conducted by the firm of Barber & Oliver, solicitors, on the part of the defendants, and by the firm of J. & W. Maude, solicitors, on the part of the plaintiffs. That correspondence, beginning in May of 1882, treats the money as a loan, and speaks of the defendants as the borrowers. The correspondence after the advance was made has the same complexion, and indeed, when it turned out in 1897 that the mortgage security was inadequate and the present action was threatened, neither of the defendants Glenton nor Saunders suggested nonliability; and as regards the defendant Lewis, his only answer was that he had (as was the fact) ceased to act as a trustee since 1882. Further, there is the express stipulation that Maria Barber should be under no personal liability in respect of the advance, and an absence of the suggestion of any such stipulation on the part of the defendants. Lastly, the declaration of trust recites that the advances were made to the defendants by the plaintiffs at their request. In my judgment the conclusion properly to be drawn from the facts is that the transaction was a loan by the plaintiffs to the defendants accompanied by the security of the transferred mortgages, for which (unless there is any other defence) they are liable. It was insisted in argument that the defendants were trustees. At best this is only one of the facts to be considered in determining what is the proper inference to draw, and it is to be pointed out that the trustees received a portion or the money advanced and that all was applied for the purposes of the trust, and that Maria Glenton is one of the beneficiaries of that trust. As Maria Glenton and Saunders have no other defence there must be judgment against them. But a further contention was raised on behalf of the defendant Lewis, with which I must now deal. It was contended that the claim against him was within, and was barred by, 21 Jac. 1, c. 16. The plaintiffs, on the other hand, argued that it was not within 21 Jac. 1, c. 16, but that it was an action to recover a sum of money secured by or charged upon, or payable out of, land within the meaning of section 8 of the Real Property Limitation Act, 1874, and that the payments of interest to the plaintiffs by his former co-trustees from time to time kept the claim alive against him. It was admitted on his behalf that, if the plaintiffs' contention was correct, he could not claim the benefit of section 14 of the Mercantile Law Amendment Act, 1856 (see *In re Frisby*, 43 Ch.D., p. 116). The question then is—Does the Real Property Limitation Act, 1874, govern this case? [His lordship read section 8 of the Act.] In my opinion this section applies. By the deed now sued on the money advanced is made a first charge on all moneys recovered by virtue of the mortgages, and the plaintiffs have the power to foreclose, subject only to the defendants' consent, which they could withhold only in the event of their preferring to pay off the debt. Therefore, having regard to the terms of this deed, I think this money was secured by mortgage and was charged upon and was payable out of land within the meaning of section 8. It was argued in *Frisby's case* that the section applies only to actions against a mortgagor, and Bowen, L.J., appears to have held that view; but Cotton, L.J., said he could find nothing in the section pointing at such a limitation. In my view, however, it is not necessary in this case to express an opinion on the point, for I think the transaction between these parties amounted at least to an equitable mortgage, and the defendants are practically in the position of mortgagors. Section 8 of the Act of 1874, therefore, applies to this case, and, if so, the defendant Lewis is not entitled to the benefit of section 14 of the Mercantile Law Amendment Act, 1856. It follows that the payments made by the co-trustees of Lewis are sufficient according to the decision in *In re Frisby* to keep the claim alive against him. It was also contended on behalf of Lewis that if the two sections are read together, 21 Jac. 1, c. 16, would govern all cases where there was a contract without specialty, and that section 8 of the Act of 1874 applied only where there was a specialty. It was argued that here there was no specialty contract, and therefore the case fell within 21 Jac. 1, c. 16, and therefore Lewis was entitled to the benefit of the Mercantile Law Amendment Act, 1856. I do not agree with this contention. I think the effect of this section 8 is to take out of 21 Jac. 1, c. 16, and for all purposes, all actions of debt secured by mortgage or otherwise charged upon or payable out of land. But, further, section 8 expressly included cases of security by lien which are not often effected by specialty contract. There must, therefore, also be judgment against the defendant Lewis, but as the question is important there will be in his case stay for an appeal if it is desired. It follows from what I have already said that there will also be judgment for the plaintiffs on the counter-claim.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Maude & Tunnicliffe.*

Solicitors for the defendant Glenton, *Walker, Son, & Field.*

Solicitors for the defendant Lewis, *Calkin, Lewis, & Stokes.*

Q. B. Div.
(Ridley and Channell, JJ.) May 19, 20.

THE MAYOR OF BURY ST. EDMUNDS v. WEST SUFFOLK COUNTY COUNCIL. (a.)

Local government—Quarter sessions borough with population over 10,000—*New county bridges—Liability for costs of—Special and general expenses of county—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 6, 35 (1) (2).

A quarter sessions borough with a population over 10,000 *is not liable under the Local Government Act*, 1888, *to contribute rateably to the costs incurred by the county in erecting, maintaining, or repairing new county bridges*—i e., *county bridges taken over or newly erected since the passing of that Act.*

This was a special case stated on a question raising the liability of a quarter sessions borough with a population of over 10,000 to contribute towards the costs of county bridges which had become county bridges since the passing of the Local Government Act, 1888.

A writ of summons was issued in an action brought by the Corporation of Bury St. Edmunds against the defendants. The indorsement on the writ so far as here material was as follows: "The plaintiff's claim is for a declaration that the plaintiffs are not liable to contribute rateably to the costs of erecting, maintaining, or repairing new county bridges and for £137 13s., money received by the defendants for the plaintiffs' use."

On that indorsement a special case was stated, from which it appeared that Bury St. Edmunds is a quarter sessions borough, with a separate commission of the peace, and contained, according to the census of 1881, a population of over 10,000. At the time of the passing of the Local Government Act, 1888, and at the present time there were and are certain bridges in the borough which the plaintiffs were and are legally bound to maintain; and bridges in the county of West Suffolk which the defendants were and are legally bound to maintain and to which the plaintiffs are not liable to be and had not been assessed. Since 1888 certain other bridges in the county have become county bridges under section 6 of the Local Government Act, 1888. There are practically no main roads in this county and what few there are do not cross any of these bridges.

The defendants since 1892 paid £1,570 4s. 4d. in respect of these bridges, which they charged to their county accounts as general expenses, and the plaintiffs have been assessed to their county rate, and have contributed thereto the sum of £137 13s., their rateable proportion of the whole sum.

The plaintiffs' contention was that the payments should have been charged to special and not to general expenses, so that they might be exempted from contributing.

The following sections of the Local Government Act, 1888, were referred to during the argument:

"Section 6.—The county council shall have power to purchase or take over on terms to be agreed on existing bridges not being at present county bridges, and to erect new bridges, and to maintain, repair, and improve any bridges so purchased, taken over, or erected."

"Section 35.—In the case of a quarter-sessions borough . . . containing . . . a population of 10,000 or upwards the following provisions shall . . . apply. (2) Where such borough is at the passing of this Act exempt in whole or in part from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorized to incur costs the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of costs incurred for any such purpose."

W. Graham, for the plaintiffs.—The action was brought to recover money paid in respect of those bridges recently made county bridges. The plaintiffs are only liable to repair bridges within the borough; there is nothing in the Local Government Act, 1888, which makes any distinction between county bridges then existing and those which have become county bridges since the passing of that Act. The difference between special and general expenses is defined in section 68 of the Local Government Act, 1885, and the plaintiffs' contention is that this is a special expense because it cannot properly be levied over all the county.

W. Wills, for the defendants. — Intermediate quarter session boroughs with a population of over 10,000 are liable to be rated to contribute to the maintenance and repair of any bridges that have become county bridges after the passing of the Local Government Act, 1888. Erecting or taking over these new county bridges was not a purpose for which the quarter sessions could, prior to that date, have incurred costs.

RIDLEY, J.—I think that this matter is fairly clear. The question arises upon the 35th section of the Local Government Act, 1888, although other sections of that Act also have to be referred to in order to arrive at a proper construction of section 35. The former state of things, as has been pointed out by my brother Channell as to boroughs such as this borough of Bury St. Edmunds, was that they were called upon in certain cases to contribute to the rates—that was a state of things which had to be dealt with when the Local Government Act was passed creating the county council, and it appears to have been the policy of the Legislature to say that for certain purposes the borough shall maintain and keep its own bridges and roads and so forth out of its own rates, but for other purposes it shall not be liable where it has not hitherto contributed—that is to say, it shall continue to pay its own expenses as to what was required within the borough, but as to the county expenses of a certain character it was not to pay any contribution at all. The two are separated for the future. It is different, of course, with the larger boroughs, and with the smaller ones on the other hand, but we are dealing now with the quarter sessions boroughs, or what may be called the No. 2 class. Now, what did the Local Government Act, 1888, enact with regard to these boroughs? It says in sub-section (1) of section 35 that the powers, duties, and liabilities of the council of such boroughs shall continue as under the Municipal Corporations Act, 1882, "but, subject to such provisions and to the savings hereinafter contained, the borough shall form part of the county for the purposes of this Act." Then it continues (sub-section (2)): "Where such borough is at the passing of this Act exempt in whole or in part from contributing towards cost incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorized to incur costs the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of cost incurred for any such purpose."

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Now, the maintaining of county bridges has always been recognized as falling within the county rate, and it is a purpose for which the quarter sessions of the county in which this borough is situated and in which other boroughs are situated were authorized to incur costs. That purpose, therefore, is one from contribution to which the borough is *primâ facie* exempted.

So far the matter is perfectly clear. But the defendants contend that although for all existing county bridges existing at the time of the passing of this Act the borough is exempt from contribution, yet that exemption does not apply in the case of bridges taken over or newly erected since the passing of that Act, because the cost of those bridges was not a "purpose" in respect of which the quarter sessions were authorized to incur costs.

It was argued that the quarter sessions, although they could incur costs up to that time in respect of the maintenance of bridges, were not authorized as is at this present moment the county council under section 6 of the Local Government Act, 1888, to erect bridges. It is not, I think, correctly stated in that form, because it does appear that under the Highways and Locomotives Amendment Act, 1878, s. 22, the county authority might make contribution to the extent of one-half of the cost of the erection of a new bridge; but it is true that the quarter sessions' power to incur liability in the putting up of a new bridge did only extend to one-half the cost of such bridge, whereas reading section 6 it appears to me to give the county council power, if they think proper to do so, to erect a new bridge entirely at its own cost. It may be arguable that it is not so, but, assuming it to be so in favour of the defendants, there remains the question, Is that a distinction sufficient to enable us to say that the intention was to limit the exemption of the borough specifically to cases in which the former authority, the quarter sessions, had authority, and to leave outside the new powers conferred upon the county council? I think upon the proper construction of the Act it cannot have been intended to have that meaning.

The word "purpose" in sub-section (2) of section 35 was, I think, intended to include not only the maintenance of existing bridges, but also all the powers as to bridges given to the county council by section 6.

CHANNELL, J.—The whole matter turns upon the interpretation which we must put upon the word "purpose" in this second sub-section of section 35. Now I think it is a very general word, and that one must so interpret it. It says, Where a borough is exempt from contributing towards costs incurred for any purpose for which the quarter sessions are authorized to incur costs. Now the quarter sessions were authorized to incur costs in reference to the maintenance of bridges, and they were authorized also to incur costs in reference to the erection of bridges, not to pay the entire cost, but to contribute towards cost of erection of bridges; and the item "general county bridges" was a substantial heading of county expenditure, and was always so treated. It was an item of expenditure in respect of which there was no power to call upon the quarter session boroughs for contribution, although, of course, as to a very large number of matters there was power so to call upon the boroughs for contribution. That being the state of things, the policy of this Act undoubtedly is to leave this class of borough in substantially the same pecuniary position as it was before. Where you find that these boroughs have to pay separately for their own bridges *primâ facie* you would not expect that they should pay any share for the bridges in the county outside the borough. This is not of universal application, but in reference to these boroughs I know of no case in which they are charged double. The smaller boroughs are charged double for a considerable number of things. That being the general view, and I quite appreciate Mr. Will's argument, the only difficulty created is in reference to section 6, which appears to confer a new power upon the county council. It is quite clear that if a new power is conferred upon the county council of incurring costs in reference to some matter for which the quarter sessions originally had no power to incur costs, that the boroughs are liable to be rated in reference to costs incurred as to such new matters. So that the question really turns partly on this word "purpose" and partly on section 6. It seems to me section 6 is merely an enlarged power of incurring costs for the same purpose for which the quarter sessions had previously a more limited power, and that being so, it does not affect this question, it still remains a purpose for which the quarter sessions were authorized to incur costs, and the boroughs therefore are exempt in reference to it. On those grounds I think we ought to give the declaration as asked.

Judgment accordingly, no order for costs.

Solicitors for the plaintiffs, *Edgar Robins & Clark*, for *C. E. Salmon*, Town Clerk, Bury St. Edmunds.

Solicitors for the defendants, *White, Barrett, & Co.*, for *A. Townshend Cobbold*, Deputy Clerk of the County Council, Ipswich.

House of Lords.

From C. A. (England). July 4, 1898.

WHEELER v. HUMPHREYS. (a.)

Will—Hotchpot clause—Covenant by testator—Settlement—Debt—Satisfaction.

The testator had covenanted with the trustees of the son's marriage settlement that his executors would pay to them £10,000, to be invested and held upon trust for the son for life, with remainder to the son's wife for life, with remainder as to the capital for the children of the marriage, and in case of there being no child (as in the event happened) the capital was to be held in trust for the testator absolutely. By his will the testator directed his executors and trustees to convert his whole estate into money, and to stand possessed of the clear residue in trust for his two children in equal shares. And the testator by his will declared that any sum given "to or with any child" on his or her marriage was to be taken in or towards satisfaction of the share of such child, and brought into hotchpot. The son died, leaving a widow and no issue.

Held, that the testator's trustees must specifically appropriate and allot to the son's share under the will the testator's contingent reversionary interest in the £10,000, so as to effect an equal division between the son and the daughter.

Decision of the Court of Appeal, 45 *W. R.* 376, [1897] 1 *Ch.* 325, *affirmed, but on different grounds.*

This was an appeal from an order of the Court of Appeal (Lindley, A. L. Smith, and Rigby, L.JJ.), reported under the name of *In re Cosier, Humphreys*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

v. *Gadsden*, 45 W. R. 376, [1897] 1 Ch. 325, reversing that of Chitty, J.

The facts are given in Lord Macnaghten's judgment.

Farwell, Q.C., and *J. G. Wood*, for the appellants.—The order appealed from gives no operation to the hotchpot clause, the object of which is to cut down a previous gift. The words "shall be taken in satisfaction" mean that the sum is to be taken into account for the purpose of calculation and division.

Levett, Q.C., and *Edward Ford*, for the respondents.—The object of the hotchpot clause was to ensure equality: *Chichester* v. *Coventry*, 15 W. R. 849, L. R. 2 H. L. 71, 95.

Farwell, Q.C., replied.

The House took time for consideration.

July 4.—The LORD CHANCELLOR (Earl of HALSBURY) expressed his concurrence with Lord Macnaghten's judgment.

Lord MACNAGHTEN.—I listened respectfully to the learned counsel for the appellants. I have since had the opportunity of reconsidering arguments which at the time I was unable to follow. But I must confess that the only result is that I am still unable to understand what the difficulty is—the case appears to me to be so very simple, though it is perhaps a little obscured by the line of argument adopted in the Court of Appeal.

The testator, at the time when he made his will, was a widower with only two children—a son and a daughter—both of whom were then married. By his will he directs his executors and trustees to convert his whole estate into money, and to stand possessed of the clear residue in trust for his two children in equal shares. After settling the daughter's share and giving his trustees various powers, including a power specifically to appropriate and allot any part of his estate in or towards satisfaction of the respective shares thereinbefore given or settled, he declares his will as follows: "Provided also, and I declare that any and all sums of money, annuities, or annual sums and property which I have already covenanted or agreed to give, or which I may hereafter covenant or agree to give to or with any child of mine on his or her marriage, shall, in default of any direction to the contrary in writing under my hand, be taken in or towards satisfaction of the respective share of such child . . . and shall be brought into hotchpot and accounted for accordingly."

In the case of the daughter there was nothing to be brought into hotchpot. In the case of the son, the testator had covenanted with the trustees of the son's marriage settlement that his executors would pay to them the sum of £10,000, to be invested and held upon trust for the son for life, with remainder for the son's wife for life, with remainder as to the capital for the children of the marriage. In case there should be no child (as in the event happened) the capital was to be held in trust for the settlor absolutely.

The clear residue of the testator's estate, without providing for this sum of £10,000, amounted, roughly speaking, to £52,000. Taking it at that sum, how ought the amount to have been dealt with?

The first question seems to be, What was the effect of the father's covenant? What did it give to the son? It gave him a life interest in the investments representing the £10,000. Then it gave a life interest to the son's wife, and, further, it gave the capital to the issue of the marriage in the event of there being any issue to take. For the purposes of the will it seems to me that it would be only reasonable to hold that, whatever was coming to the son's wife and the children of the marriage under the covenant, was a marriage gift to the son. What was given was, in substance, given to the son to be enjoyed by him by means of a settlement on himself, his wife, and children. But there the gift to the son ends. The interest which the father retained or reserved was not given to the son in any sense. It would, therefore, have been wrong to require the son to bring the whole £10,000 into hotchpot in every event. And the testator has not done so. The learned counsel for the appellants did not contend that the £10,000 was to be brought into hotchpot as a gift "to the son." They argued that the whole fund was to be brought into hotchpot as a gift "with the son." That, if I may venture to say so, is the mistake which the learned judge of first instance makes. "The truth is," he observes, "that the testator has not referred in this hotchpot clause to the trusts of the £10,000, but what he has directed to be brought into account is the £10,000 which he gave with his son." Now, I cannot agree with that observation. The reference in the will is, I think, a reference to the trusts of the £10,000, so far as they enured for the benefit of the son, and to nothing else. Surely the testator must have been referring to the beneficial interest in the gift, not to the legal ownership of the fund which was designed to protect that interest. A gift is a gift, whether it be given directly or given through the medium of a trust. What the donor keeps back is no gift. Then I do not understand the expression, "given with any child of mine," as applied to a provision on behalf of a son. It obviously applies to a provision on behalf of a daughter. You give your daughter in marriage, and you give a portion with your daughter. That is a common expression, and correct enough, because the portion is given to, or for the benefit of, the person to whom the daughter is given. In the marriage service the question is asked, "Who giveth this woman to be married to this man?" A corresponding question applied to the other contracting party, even nowadays, I presume, would be thought inappropriate. It appears to me that it would be equally inappropriate to refer to money settled on behalf of the intended husband as given "with" him. The contention on the part of the appellants involves a contradiction. It requires an object of the testator's bounty to give credit for something which never was his, and then it treats that very thing as belonging absolutely and for all purposes to the testator himself. This contention seems to have had its origin in a misapplication of the testator's words. Not that that misapplication can really make any difference. The contingent interest reserved by the settlor is no more given "with" the son (if anybody prefers that way of looking at it) than given "to" the son. It was not given at all. The settlor kept it.

The courts below agree in thinking that the sum of £10,000 which the testator covenanted to pay to the trustees of his son's marriage settlement must be brought into account under the hotchpot clause *en bloc* and without reserve. There, however, they part company. In the first court it was held that the hotchpot clause could have no further operation. The contingent interest under the ultimate trust in the settlement remained the father's property; as such it would have to be divided equally between the son and the daughter when it fell into possession; the result was unexpected, but inevitable. The Court of Appeal are more fortunate in finding a way of escape. By inverting the hotchpot clause they arrive at a correct result. The whole fund, they say, must be brought into hotchpot by the son. It has therefore to be taken towards satisfaction of his share; the

direction that it is to be so taken implies a gift, and therefore whatever interest the father retained in the fund is given to the son by the hotchpot clause, as Rigby, L.J., thinks, or, as the other members of the court hold, by the conjoint operation of that clause and the gift in the earlier part of the will.

Now, I must say I cannot follow this reasoning. It seems to me plain that the testator's reversionary interest in the fund cannot come under the operation of the hotchpot clause. That clause has nothing to do with it. Nothing was to be brought into hotchpot but what the testator had covenanted or agreed to give. The hotchpot clause is in the common form. The language used must have its ordinary effect. The simplest way of looking at the matter is to put oneself in the position of the executors when they came to divide the estate. They had £52,000 in hand, and no liability to meet but the claims of the settlement trustees. The first thing to be done was to pay the trustees. The trustees got their £10,000. Against that a like sum was set apart for the daughter's share. I pause there, for the division of the rest of the estate cannot give rise to any difficulty. The surplus, whatever it is, may be disregarded for the purpose of considering the present question. I ask what is the result of what the executors have done so far? Equality, if the testator's interest under the ultimate trust has been appropriated to the son; inequality if that interest is the father's property. If that mistake is to be regarded as still made, the daughter has certainly received too much. As no one suggests, or ever has suggested, that the beneficial interests under the prior trusts are not to be brought into hotchpot, it is obvious that the daughter has received too much by the exact amount or value of the testator's reversionary interest. How is the mistake to be set right? Simply by doing now what ought to have been done before anything was set apart for the daughter. You must specifically appropriate and allot to the son's share the testator's contingent reversionary interest under the ultimate trust. But that is to be done not under the hotchpot clause, but under the plain directions in the earlier part of the will. It is the only way to effect an equal division between the son and the daughter. When ever the interest of a legatee, together with the interest, if any, of the testator, in a particular fund or a particular property exhausts the whole beneficial interest therein, and the legatee has to bring his interest into hotchpot, the appropriation of the fund or property in or towards satisfaction of the legatee's share or legacy under the will necessarily involves bringing the legatee's interest into hotchpot, and at the same time deals with the testator's interest, if any, in conformity with his directions in regard to his own property.

The son is now dead without issue, and the whole of the £10,000 belongs to the son's estate absolutely, subject only to the life estate of his widow. The result of the view put forward on behalf of the appellants is certainly startling. Whereas the testator directed that his residuary estate should be divided in equal shares between his two children, the son gets £10,000 less than the daughter. The result might have been more startling still. The residuary estate, without providing for the £10,000, might have been only £20,000. That is an event which the testator seems to have contemplated as at least possible, because he directs that what he had covenanted to give to his son should be taken either towards satisfaction or in satisfaction of his son's share under the will. The son's wife might have died without issue in her husband's lifetime, and then, according to the view of the appellants' counsel, the testator's endeavour to produce equality would result in this—the son living and in a position to marry again would get £5,000, and the daughter would carry off £15,000. Suppose, further, that the bequest to the son had been a definite sum of £10,000 instead of being a share of residue, and suppose the ultimate residue had been given to someone else—an eldest son, for instance—the son, in whose favour the covenant was made, and who was in a position to marry again, would have taken nothing but a life estate.

I agree with Lindley, M.R., that such a result does suggest that there must be some error somewhere. But I desire to rest my judgment on the plain language of the will, without putting any strained construction on any words in the hotchpot clause or giving it a peculiar or unusual effect.

I think that the appeal must be dismissed with costs.

Lord MORRIS and Lord JAMES OF HEREFORD concurred.

Appeal dismissed.

Solicitors for the appellants, *Flower, Nussey, & Fellowes.*

Solicitors for the respondents, *Beyfus & Beyfus.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) — June 17, 23, 1898.

MACKINNON *v.* CLARK. (*a.*)

Election law—Parliament—Illegal practice—Penalties—Return of election expenses—"Transmit," meaning of—Corrupt and Illegal Practices Prevention Act, 1883 (46 *&* 47 *Vict. c.* 61), *s.* 33, *sub-sections* 1, 5.

By section 33, *sub-section* 1, *of the Corrupt and Illegal Practices Prevention Act,* 1883, *it is enacted that, within thirty-five days after the day on which a candidate returned at a parliamentary election is declared elected, the election agent "shall transmit to the returning officer a true return" respecting the election expenses. By sub-section* 5 *a candidate who has failed to comply with the requirements of section* 33 *is liable to a penalty for each day on which he sits or votes in the House of Commons.*

The defendant was a candidate at a parliamentary election, and was declared elected on the 23*rd of July. The thirty-five days expired on the* 27*th of August, on which day, at* 10 *p.m., the defendant, who was his own election agent, posted to the returning officer a return of his expenses. The return reached the returning officer in the ordinary course of post on the* 29*th of August. The return was incorrect in that it omitted one item of expenditure, as to which the defendant had not received an authorized excuse under section* 34. *The defendant sat and voted in the House of Commons on the* 28*th of August and on subsequent days.*

Held, that the defendant, by posting the return on the 27*th of August, had complied with the requirements of section* 33, *sub-section* 1, *as to transmission within thirty-five days, and that, although the return was incorrect, it was none the less a return within the meaning of section* 33.

Appeal of the defendant and cross-appeal of the plaintiff from the judgment of Kennedy, J., at the trial of the action without a jury.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The action was brought to recover £4,900, being forty-nine penalties of £100, on the ground of the defendant's having sat and voted in the House of Commons on forty-nine occasions as member for the county of Caithness without having duly transmitted to the returning officer a true return respecting his election expenses.

At the general election of 1895 the defendant was a candidate for Parliament for the county of Caithness. The poll was declared on the 23rd of July, when the defendant was declared to be duly elected. The defendant had acted as his own election agent and it thereupon became his duty under section 33, sub-section 1, of the Corrupt and Illegal Practices Prevention Act, 1883, to transmit a return of his election expenses to the returning officer within thirty-five days from the day on which he was declared elected. The thirty-five days expired on the 27th of August, on which day the defendant posted a return of his election expenses in the letter-box of the House of Commons at 10.45 p.m. This return left London the following morning, and in the ordinary course of post was delivered to the returning officer on the 29th of August. The return was incomplete by the omission of certain matters as to which the Court of Session in Scotland had allowed an authorized excuse under section 34 of the Corrupt and Illegal Practices Prevention Act, 1883, the omissions being due to inadvertence. The return also omitted an item of £2 9s., for which no authorized excuse had been applied for or granted. The defendant voted in the House of Commons on the 28th of August, and on forty-eight days in 1896.

Kennedy, J., held that the return had not been transmitted until it reached the returning officer, and that therefore it had not been transmitted within thirty-five days, but that the transmission of an incorrect return was not a failure to transmit a return, and the learned judge gave judgment for the plaintiff for one penalty of £100 in respect of the voting by the defendant on the 28th of August.

The Corrupt and Illegal Practices Prevention Act, 1883:

"33. (1) Within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning officer a true return (in this Act referred to as a return respecting election expenses) in the form set forth in the second schedule to this Act, or to the like effect, containing," &c.

"(5) If in the case of an election for any county or borough the said return and declarations are not transmitted before the expiration of the time limited for the purpose the candidate shall not, after the expiration of such time, sit or vote in the House of Commons as member for that county or borough until either such return and declarations have been transmitted, or until the date of the allowance of such an authorized excuse for the failure to transmit the same, as in this Act mentioned, and if he sits or votes in contravention of this enactment he shall forfeit one hundred pounds for every day on which he so sits or votes to any person who sues for the same.

"(6) If without such authorized excuse as in this Act mentioned a candidate or an election agent fails to comply with the requirements of this section he shall be guilty of an illegal practice."

The defendant in person contended that the requirements of section 33, sub-section 1, as to transmitting the return were complied with if the return was despatched by post within the thirty-five days.

He cited *Pennell* v. *The Churchwardens of Uxbridge*, 10 W. R. 319, 31 L. J. M. C. 92, and *Banks* v. *Goodwin*, 11 W. R. 309, 32 L. J. M. C. 87.

A. T. Lawrence, Q.C., and *Courthope Munroe*, for the plaintiff.—The learned judge has rightly held that a return is not transmitted until it comes to the hand of the returning officer. The word "transmit" has always been construed as being equivalent to lodge: see *Aspinall* v. *Sutton*, [1894] 2 Q. B. 349. That case turned on the construction of 20 & 21 Vict. c. 42, s. 2, which provides that upon an appeal by way of case stated against a decision of justices, the appellant must, within three days after receiving the case, "transmit" it to the court, and it was there held that the case must be lodged in court within the three days. There is no reason why the word "transmit" in this Act should be construed differently. This construction does not involve any hardship, for if the return were sent off so that in ordinary course it would arrive within the prescribed time, but it happened to be delayed by some accident, the party would be entitled to relief under section 34. (They also cited in this point *Hurdle* v. *Waring*, 22 W. R. 735, L. R. 9 C. P. 435.) Secondly, the defendant failed to comply with the Act because the return sent, being incomplete, was not a "true return" within section 33, sub-section 1, and the plaintiff is therefore entitled to the full amount of the penalties claimed.

June 23.—The judgment of the Court (A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.) was read by

A. L. SMITH, L.J.—This is an action by the plaintiff, as a common informer, to recover from the sitting member for the county of Caithness penalties amounting to the sum of £4,900, for having sat and voted in the House of Commons as member for that county forty-nine times without, as it is alleged, having made a return of his election expenses, pursuant to section 33 of the Corrupt and Illegal Practices Prevention Act, 1883. My brother Kennedy has held that the defendant is liable for one penalty of £100—that is, for voting upon the 28th of August, 1895, and the defendant appeals against this judgment of the learned judge. The plaintiff appeals against the learned judge for having held that the plaintiff was not entitled to forty-eight other penalties of £100 each, amounting to the sum of £4,800, for having voted after the return reached the returning officer upon the 29th of August, 1894. The facts are extremely short. Upon the 23rd of July, 1895, the defendant, Dr. Clark, was declared elected to represent the county of Caithness in the House of Commons. At midnight of the 27th of August, 1895, the thirty-five days within which Dr. Clark, who was his own election agent, had to make (I use here advisedly a neutral word) his return of election expenses to the returning officer expired. Before midnight of that day—viz., at 10.45 p.m. upon the 27th of August, 1895, Dr. Clark in London posted his return to the returning officer, who was resident at Wick, in Caithness. Upon the next day (the 28th of August, 1895) Dr. Clark sat and voted in the House of Commons, and also upon forty-eight occasions subsequent to the receipt of the return by the returning officer, which reached him upon the 29th of August, 1895. The question is, in these circumstances, has Dr. Clark become liable to any, and what, penalties under the Act of 1883? This depends, first of all, upon what in section 33 of the Act is the meaning of the words "transmit to the returning officer." Sub-section 1 of that section runs thus: "Within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning

officer a true return (in this Act referred to as a return respecting election expenses)"; and by sub-section 5 the candidate is liable to a penalty of £100 for each day he votes without having done so. It is said on behalf of the plaintiff that the words "transmit to the returning officer" mean not only that the return shall be sent off to the returning officer within the thirty-five days, but that it shall actually be delivered to or lodged with him within that period. It will be observed that the section says nothing about delivery to or lodgment of the return with the returning officer within the thirty-five days. This is remarkable, for if lodgment with the returning officer is what the Legislature was aiming at, why has it not said so in distinct terms? All the section enacts is, that the agent shall within the prescribed period transmit the return to the returning officer. This is what the agent has to do from where he happens to be, and I can find no obligation cast by this section upon the agent to go, as in the present case, from London to the other end of the United Kingdom to ascertain whether the returning officer has received the return; nor in the Act is there to be found any obligation upon the returning officer to forward to the agent an acknowledgment of the receipt of the return. The word "transmit" in this section in my judgment means the same thing as the word "send" or "remit," and, for reasons I will presently give, it does not mean "lodge," as the plaintiff contends. The plaintiff's construction of the word "transmit" brings about the extraordinary result that, if the return is sent off, say, a week before the expiration of the thirty-five days, and in ample time to reach its destination within the thirty-five days, yet the candidate is guilty of an illegal practice (see section 33, sub-section 6) if the return happens to perish upon its way and does not reach the returning officer within the prescribed time and the member votes, unless he can obtain an "authorized excuse." It is said by the plaintiff that section 33, sub-section 6, makes the non-lodgment of the return within the thirty-five days an illegal practice only if the candidate does not get an "authorized excuse" as provided by that section, and if the return perished upon the way through no fault of the candidate he could always obtain such an excuse. Is this correct? We must look to section 34 of the Act to see in what cases the court can make an order allowing an "authorized excuse." Now, it appears to me strange that the statute should make the failure to transmit the return within the thirty-five days within the meaning of the section an illegal practice dependent upon whether an "authorized excuse" for not doing so can be obtained or not. But in respect of what can an "authorized excuse" be obtained? Section 34 is explicit upon the point. It enacts by sub-section 1 (*a*) that "if the candidate . . . shews that the failure to transmit such return . . . has arisen by reason of his illness . . . or misconduct of his election agent or sub-agent, or of any clerk or officer of such agent, or by reason of inadvertence, or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant," the court may grant an "authorized excuse." Take the case of the return being destroyed whilst in transit to the returning officer, say, in an accident like the Abergele railway accident or the Tay Bridge accident, under what head of "authorized excuse" in this section does this come? It seems to me under none, and if this be so it is cogent, if not conclusive, to show that the plaintiff's reading of the word "transmit" is erroneous, for if it means lodgment of the return with the returning officer within the thirty-five days, and not the sending off of the return within that time, there would surely have been an "authorized excuse" obtainable under section 34 for what might happen to the return during its transit to the returning officer, so that if it arrived with that officer outside the thirty-five days by reason of circumstances beyond the control of the candidate, he might be able to obtain the "authorized excuse" provided for by the section; for it must be admitted that under section 33, sub-section 6, without obtaining an "authorized excuse," the candidate in such circumstances would be guilty of an illegal practice, and liable to the consequences thereof. It is said that the words in section 34, sub-section 1 (*a*), "by reason of inadvertence," cover the case of the return perishing during transit; but this, in my judgment, is not the meaning of those words, for they mean the overlooking or forgetting of something, and not accidents which may happen to the return itself after it is sent off, and whilst on its way to the returning officer. It also appears to me that such a loss of the return is not covered by the words "any reasonable cause of a like nature" in the section, for the perishing of the return is not of a like nature to the other matters mentioned in the section. In my judgment the "authorized excuses" in section 34 do not cover the case of a return perishing during transit. By section 23 of the Act power is given to the court, irrespective of granting an "authorized excuse," to except innocent acts from being illegal practices, and under this the candidates may obtain relief; but this in no way affects the question, What are the acts for which "authorized excuses" are to be given under section 34, sub-section 1 (*a*), so as to cause the non-sending of the return within the prescribed period not to be an illegal practice within section 33, sub-section 6? I do not myself think that the cases cited—viz., *Pennell* v. *The Churchwardens of Uxbridge* and *Banks* v. *Goodwin* and others—throw any real light upon what is the meaning of the word "transmit" in section 33 of the Corrupt and Illegal Practices Prevention Act, 1883, and if I were to refer to cases I would cite the case of *Comber* v. *Leyland*, recently decided, but not yet reported, by the House of Lords upon the word "remit," in the contract in that case. The word "transmit" may well have a different meaning in different statutes and in different contracts. For the reasons above, I cannot agree with my brother Kennedy in thinking that the word "transmit" in this section means "lodge," and, in my opinion, Dr. Clark did not violate section 33, sub-section 1, when he voted upon the 28th of August, 1895, having sent off his return to the returning officer at 10.45 p.m. upon the day before—viz., the 27th of August, 1895.

Another point was taken by the learned counsel for the plaintiff, which has only to be stated to show that it is utterly untenable. It is this—that a return with an error in it is no return at all; that although an agent of the candidate has sent off to the returning officer the return of the candidate's election expenses within the thirty-five days, and such return has reached the returning officer within that period, yet if it be subsequently discovered that an expense, say, of 2s., which should have been returned, has by error been omitted, nevertheless, if the sitting member in utter ignorance of this omission, has voted, say, ten, twenty, or even a hundred times in the House of Commons, he is liable to a penalty of £100 upon each day upon which he votes. This notion is to me preposterous. I entirely agree with what my brother Kennedy has held as to this. It is said that section 33, sub-section 1, enacts that the return to be made within the thirty-five days is to be a true return,

and that a return with a blunder in it is therefore no return at all within the Act. But section 34, sub-section 1, shows clearly that this is not so, for by it the court may grant an authorized excuse for the failure to "transmit such return," and also for "any error . . . in such return," which shows to demonstration that a return with errors in it is still a return within the Act. For the errors which did exist in the return sent in by Dr. Clark he has obtained "authorized excuses" in the court in Scotland, excepting as to a sum of £2 9s., which was overlooked when "authorized excuses" were applied for and obtained. We have nothing to do with any proceedings which may be taken as regards the £2 9s. item, for it in no way affects the claim of the plaintiff for penalties against Dr. Clark having voted either before or after the return with the omission in it reached the returning officer. For the reasons above I think that Dr. Clark has not brought himself within the meshes of the Act so far as to be liable to penalties for having voted without having made a return within the Act, and that the appeal of Dr. Clark, the defendant, succeeds, and should be allowed with costs here and below, and that the appeal of the plaintiff fails, and should be dismissed with costs.

Appeal allowed; cross-appeal dismissed.

Solicitors for the plaintiff, *Leggatt, Rubinstein, & Co.*

From Q. B. Div. (Chitty and Collins, L.JJ.) June 15, 1898.

MONTGOMERY & Co. *v.* DE BULNES. (*a.*)

Practice—Execution—High Court judgment—County court—Payment by instalments—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

A creditor who has obtained a judgment in the High Court, and afterwards obtained from the county court judge an order for payment of the debt by instalments, cannot put in motion the High Court procedure and issue execution without going to the county court judge and getting the order made by him discharged.

Jones *v.* Jenner, 4 *W. R.* 651, 25 *L. J. Ex.* 319, *approved.*

In re Ives, Ex parte Addington, 34 *W. R.* 593, 16 *Q. B. D.* 665, *overruled.*

Appeal of the plaintiffs from Darling, J. (at chambers).

The plaintiffs brought their action in 1897 and obtained judgment for £400, of which £45 4s. 9d. remained due on the 2nd of March, 1898. A second action was subsequently brought for £91 11s. 3d. No appearance had been entered in either action.

On the 2nd of March judgment was signed in the first action for £50 4s. 9d., and in the second action for £96 11s. 3d., £5 in each case being added on to the debt for costs. The plaintiffs applied by way of judgment summonses in both actions to the county court for an order for payment by instalments of both judgment debts.

The summonses came on for hearing on the 3rd of May. The evidence as to what happened on that occasion was conflicting, and the Court of Appeal considered that orders were made on each summons for payment by instalments of 30s. a month.

On the hearing it transpired that the defendant owned some furniture, and on the 3rd of May, the same day, two writs of *fi. fa.* were issued, one on each judgment.

On the 6th of May the plaintiffs withdrew the execution on the first judgment.

On the 11th of May the defendant took out a summons before the district registrar to set aside the execution on the second judgment. The registrar referred the matter to the judge, who set aside the execution and ordered the plaintiffs to pay all the costs.

The plaintiffs appealed.

T. Willes Chitty, for the appellants.—The point is, whether the fact that a judgment creditor has applied to the county court for an order for payment by the debtor by instalments prevents him from issuing a writ of *fi. fa.* in the High Court. There is no authority to the effect that a man may not pursue all his remedies at the same time. Imprisonment under section 5 of the Debtors Act, 1869, does not deprive the creditor of his right to issue execution against the goods of the debtor, and consequently an order for payment by instalments may be followed by execution instead of imprisonment. The *dictum* of Cave, J., in *In re Ives, Ex parte Addington*, 34 W. R. 593, 16 Q. B. D. 665, that an order of the High Court to pay by instalments does not take away the right to levy execution, covers my case. No order for payment by instalments has been made here. It has simply been postponed. *Jones* v. *Jenner*, 4 W. R. 651, 25 L. J. Ex. 319, does not apply, because that case was decided in 1856, before the Debtors Act, 1869.

A. D. Bateson, for the respondent.—*In re Ives* is in direct conflict with *Jones* v. *Jenner*. It would be a great hardship on the debtor that he might be imprisoned on a committal order and that the creditor might also issue execution. The county court judge offered an order of 30s. on each summons, or £3 on the one, and no order on the other. The plaintiffs are now trying to go behind that offer, and it is a breach of faith to the judge. The county court judge has in effect altered the judgment of the High Court. He has postponed the judgment for six months, and that being so, execution cannot be issued. This case is absolutely within the principle of *Jones* v. *Jenner*. I submit that there is ample power to stay execution in a proper case, and this is one. Further, the plaintiffs having elected to go to the county court cannot now go back to the High Court.

Chitty, in reply.—There is no question of discretion here. The plaintiffs may or may not issue a writ of *fi. fa.* The county court judge has not made any order. He has merely adjourned the application. An order varying the terms of the judgment means an order for payment by instalments, and that has not been made here.

CHITTY, L.J., referred to the facts, and continued: The question is whether it is competent in point of law for the plaintiffs, who have voluntarily gone to the county court judge, and put in motion section 5 of the Debtors Act, 1869, to afterwards levy execution on the judgment in the High Court without at any rate going to the county court judge and getting the order made by him discharged. I think that the Act means that if a person goes to the county court and accepts from the county court judge an order there for payment by instalments, he thereby consents to have the order of the High Court modified to the extent of that order. That the county court judge has that power is unquestionable. He can direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order. That is the language of

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

section 5. It seems to me that so long as the county court judge's order stands there is a modification of the order of the High Court, and it would, to my mind, involve a great injustice to a defendant if it were not so. He is told that he is to pay by instalments, and the instalments in such a case are generally small. In this case the plaintiffs did not see their way to obtaining execution, and they thought that this was the best way of getting their money, and the defendant has loyally and faithfully obeyed the order since it was made, and has paid his instalments up to the present. A man in such a position exerts himself in order to get the money together for the purpose of complying with the order. He does so under stress of liability to imprisonment if he makes default; but I think he would be likely to be misled, and it would put him in a hard position if he were told that he was still liable, in spite of that, to pay the whole debt, and that what goods he had could be taken in execution. It has been put forward as a ground for this application that the plaintiffs have discovered that the defendant had some furniture, but that fact was known at the time when they obtained the order of the county court judge, and they nevertheless took the order. The result is that they are not entitled so long as that order stands to levy execution, and as regards the adjournment of the second summons, I think that is part of the order which the county court judge made on both summonses. He said that the defendant was to pay 30s. instalments on the two summonses or £3 on the one, and in the latter event he would adjourn the second summons. For what purpose? To see whether the defendant does or does not loyally comply with the order.

Then it is pointed out that under section 5 of the Act of 1869 imprisonment shall not operate as a satisfaction of a debt, and that the Act is silent as to the operation of an order for payment by instalments. There is, it is true, nothing in the Act about it, but it appears to me that the reasonable construction of the Act is as I have stated. Now, how stand the authorities? There is the case in the Court of Exchequer in 1856, long before the Act of 1869 was passed—viz., *Jones* v. *Jenner*. There it was held that after proceeding in a county court upon a judgment in the High Court, the plaintiff could not issue execution in the High Court—as Pollock, C.B., said, "if a plaintiff elects to enforce his judgment in the inferior court, there he must remain." The actual decision was that the plaintiff could not obtain a garnishee order. The report is, no doubt, short, and the reasons given by the different judges are not quite the same, but all come to the same conclusion, that the plaintiff should not take his garnishee order, and the Chief Baron said that a writ of *fieri facias* on the judgment could not then be issued in that court. That case was before 1869, but the principle applies, as the application to the county court there was founded on a plaint issued in the county court upon the judgment in the High Court. Now, having regard to the Act of 1869, it is not necessary to do that, but the application can be made direct to the county court judge himself. The reasoning of what the Chief Baron said applies to the present case. Against that, there is what Cave, J., said in *In re Ives, Ex parte Addington*. I have attended to that as I should to anything that fell from that learned judge, but it seems to me that he has not taken the right view. He has taken a view that is contrary to that taken by the Court of Exchequer in *Jones* v. *Jenner*, and it seems to me that the more reasonable view was that adopted by that court. Cave, J.'s, observations were addressed to the Act of 1869, but they have no special force, in my opinion, beyond this, that they are to be treated with respect, as *dicta*. The decision in *Jones* v. *Jenner* was not cited to Cave, J. If he had been aware of that case he possibly would not have said what he did. I think it is not necessary to travel into the somewhat entangled questions which have been raised under rule 26 of order 25 of the County Court Rules. I think we ought to dismiss this appeal.

COLLINS, L.J.—I do not think it is necessary to add anything to the reasons which have been so fully stated by the Lord Justice, and with which I agree.

Appeal dismissed.

Solicitors, *Pritchard, Englefield, & Co.; Field, Roscoe, & Co.*

High Court of Justice.

Chan. Div. Stirling, J. — June 9, 14; August 3, 1898.

In re ARBITRATION.

BARING-GOULD *v.* SHARKINGTON COMBINED PICK, &c., (LIMITED), AND THE ARBITRATION ACT, 1889. (*a*.)

Company—Winding up—Purchase of undertaking—Dissentient shareholder — Arbitration — Award of umpire—Validity of award—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *first schedule* (*c*), (*d*)—*Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 161, 162.

The articles of association of a company constitute an agreement between the shareholders inter se, *and not between an individual shareholder and the company, and consequently are not an agreement within section* 162 *of the Companies Act,* 1862, *so as to exclude the right of the shareholder to resort to arbitration.*

The words "being called on to act" in clause (*c*) *of the first schedule to the Arbitration Act,* 1889, *do not mean calling on the arbitrators to do some specific thing connected with the arbitration, but to enter on the specific business of the arbitration. Consequently, where notice was served on arbitrators calling on them to appoint an umpire, and their award was not made till more than three months after the receipt of such notice,*

Held, that the power of the arbitrators had not expired by effluxion of time, and that the jurisdiction of the umpire had not yet arisen.

This was a summons in the action to enforce an award made under the following circumstances:

Article 128 of the articles of association of the defendant company provided that if a sale or arrangement should be made under the Companies Act, 1862, s. 161, the purchase-money to be paid for the interest of a dissentient member should be such sum of money as the liquidator could obtain by selling the shares, stock, or other property to which the dissentient member would have been entitled on the completion of the sale or arrangement had he not expressed his dissent.

In the autumn of 1897 a scheme was brought forward for the reconstruction of the company, and resolutions were passed for a voluntary winding-up. On the 9th of September the plaintiff dissented from these resolutions.

On the 15th of October the liquidator entered into an agreement for the sale of the assets of the old company to a new company. The price was to be 24,900 fully-paid shares of the new company, which were to be applied for by the shareholders of the old company.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

On the 13th of November the plaintiff brought this action to restrain the liquidator parting with the assets or undertaking of the old company without providing for his interest under section 161. The matter was referred to arbitration, but the company accepted the arbitration under protest. An umpire was appointed in the arbitration, and he, on the 30th of April, 1898, awarded the plaintiff £100 for his interest in the company. The plaintiff then took out this summons, which was adjourned into court to enable the defendants to raise the question of the validity of the award.

Buckley, Q.C., and *Gore Browne*, for the summons.

Mattinson, Q.C., and *Beddall, contra.*

The arguments used and cases cited are fully dealt with in the judgment.

Aug. 3.—STIRLING, J., stated the facts, and continued: Two objections have been taken to the award. First, it is said that the event on which arbitration is to take place under section 162 of the Act of 1862 has not happened; secondly, that the event which gives the umpire jurisdiction has not happened. Section 162 provides thus: [His lordship read the section, and continued:] Now, on behalf of the company and the liquidator it is contended that article 128 constitutes an agreement within the meaning of this section, and that the right to resort to arbitration is thereby excluded. In opposition to this view various arguments have been urged. First, it is said that the agreement under section 162 must be between the disputing parties; and it is said that these are the dissenting shareholder on the one hand and the liquidator on the other. I am not satisfied that this is so, and that these are the disputing parties. The language of section 162 and the decision in *De Rosaz* v. *Anglo-Italian Bank*, 17 W. R. 724, 4 Q. B. 462, seems to show that the disputing parties must be the shareholder and the company. Then arises this objection: it is said that the articles of association do not constitute an agreement between the shareholder and the company, but between the shareholders *inter se*; and in support of this view two cases are relied on. The first is *Eley* v. *The Positive Government Security Life Assurance Co. (Limited)*, 24 W. R. 252 and 338, 1 Ex. Div. 20 and 88. There the articles contained a clause that the plaintiff Eley should be solicitor to the company, and he acted as solicitor for a time, but ultimately they ceased to employ him. The plaintiff brought an action against the company for breach of contract in not employing him as solicitor in the terms of the articles, and it was held that the articles of association were a matter between the shareholders *inter se* or the shareholders and directors, and did not create any contract between the plaintiff and the company. In that case Eley does not appear to have been a shareholder—at least an original shareholder—in the company, but in *Browne* v. *La Trinidad*, 36 W. R. 289, 37 Ch. D. 1, a case arose in which the articles of association provided that the directors should adopt and carry into effect with or without modification an agreement which had been entered into before the formation of the company between the plaintiff and a person as trustee for the intended company, by which it was stipulated that the plaintiff should be a director, become a shareholder of the company, and should not be removable till after 1888. It was held that, treating the agreement as embodied in the articles, still there was no contract between the plaintiff and the company, the articles being only a contract between the members *inter se* and not between the company and the plaintiff. The material passages in the judgment of the Court of Appeal are to be found on p. 13 of 37 Ch. D. [His lordship read the judgment of Cotton, L.J., on that page and also the judgment of the present Master of the Rolls down to the words "It appears to me upon the materials before us that he has no contract with the company."] It seems to me that, having regard to that decision, I cannot treat this as a contract between the dissentient shareholder and the company, and I think that this point is well founded. The third point which is raised is this, that article 128 does not apply to this case, and I think that that point is also well founded. Article 128 only applies to a case where a dissentient shareholder would have been entitled to "shares, stock, or other property" upon the completion of the arrangement if he had not expressed his dissent. Here, under the agreement of the 15th of October, 1897, a shareholder who did not express his dissent would be entitled only to a sum of money, he would not be entitled to shares and stock unless he did something more, unless, for example, he made an application for allotment. I think, therefore, that the first objection to the award raised on behalf of the company and the liquidator fails.

Then it is said that the award is bad because the umpire had no jurisdiction. The jurisdiction of the umpire only arises if the arbitrators declare in writing that they cannot agree or the power of the arbitrators has expired by effluxion of time. It is admitted that the former event has not occurred, but the question is whether the latter event has occurred. This turns on the provisions of the first schedule of the Arbitration Act, 1879, clause (*c*). [His lordship read the clause, and continued:] Now, it is not contended that they failed to make their award within three months after entering on the reference or any extension of time, but it is said that they failed to make their award within three months "after being called on to act by notice in writing," and that is made out in this way. It is said that on the 11th of January, 1898, notice was served on the arbitrators to appoint an umpire. The three months expired on the 11th of April and the award was made on the 30th of April, within a month of the latter date. The question turns on this, whether notice to appoint an umpire is a notice calling on the arbitrator to act within the clause. I have found on this point no judicial decision, but the meaning of "entering on the reference" was considered in *Baker* v. *Stephens*, 15 W. R. 902, L. R. 2 Q. B. 523, where it was held that it meant not merely making an appointment to hear the parties, but actually beginning to hear them, and that an award was made in time if within the time, reckoning not from when the arbitrator accepted the office, but from when he entered into the matter of the reference either with both parties before him or a peremptory appointment enabling him to proceed *ex parte*. I will read a few words from the judgment of Blackburn, J. He first says he does not think entering on the reference means accepting the office of arbitrator. Then he says: [His lordship read the judgment from the words "It is plain, as it seems to me, that entering upon the reference means something else than merely accepting the office," to "And on the whole I think the latter is the true construction of the section," and continued:] That case does not govern the present one, but it throws some light on the meaning of the section. It seems to me that the words "being called on to act" do not mean calling on the arbitrators to do some specific thing connected with the arbitration, but to enter on the substantial business of the arbitration. I think, therefore, the objection is well founded, and that the jurisdiction of the umpire does not arise.

Solicitors, *Seal; Booth & Smee.*

Chan. Div. } April 26; May 24, 1898.
Stirling, J. }

In re PRINCE.
GODWIN *v.* PRINCE. (*a.*)

Administration—Testamentary expenses—Probate costs—Costs of unsuccessfully opposing probate.

By his will, a testator charged his residuary real and personal estate with the payment of his debts and funeral and testamentary expenses. His personal estate was insufficient for the payment of his debts. An action was brought in the Probate Division by a person claiming to revoke the probate of the will, and to have an earlier will established; but that action was dismissed, and the costs of all parties were directed by the Probate Division to be paid out of the testator's estate.

Held, that the plaintiff's costs of such action were not testamentary expenses within the meaning of the provision in the will, and that they were therefore not payable out of the testator's real estate.

This was a summons taken out by the executors of the will of John Prince, deceased, for directions whether, the personal estate of the testator being insufficient for the payment of his debts, the plaintiffs might be at liberty to raise by mortgage or sale of the testator's real estate a sum sufficient to pay the costs of all parties to an action *Prince* v. *Godwin* lately pending in the Probate Division directed to be paid out of the testator's estate by an order of the Probate Division.

By his will dated the 1st of April, 1895, the said John Prince devised and bequeathed the residue of his real and personal estate, subject to the payment of his just debts and funeral and testamentary expenses, to his children, and he thereby authorized and empowered his executors to raise by mortgage of his real estate any sum which might be necessary for the purposes of his estate and for the payment of legacies.

The testator died on the 29th of May, 1896, and on the 19th of November, 1896, his will was proved in common form by the executors.

On the 13th of January, 1897, the testator's widow commenced the said action of *Prince* v. *Godwin* in the Probate Division, impeaching the validity of the testator's said will on various grounds, and she claimed that the court should revoke the grant of probate of that will and should decree probate of a previous will dated the 10th of June, 1891. The executors, the defendants to that suit, denied her allegations, and claimed that the court should pronounce against the will set up by the plaintiff and decree probate in solemn form of the said will of the 1st of April, 1895. The said action was heard on the 19th, 20th, and 22nd of November, 1897, and in the result the judge pronounced in favour of the will of 1895 and ordered the costs of all parties to be paid out of the testator's estate.

The present summons was subsequently taken out by the executors, and upon it the question arose whether the costs in *Godwin* v. *Prince* of the testator's widow were payable out of the real estate of the testator.

Romer, for the executors.

Martelli, for the residuary devisees.—The Probate Court had not jurisdiction to order payment of costs out of real estate: *Young* v. *Dendy*, L. R. 1 P. & E. 344, 15 W. R. Pro. Dig. 20; *Charter v. Charter*, 24 W.R. 874, 3 Ch. D. 218; *In re Price*, 34 W. R. 291, 31 Ch. D. 485; *In re Shaw*, 43 W. R. 159, [1894] 3 Ch. 615; Williams on Executors, 9th ed., p. 311.

E. P. Hewitt, for the widow.—Testamentary expenses are by the will charged on the real estate, therefore these costs, being testamentary expenses, are payable out of the real estate. *In re Price* does not touch this case, as there the question was as to specifically devised real estate. Costs of opposing probate were held to be testamentary expenses in *Brown* v. *Burdett*, 31 W. R. 854.

Martelli, in reply, referred to *Sharp* v. *Lush*, 27 W.R. 528, 10 Ch. D. 468; *Patching* v. *Barnett*, 45 L. T. Rep. 292, 30 W. R. Dig. 54.

STIRLING, J., stated the facts, and said: It is admitted, and upon the authorities it is quite clear, that the order of the Probate Division of the 22nd of November, 1897, affected only the personal estate of the testator. The question is whether the costs of the plaintiff in the probate action can be paid out of the real estate as testamentary expenses. Now, this court has not drawn a very narrow line as regards the meaning of "testamentary expenses," and I have no wish to do anything to narrow the definition which that expression has received in this court. It has been held that where an action has been properly brought by an executor or administrator for the administration of the personal estate, and the proper parties appear, the costs of both plaintiff and defendants are, as a general rule, testamentary expenses within the meaning of such a will as this. Moreover, it is not necessary that the action should have been brought by the executor. The same rule applies if one of the persons beneficially entitled comes here as plaintiff and asks the court that directions may be given to the executors for the proper administration of the estate. Although I have not been referred to any case which defines the meaning of testamentary expenses as regards an action in the Probate Court, I should be sorry to lay down any very narrow definition with regard to it. For example, if there were an action properly brought by the executors for the probate of the will in solemn form, in which it was necessary to summon various parties who might be interested in disputing the validity of the will, and if those parties appeared and contented themselves with simply cross-examining the plaintiff's witnesses, or with producing such further evidence as might in the judgment of the court be necessary in order to enable the court to arrive at a proper determination whether the will ought to be proved or not, I should be unwilling to say, if the Court of Probate said that these were proper costs to be paid out of the personal estate, that they were not, or might not be, also testamentary expenses within the meaning of such a will as this. Again, even if the proceedings were not taken by the executors, but by some other person interested in upholding the will, and that was considered by the Court of Probate to be a reasonable course for establishing the will, I should be unwilling to hold, simply on the ground that the action had not been brought by the executors, that the plaintiff would be excluded from a benefit in the will charging testamentary expenses upon real estate.

But here the plaintiff in the action came challenging the will. It was not a mere mode of getting the decision of the court upon the validity of the will by requiring the will to be proved in solemn form, but, as I have ascertained from the learned judge who tried the case, there was a serious contest raised by this lady as to the validity of the will.

That the costs of the executors in the probate action were testamentary expenses appears to me to be

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

beyond controversy—they were costs properly incurred in upholding the will.

The costs of the plaintiff, on the other hand, or the bulk of them—and they are very considerable—were incurred in contesting the will, in asserting that it was a will which ought not to be recognized as the will of the testator; and it does not appear to me, however wide the definition may be, that those costs ought to be regarded as testamentary expenses.

Solicitors, *Morten, Cutler, & Co.*, for *Challinors & Shaw*, Leek; *Preston, Stow, & Preston*, for *Tomkins*, Leek.

Chan. Div. }
Kekewich, J. } June 22, 1898.

HOPKINS AND ANOTHER *v.* HEMSWORTH AND ANOTHER. (*a.*)

Mortgage — Real estate — Equitable sub-mortgage by deposit—Priority—Notice—Equitable sub-mortgagees of land.

An equitable sub-mortgage by deposit of the original mortgage deeds of real estate confers on the equitable sub-mortgagees an interest in the land mortgaged, and, consequently, the doctrine of obtaining priority by the giving of prior notice, does not apply in such case.

In re Richards, Humber *v.* Richards, 39 *W. R.* 186, 45 *Ch. D.* 589, *considered and followed.*

By an indenture of settlement dated the 11th of December, 1861, being the settlement made on the marriage of Augustin and Mary Hannah Williams, certain property was conveyed to William Taylor and John Severn Walker to be held by them upon trust for Mary Hannah Williams and Augustin Williams and their children as therein mentioned.

William Taylor died on the 20th of August, 1874, and John Severn Walker died on the 11th of June, 1875, having by his will appointed his widow Ellen Barber Walker and the plaintiffs William Jeffery Hopkins and George Truefitt his executors.

On the 8th of December, 1875, a sum of £500, part of the trust property, was paid off and was in the hands of R. C. H., solicitor to the trust.

Pending the intended appointment of new trustees and a permanent investment of the £500, Mrs. E. B. Walker and the plaintiffs agreed that R. C. H. should retain the £500 and should give security for the repayment thereof with interest at 5 per cent. per annum by deposit with them of certain mortgage securities, dated the 25th and 26th of October, 1875, belonging to him and of the documents of title relating to the property comprised therein. On the 8th of December, 1875, R. C. H. accordingly deposited with Mrs. E. B. Walker and the plaintiffs a memorandum of deposit and the deeds and documents therein specified. The memorandum was to the following effect: "I have this day deposited with Mrs. Ellen Barber Walker and Messrs. William Jeffery Hopkins and George Truefitt, the devisees in trust and executors of the will of the late John Severn Walker, Esq., deceased, who was the surviving trustee of the settlement made on the marriage of Rev. Augustin Williams and Mary Hannah his wife, the above deeds and writings as a security for the sum of £500 lately out on mortgage of property in Worcester recently sold when such mortgage was paid off, and which sum of £500 remains in my hands pending the appointment of new trustees of the said settlement to be proceeded with forthwith. And I undertake at any time when called upon to repay the said sum of £500 with interest thereon at 5 per cent. per annum, and hereby indemnify the said Ellen Barber Walker, William Jeffery Hopkins, and George Truefitt from all liability in case any loss or deficiency should arise in respect of the investment of the said sum of £500 as above. Signed, R. C. H."

Mrs. E. B. Walker died on the 2nd of October, 1890.

On the 29th of July, 1891, R. C. H. sent to Messrs. Hughes & Brown, the plaintiffs' solicitors, a draft appointment of a new trustee of the settlement for approval. The draft purported to be an appointment by Augustin Williams and Mary Hannah Williams of Henry Lucy Sowdon to be a trustee of the settlement in place of John Severn Walker. R. C. H. at the same time represented to the plaintiffs through their solicitors, Messrs. Hughes & Brown, that he was authorized to act as solicitor for Henry Lucy Sowdon, and that Sowdon had agreed and consented to accept and act in the trusts of the settlement.

In June, 1892, the deed of appointment and a transfer of the trust securities to Henry Lucy Sowdon were executed, and on the 10th of June, 1892, the plaintiffs delivered the deeds and documents specified in the memorandum of the 8th of December, 1875, to R. C. H. as solicitor to Henry Lucy Sowdon.

As a matter of fact Sowdon had neither given authority to R. C. H. to act as his solicitor, nor had he agreed and consented to accept and act in the trusts of the settlement; and he disclaimed the trusts of the settlement and the assurances vesting the property in him.

On the 24th of September, 1892, R. C. H. deposited with the defendant Harry Raines Hemsworth the deeds and documents specified in the memorandum of deposit of the 8th of December, 1875, as an equitable security for a loan to him of £128 18s. 1d.

On the 5th of October, 1894, John Wootton, the original mortgagor, under the mortgages of the 25th and 26th of October, 1875, died, and on the 20th of March, 1895, H. R. Hemsworth gave notice to the executors of Wootton's will of the deposit with him of the 24th of September, 1892, the plaintiffs not having at that time given notice of the memorandum and deposit of the 8th of December, 1875.

On the 12th of May, 1896, R. C. H. being insolvent executed an assignment of all his property to Hubert Aloysius Leicester upon trust for the benefit of his creditors.

In November, 1897, the plaintiffs brought this action against Hemsworth and Leicester, claiming that it might be declared that they were entitled to first charge upon the mortgages of the 25th and 26th of October, 1875, and on the documents of title relating to the property comprised therein, and on the moneys secured by the said mortgages in priority to any claim by the defendant, to secure the sum of £500 lent by them to R. C. H. and interest thereon at 5 per cent. per annum. That an account might be taken of what was due to them in respect of the said charge, and that the said charge might be enforced by foreclosure on sale. That the defendant Hemsworth might be ordered to deliver up to them the deeds and documents of title in his possession relating to the said mortgage security.

The defendant Leicester disclaimed any interest in the property.

The defendant Hemsworth in his defence stated the fact of John Wootton's death, and that he had given notice to John Wootton's executors of the memorandum and the deposit of the 24th of September, 1892. He further alleged that the plaintiffs were guilty of gross and wilful negligence and breach of trust in handing the deeds in litigation to R. C. H.,

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

also that the appointment of Sowdon as sole trustee of the settlement would, if carried out, have been improper and a breach of trust, as not being within the power for the appointment of new trustees contained in the settlement, and that the plaintiffs had made no inquiry as to Sowdon being willing to act as trustee, or as to his having given authority to R. C. H. to act as his solicitor. By way of counterclaim the defendant Hemsworth claimed a declaration that he was entitled as against and in priority to the plaintiffs to the full benefit of the memorandum and deposit of the 24th of September, 1892, and the charge thereby professed and intended to be created.

Warrington, Q.C., and *S. Dickinson*, for the plaintiffs.—The question to be decided is as to priority between equitable sub-mortgagees by deposit of a legal mortgage of freeholds. The doctrine of obtaining priority by notice does not apply to a charge upon any interest in land: *In re Richards, Humber* v. *Richards*, 39 W. R. 186, 45 Ch. D. 589, and this is an interest in land and not a *chose in action* inasmuch as it is a debt secured by a mortgage of land.

Benshaw, Q.C., and *J. B. Matthews*, for the defendant Hemsworth. — In this case both the plaintiffs and the defendant are sub-mortgagees, having an equitable charge. The case of *In re Richards, Humber* v. *Richards*, is different to the present case. There the question was between an assignee of the mortgagee and a sub-mortgagee. Here the parties have each a charge, by equitable sub-mortgage, on the debt from the original mortgagor to the original mortgagee. An interest of this nature is a *chose in action*, and notice being necessary, whichever party gives notice first gains priority: *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, 3 Russ. 30; *In re Hughes' Trusts*, 12 W. R. 1025, 2 Hem. & M. 89; *Wigram* v. *Buckley*, 43 W. R. 147, [1894] 3 Ch. 483.

KEKEWICH, J., after dealing with the alleged negligence on the part of the plaintiffs, and holding that there had been no such negligence as would, on the authorities, postpone them to the defendant, proceeded:

There is a subordinate point, but one of some importance. It is said that notice was necessary to perfect the securities, and as the plaintiffs did not give notice, whereas the defendant did give notice to the executors of the original mortgagor, the defendant is entitled to stand before them.

The difference between equitable estates and interests in land on the one hand, and *choses in action* on the other, for this purpose has been recognized on both sides. The question is, to which class does a mortgage debt belong. In the case of *In re Richards, Humber* v. *Richards*, Stirling, J., reviews the authorities, and at p. 597 of 45 Ch. D., says: "So that from the time of Sir W. Grant down to that of Lord Hatherley, the rule with respect to mortgage debts has been, that as between the particular assignee and the assignee in bankruptcy the title of the particular assignee prevails, although no notice has been given to the mortgagor by the former."

The distinction suggested between that case and the present is that Stirling, J., was not considering the case of two independent dealings with one mortgage by way of sub-mortgage. It seems to me, however, that the principle laid down by Stirling, J., covers the case, and it would be mischievous to pare down his language in that way and say that it does not extend to such a case as the present one. It is true that no case exactly in point seems to have been discovered, but, in my opinion, the interest created by deposit of title-deeds is equally an interest in land for this purpose, whether it is created directly by an original mortgagor or derivatively through an intervening mortgagee by way of sub-mortgage; and the principle is, that whenever you are dealing with interests in land, the doctrine of obtaining priority by notice is inapplicable. There will be a declaration accordingly that the plaintiffs are entitled to a first charge on the indenture of mortgage and the documents of title relating to the mortgaged property, and on the moneys secured by the mortgage in priority to any claim by the defendant.

Solicitors, *Janson, Cobb, & Pearson*, for *Hughes & Brown*, Worcester; *A. Hunt*, for *R. A. Essex*, Worcester.

Chan. Div. }
Romer, J. } July 22; Aug. 11, 1898.

In re S. FROST & CO. (LIMITED). (*a.*)

Company — Shares — Issue of fully-paid shares — Registered contract—Sufficient statement of consideration—Property purchased described merely by reference to prior contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Where the contract registered under section 25 *of the Companies Act*, 1867, *on the issue of fully paid-up shares merely described (by way of recital of a prior contract entered into between the vendor and a trustee for the company) the property sold, as "certain leasehold messuages, shops, and premises, together with the goodwill of the several businesses carried on by the vendor upon the same, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses."*

Held, that the consideration for the issue of the shares was sufficiently stated.

In re Maynards (Limited), 46 *W. R.* 346, [1898] 1 *Ch.* 515, *not followed.*

Motion on behalf of shareholders in the above company that the register of the members of the company might be rectified by striking out therefrom the names of the respective applicants as the holders of shares respectively set opposite their names.

By an agreement dated the 7th of October, 1895, and made between Samuel Frost (thereinafter called the vendor) of the one part, and W. H. Chandler (thereinafter called the trustee) for and on behalf of the company thereinafter referred to, and which was about to be formed, of the other part. The vendor agreed to sell, and the company to purchase, the respective leasehold shops, mortgages, and premises mentioned in the schedule thereto, together with the goodwill of the several businesses carried on upon the premises, together with all machinery, plant, horses, vans carts, fixtures, and fittings used in connection with the several businesses. The consideration to be paid to the vendor for the sale was to be the sum of £20,000, payable as to one moiety thereof in cash and as to the remaining moiety in fully paid up shares of the company, and it was by the said agreement also provided that the proportions of the purchase-money payable in shares and cash respectively might be varied by substituting other classes or amounts of shares of the company, or a larger or less amount of cash and shares respectively, as the directors of the company and the vendor migh t thereafter mutually agree upon.

The company was duly incorporated on the 9th

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

of October, 1895, with a nominal capital of £100,000, divided into 100,000 shares of £1 each.

By another agreement dated the 21st of October, 1895, and made between the vendor of the first part, W. H. Chandler of the second part, and the company of the third part, the company adopted and confirmed the last-mentioned agreement, and it was provided that the purchase-money of £20,000 should be paid as follows: that is to say, by the allotment to the vendor, or as he should direct, of 15,689 fully paid up preference shares of £1 each, of 75 fully paid up founders' shares of £1 each, and by the payment to the vendor of £2,519 cash; and further, that before any of the fully paid up shares were issued a proper contract would be filed with the Registrar of Joint-Stock Companies.

By an agreement dated the 18th of November, 1895, and made between Samuel Frost of the one part and S. Frost & Co. (Limited), of the other part, after reciting that by an agreement dated the 7th of October, 1895 (being the agreement first above mentioned), it was agreed that the vendor should sell and the company should purchase certain leasehold messuages, shops, and premises, and that he should grant to the company and the company would accept the lease of certain other premises, and that the vendor should sell and the company should purchase all the goodwill of the several businesses carried on by the vendor upon the same respective premises, together with all the machinery, plant, horses, vans, and fixtures and fittings used in connection with the several businesses as therein mentioned, and after reciting the formation of the company and the agreement above-mentioned of the 21st of October, 1895, it was witnessed and agreed as follows: (1) The company shall forthwith cause this agreement to be filed with the Registrar of Joint-Stock Companies; (2) the company shall on or before the 30th of November, 1895, allot to the vendor or his nominees the shares mentioned in the agreement of the 21st of October, 1895; (3) the said shares shall be accepted by the vendor in full satisfaction of £17,481, being that portion of the purchase-money of £20,000 which under the hereinbefore-recited supplemental agreement of the 21st of October, 1895, was to be satisfied by the allotment of fully paid up shares.

The agreement of the 18th of November, 1895, did not contain any copy of the schedule to the agreement of the 7th of October, 1895, or any further reference to the property comprised therein, and it was duly filed with the Registrar of Joint-Stock Companies, on the 21st of November, 1895, and the shares therein mentioned were shortly afterwards issued to the vendor and to his nominees.

Doubts having been raised as to the sufficiency of the contract of the 18th of November, 1895, so registered as aforesaid to protect from liability the fully paid up shares issued to Samuel Frost and to his nominees thereunder having regard to section 25 of the Companies Act, 1867, this motion was made.

The evidence showed that the application was a *bonâ fide* one and that the company was in a prosperous and flourishing condition.

T. H. Carson, for the motion.—The question is whether the consideration for the sale of the shares is sufficiently stated in the contract of the 18th of November, 1895, filed under section 25 of the Companies Act, 1867. I submit it is not, and the case is governed by *In re Maynards (Limited)*, 46 W. R. 846, [1898] 1 Ch. 515, and I also rely on *In re Kharaskhoma Exploring and Prospecting Syndicate*, 46 W. R. 37, [1897] 2 Ch. 451.

Howard Spensly, jun., for the company.—In the contract of the 18th of November, 1895, the consideration for the issue of the shares is stated to be the sale of certain leasehold messuages, shops, and premises, and the goodwill and stock-in-trade, and that is sufficient particularity to constitute a proper contract.

Cur. adv. vult.

ROMER, J.—This case is one of considerable importance and will, I am glad to understand, be brought before the Court of Appeal. I need therefore only state briefly any reasons for holding that the motion fails.

I have the misfortune to differ from some of the views expressed by my brother Kekewich in the very similar case of *In re Maynards (Limited)*, but I note in that case the point arising was not fully argued, and under the circumstances I think I ought to act on my own judgment in the present case.

To comply with section 25 of the Companies Act, 1867, the contract filed must show on the face of it the consideration, for that is an essential part of the contract, and accordingly in *In re Kharaskhoma Exploring and Prospecting Syndicate*, on appeal, it was held that where the so-called filed contract, only referred to the consideration by stating it could be found in another document not filed, it would not comply with the section.

The question before me in this case is whether what is filed is a complete contract; or whether what is filed is not in itself a complete contract because (as is alleged) it does not sufficiently state on the face of it the consideration. If what is filed amounts in itself to a complete contract, including a proper statement of the consideration, then the section is complied with, and I know of no sufficient reason why the section should have a meaning or effect given to it beyond what is conveyed by the exact language used.

Now, fairly viewed, is the consideration stated on the face of the filed document in the case before me? I think it is. The document shows that the consideration was (stating it shortly) that the vendor had agreed by a previous contract therein mentioned (but not filed) to sell and lease to the company certain leasehold premises and to sell the goodwill of the business carried on by the vendor on those premises, together with the machinery and fittings used in connection with those businesses as therein mentioned. That is a short, but to my mind sufficient, statement of the consideration, and I do not think it was essential that the full particulars of the leaseholds, businesses, and plant should be detailed in the filed contract. Indeed if the other view be held I do not know what limit could be placed on the particulars required to be set forth. Would a full list of the machinery, plant, horses, vans, carts, fixtures, and fittings be required; or if not, why not? It is not as if under the section it was made essential that any person seeing the filed contract should be able from it alone to ascertain the exact value of the consideration as compared with the shares to be allotted or cash paid. I can see nothing in the section requiring such particularity in the statement of the consideration. As previously observed, all that the Act says so far as concerns the consideration, is that the registered document must be a contract—by which no doubt is meant a contract complete in itself—including the consideration. And I do not think that, apart from what can be gathered from the Act itself, the court should construe the section by speculations or considerations as to what reasons may or may not have induced the Legislature to pass the Act. This being so I do not see why it is required to state the consideration in the filed contract under section 25 with more particularity than would

be necessary, say, in stating it in writing in any agreement required by statute to be in writing. And it appears to me that a consideration stated with such particularity as that I am now considering would undoubtedly be held to be sufficiently stated, if in writing, to answer the requirements of any such statute as I have referred to; take, for example, section 4 of the Statute of Frauds, which covered guarantees before the Act 19 & 20 Vict. c. 97. Under that section certain agreements have to be in writing, signed by the party to be charged, and accordingly it has been held that the consideration must appear in writing: see *Wain* v. *Warlters*, 5 East 10, and *Saunders* v. *Wakefield*, 4 B. & Ald. 595. Could it possibly be held under that section that a statement in a signed written agreement that the consideration was the sale of certain goods and chattels which had been handed over was insufficient because the details of these goods and chattels had to be ascertained by parol evidence? I think not. And when I look at the judgments of the Lords Justices in the *Kharaskhoma case*, it appears to me that they carefully guarded themselves from its being supposed that they considered the statement of the consideration in the contract to be filed under section 25 of the Act of 1867, required such particularity as is insisted in the case now before me.

Lastly, I may add that if such a document as I am considering be held no contract within the meaning of section 25, section 25 will in my opinion prove to be a veritable trap. If the applicants before me are right and this company had been wound up before the applicants moved, the court must have held them liable to pay in full on their shares, and many persons are likely thereafter to be made liable because they or their advisers had interpreted the word "contract" in section 25 in what appears to me in a fair and reasonable way.

Solicitors, *Edmonds & Rutherford.*

Chan. Div. }
Romer, J. } July 6, 7; Aug. 6, 1898.

COWEN v. TRUEFITT (LIMITED). (a.)

Landlord and tenant — Lease — Construction — Falsa demonstratio.

Where there is a sufficient description set forth of premises, a false demonstration may be rejected.

The defendants, who were the occupiers and owners for a term of years of two houses, Nos. 13 *and* 14, *Old Bond-street, by underlease demised to the plaintiff rooms on the second floor of Nos.* 13 *and* 14, "*together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages of No.* 13 *to and from the demised rooms.*" *There was a staircase in No.* 14 *leading to and from the said rooms, and not in No.* 13, *and no other way to which the above grant could apply. There was, however, a lift in No.* 13, *the use of which by the plaintiff was provided for by the deed.*

Held, that, the above grant containing a grant of a right of way over the staircase and passages leading to and from the demised rooms, the way granted was sufficiently certain for the court to reject the words "of No. 13," *as being a* falsa demonstratio, *notwithstanding their position in the description of the way; and the deed must be construed as giving a right of way over the staircase in No.* 14, *that being the only access which could have been referred to by the grant.*

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Action.

The plaintiff carried on the business of ladies' tea-rooms and a ladies' club. The defendants were the occupiers and owners for a term of years of Nos. 13 and 14, Old Bond-street.

By an underlease of the 24th of December, 1895, four rooms on the second floors of Nos. 13 and 14, and one room on the third floor of No. 14, were demised to the plaintiff "together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages of No. 13 aforesaid to and from the premises hereby demised on the second floor of the said messuages Nos. 13 and 14 aforesaid, and through the staircase and passages of No. 14 aforesaid from the second floor of the said premises to and from the room hereby demised on the third floor of No. 14 aforesaid at all times during the term hereby granted."

It appeared that there was no staircase in No. 13 leading from Old Bond-street directly to the demised premises, the only staircase which gave such access having been pulled down when the lift was made in 1893. There was, however, a staircase in No. 14, but, as this was entered through the defendants' shop on the ground floor of No. 14, the defendants declined to allow the plaintiff to use this staircase except in case of fire or other emergency, and insisted that she and her customers must gain access to the demised premises by means of the lift in No. 13, for the use of which by the plaintiff special provisions had been made by the underlease.

The plaintiff claimed a declaration that, under the circumstances, and upon the true construction of the underlease, she was entitled to a right of access to the demised premises through the shop by the staircase in No. 14.

The defendants counterclaimed for rectification of the underlease, on the ground of common mistake, by striking out from the grant the words "the staircase" and all other words purporting to grant any right of way other than the right to use the lift in No. 13 and the passages leading thereto and therefrom.

Farwell, Q.C., and *Stock*, for the plaintiffs.—On the true construction of this grant, a right of access to the staircase leading to the demised premises was given to the plaintiff, and the words "of No. 13" is *falsa demonstratio*, and may be disregarded: Elphinstone on Interpretation of Deeds, pp. 157 and 158.

Levett, Q.C., and *J. R. Brooke*, for the defendants.—The doctrine of *falsa demonstratio* does not apply to this case. You cannot construe a grant of way over the staircase of No. 13 into a grant of way over the staircase in No. 14.

Farwell replied.

Cur. adv. vult.

Aug. 6.—ROMER, J.—The first point which arises concerns the true construction of the underlease to the plaintiff, and may be shortly stated as follows: [His lordship having shortly stated the facts, and the words of the grant, continued:] Now, there was and is a staircase leading to and from the demised rooms, and no other way to which the grant of the right of ingress and egress could apply: but this staircase is in No. 14, and not in No. 13. There is a staircase in No. 13, but it does not lead to the demised rooms, and it is now common ground that that staircase was certainly not demised or referred to by the grant in question. The question is whether under these circumstances, as a matter of construction of the underlease, a right of way over the staircase that does lead to the rooms must not be held to pass, and the words in the grant "of No. 13" be rejected as *falsa demonstratio*. To my

mind the point is one of great difficulty. Since the trial I have considered the numerous authorities bearing on the point, some of which are not easy to reconcile, and in the result I have come to the conclusion that on this question of construction the plaintiff is right.

The principle on which the cases bearing on the point have been decided has been variously stated. One way in which it may be put is the following: "In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect." And Parke, J., in *Doe d. Smith v. Galloway*, 5 B. & Ad. 43, at p. 51, stated the principle as follows: "The rule is clearly settled, that where there is a sufficient description set forth of premises by giving the name of a close or otherwise we may reject a false demonstration." Among the numerous authorities illustrating the principle I will select the case of *Wrotesley* v. *Adams*, Plowden 187, for the observations of the court in that case at p. 191 of the edition of 1816 appear to me to bear directly on the case before me. The court there had to consider the effect of a lease of all the lessor's farm in Brosley, then in the tenure and occupation of Roger Wilcox, and decided that inasmuch as the word "farm" signified the capital or chief messuage or house and all the lands lying to it, and so had a certainty in itself, the court could disregard the erroneous description of "in the tenure and occupation of Roger Wilcox," because "there is a certainty in the thing demised—viz., the farm in Brosley, and so another certainty put to a thing which was certain enough before is of no manner of effect"; and the court distinguished the case from one where the property was merely described by an uncertain (*i.e.*, by a general) description followed by a certain one, and the distinction was illustrated thus—a release of all my right in all my lands in Dale which I have by descent on the part of my father, and I have lands in Dale but none by descent on the part of my father, there the release is void; but a release of Whiteacre in Dale which I have by descent on the part of my father is good if I have Whiteacre, though not by descent on the part of my father. Now, when I come to apply this principle to the case before me, considerable difficulty arises owing to the wording of the grant of the right of way, and especially to the position of the words "of No. 13." But looking at the question as one of substance rather than of form, it appears to me that the most important matter to be borne in mind in construing the grant is that it is a right of way over the staircase and passages which led to and from the demised rooms. This causes no ambiguity or doubt whatever; the way is made certain, and is in no sense described in an uncertain or general manner; then does the addition of the words "of No. 13" compel the court to hold that the otherwise clear grant is to be held void, or cannot the court reject the words as being *falsa demonstratio*? In my opinion the latter is the correct view, and the court ought to hold the deed effectual as granting the right of way over the only access which could have been referred to by the grant in question. I think no difference ought to be drawn between this grant according to its actual wording and a grant worded thus: "Together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages which lead to and from the demised rooms and which are in No. 13," where I think comparatively little difficulty would have been felt by the court in rejecting the added words "and which are in No. 13." For these reasons I construe the grant in favour of the plaintiff's contention, though I feel great doubt on the point.

Judgment for the plaintiff and against the defendants' counter-claim.

Solicitors, *W. Hilton Perkin; W. H. Herbert.*

Q. B. Div.
(Wills and Kennedy, JJ.) } May 24; July 2, 1898.

KENNAIRD (*Appellant*) v. CORY & SON (LIMITED) (*Respondents*). (*a.*)

Thames navigation—Watermen—Towing barges on river—Bye-law providing for licensed waterman on steamboat employed in towing barges—Validity—Watermen and Lightermen Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*), *s.* 80.

Section 80 *of the Watermen and Lightermen Amendment Act*, 1859, *gave power to the Company of Watermen and Lightermen of the River Thames to make bye-laws "for the government of the company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act and the several powers and authorities thereby vested in the company."*

Held, that a bye-law made under this section, requiring that "every steamboat navigated on the river in the towing of barges, vessels, and craft should have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof" was ultra vires *and invalid, as not coming within the scope of any of the purposes specified in the section.*

Case stated by the police magistrate for the borough of West Ham.

An information was laid by the appellant stating that the steamboat *Rotifer*, of which the respondents were the owners, on the 6th of December, 1897, in the River Thames off Silvertown, in the borough of West Ham, unlawfully towed the barge *Hetty* without having a licensed waterman on board such steamboat for the purpose of assisting in the management and navigation of the same, contrary to bye-law 60 of the bye-laws made under the Watermen and Lightermen Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii.).

Upon this information a summons was issued, and upon the hearing of the same on the 19th of January, 1898, the learned magistrate found the following facts—namely: That the steamboat *Rotifer* did on the 6th of December, 1897, on the River Thames off Silvertown, tow and navigate one barge without having on board such steamboat a licensed waterman to assist in the management and navigation thereof.

The Watermen and Lightermen Amendment Act, 1859, provides:

Section 80.—"The said court of master, wardens, and assistants are hereby empowered from time to time to make such bye-laws as they think proper for the government of the said company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of this Act and the several powers and authorities hereby vested in the said company, with power to annex reasonable penalties and forfeitures for the breach of such bye-laws respectively not exceeding the sum of five pounds for any one offence, so that the same bye-laws be not inconsistent with any of the laws of

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

this kingdom, or with this Act, or with any of the bye-laws, rules, orders, or regulations made or to be made by the conservators of the River Thames under the authority of the Thames Conservancy Act, 1857, or of any Act for the time being in force relating to the conservancy of the River Thames; and also from time to time to alter, amend, and repeal such bye-laws, or any of them; provided always, that no such bye-laws shall in any way interfere with the tolls of the Sunday ferries hereinbefore authorized, and that no such bye-laws or alterations in any bye-laws shall be of any validity until they shall have been approved by the conservators of the River Thames."

Under section 80 of the Act, bye-laws were made by the Company of Watermen and Lightermen of the River Thames, for their government, and for the government and regulation of watermen, lightermen, barge-owners, and others connected with the navigation of the River Thames between Teddington Lock and Lower Hope Point, near Gravesend, and made in pursuance of and for carrying into effect the purposes of the Act, and the several powers and authorities thereby vested in the company.

Bye-law 60 provided:

"That every steamboat navigated on the river within the limits of this Act, in the towing of barges, lighters, vessels, and craft, shall have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof. And if any such steamboat shall be navigated in contravention of this section, the owner thereof, or the master in charge of the same, shall incur a penalty not exceeding forty shillings; and that every barge, lighter, or craft towed on the river by steamboat, shall have one licensed lighterman, or licensed apprentice at the least, in charge thereof to steer and navigate the same; and if the same shall be navigated in contravention of this section, the owner thereof, or the person in charge of any such craft, shall incur a penalty not exceeding forty shillings."

It was contended before the magistrate by the respondents—(1) That bye-law 60 was *ultra vires* and not within the scope of section 80 of the Act of 1859; (2) that the bye-law was inconsistent with the Act, inasmuch as the Act, in section 66, has a proviso that, with regard to the matters coming under that section, if the owner prove that he is unable for the usual compensation to obtain the services of a lighterman or apprentice as required by the section, then no such penalty shall be payable by him; whereas in bye-law 60, which requires in some cases a waterman and in some cases a lighterman to be employed, there is no similar proviso; (3) that the bye-law was unreasonable, and especially on the ground that, although it purports to confer certain privileges on watermen, neither the Act nor the bye-laws impose any corresponding obligation on them to work on a steam tug; (4) and in the alternative that, if the bye-law is good, no offence had been committed as only one barge was being towed.

The magistrate dismissed the information on the ground that, looking at the general scope of the Watermen and Lightermen Amendment Act, 1859, and the interpretation given by section 3 of the Act to the word "waterman," bye-law 60—so far as the information before him was concerned—was *ultra vires*.

The question for the opinion of the court was—Whether the magistrate was right in his decision in holding the bye-law No. 60 to be *ultra vires*?

Ashton, for the appellant.—Section 80 is the section which gives the company power to make these bye-laws, and under that section these bye-laws were made, the section giving power to make bye-laws "for the government of the company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act, and the several powers hereby vested in the company." The preamble of the Act shows what some of these purposes of the Act are—namely, for "the regulation of the persons employed to navigate" the barges, and for "the security of passengers passing to and fro on the river." The bye-laws may be supported as coming within the terms of this preamble as well as within the scope of section 80. It is also a reasonable bye-law, as it is a reasonable thing for the common safety to require that when a steamboat is employed on the River Thames in towing barges there should be one licensed waterman on board to assist. In *Elmore* v. *Hunter*, 3 C. P. D. 116, 26 W. R. Dig. 215, which came under section 66, six barges were fastened together and were towed by a steam tug; four men were in charge, and there was no person on board the two last barges, and the court there decided that these two barges were "worked or navigated" in contravention of the Act. The bye-law in this case was within the powers of the company to make, and was also reasonable, and it is therefore a valid bye-law.

He also referred to *Gosling* v. *Green*, 41 W. R. 141, [1893] 1 Q. B. 109; "*The Quickstep*," 15 P. D. 196, 39 W. R. Dig. 214; *Rolles* v. *Newell*, 39 W. R. 96, 25 Q. B. D. 335; and *Edmonds* v. *Master of the Company of Watermen and Lightermen*, 24 L. J. M. C. 124.

C. A. Russell, Q.C. (*Tudor Howell* with him), for the respondents.—The preamble states that one of the objects of the Act is that "proper regulations should be made for the navigation of barges, &c., carrying goods, wares, and merchandize," and section 66 deals with that matter and provides that "no barge, lighter, boat, or other like craft for the carrying of goods shall be worked or navigated unless there shall be in charge of such craft a licensed lighterman or qualified apprentice," and there is this important proviso, that the penalty is not to be incurred if the owner of the barge show that he could not for the usual remuneration obtain the services of a lighterman. Then section 80 gives power to make bye-laws for the various objects specified in that section. This bye-law does not come within any of those purposes. It is not a bye-law "for the government of the company," or "for the government and regulation of watermen and lightermen," or "for carrying into effect the purposes of the Act and the several powers vested in the company." It does not come within any of these objects, but is merely a bye-law made by the company in their own interests. It is also unreasonable, as it contains no proviso similar to that in section 66 of this Act, and it could not be carried out. The magistrate was therefore right in holding it to be bad.

Ashton in reply.

Cur. adv. vult.

July 2.—The written judgment of the court (WILLS and KENNEDY, JJ.) was delivered by

WILLS, J.—The decision of the learned magistrate is in our opinion correct. We shall not attempt to define the office of a bye-law, or to lay down the limits of its operation. It is sufficient to say that bye-laws of the class with which we are dealing derive their authority from the statute which gives power to make them, and the provisions of different statutes in that behalf vary almost infinitely; so that it is necessary in any particular instance to look to the enactment under the authority of which the bye-law affected to be made, and to see whether or not it is within the statutory power. The bye-law

with which we have to do is one made by the court (duly empowered to make bye-laws) of the master, wardens, and commonalty of the watermen and lightermen of the River Thames; and section 80 of their Act of 1859 (22 & 23 Vict. c. cxxxiii., Session 2) is the enactment upon which the power to make bye-laws is founded. It provides that "the court of master, wardens, and assistants are hereby empowered from time to time to make such bye-laws as they think proper for the government of the said company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of this Act and the several powers and authorities hereby vested in the said company." The bye-law in question is bye-law 60. It provides: "That every steamboat navigated on the river within the limits of this Act, in the towing of barges, lighters, vessels, and craft, shall have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof," and imposes a penalty of 40s. upon the owner or master in charge of any steamboat navigated in contravention of this "section"—that is, of this bye-law. The word "vessel" in this bye-law must be read as vessel of the like kind with barge or lighter. Nothing is clearer in the Act of 1859 than that the only craft it deals with (excepting passenger boats) are lighters, barges, and kindred craft, and that in the few places in which the word "vessel" has been introduced it refers to vessels of the like kind with lighters and barges, and not to vessels of all sorts; and it is fair, therefore, in favour of the bye-law to give it the same meaning in the bye-law, otherwise it would be preposterously beyond anything within the purview of the Act. Now, the bye-law is clearly not one for the government of the company, nor for the governing and regulation of lightermen or watermen; it can only be supported therefore if it aid in carrying into effect the purposes of the Act, or some one or more of the powers and authorities vested in the company by the Act. It is necessary therefore to see what these purposes and what these powers and authorities are. Part of the preamble of the Act recites that it is expedient that proper regulations should be made for the navigation of barges, lighters, boats, and other light craft carrying goods, wares, and merchandize within the limits of this Act, and for the regulation of the persons employed to navigate the same, and for the security of passengers passing to and fro on the said river in boats and other craft, and for the orderly conduct of the traffic on the said river," and it was argued broadly that all the matters referred to in this recital are amongst the purposes of the Act, and that the court had power to make the bye-law in question inasmuch as its object (it was said) fell under one or another of the above heads. This argument, however, magnifies to the extent of distortion the proper office of a preamble. If it is sound, there is hardly a subject connected with the traffic on the river, whether for business or pleasure, goods or passengers, which might not be dealt with—from a cockboat to an ocean steamer—or the regulation of speed, manning, lights, and everything else which may be considered to bear upon the security of passengers in boats and craft, or the orderly conduct of traffic. It does not follow that because large words are used in a preamble everything to which they can be referred is within the scope of the Act. They may be useful to a limited extent in helping to interpret doubtful passages or phrases in the Act, but they do not extend its provisions or its scope beyond what the enacting parts of the Act contain, and it is necessary, therefore, to see what the Act does provide for. Section 2 defines a "passenger boat" as "any sailing boat, river steamboat, row-boat, wherry, or other like craft used for carrying passengers within the limits of this Act, unless there is something in the context inconsistent with such a meaning." Section 3 defines a "lighterman" as "any person working or navigating for hire a lighter, barge, boat, or other like craft within the limits of this Act," and "waterman" as "any person navigating, rowing, or working for hire 'a passenger boat,' unless there is something in the context inconsistent with such meanings." Sections 6-42 refer to the internal affairs of the company. Sections 43-45 (now repealed) require lighters and such-like craft to be registered and certain particulars to be painted visibly on the craft. Sections 46-52 regulate the apprentices and their indentures and rights, and section 53 refers to the registration of persons who may enter into indentures with apprentices. Section 54 enacts that "if any person, not being a freeman licensed in pursuance of this Act, or an apprentice qualified according to this Act, to a freeman . . . shall at any time act as a waterman or lighterman, or ply or work or navigate any wherry, passenger boat, lighter, vessel, or other craft, upon the river . . . within the limits of this Act, for hire or gain," he shall be liable to a penalty: Provided that any person licensed as herein provided or qualified apprentice may work as a lighterman. Sections 55-60 regulate the qualifications of applicants for a lighterman's or waterman's licence and the fees payable in respect of them. Section 61 enacts that every apprentice may, upon certain conditions, become a freeman. Sections 62-65 deal with matters connected with licences. Section 66 has more bearing upon the matter in hand. It enacts that "no barge, lighter, boat, or other like craft for the carrying of goods, wares, or merchandize shall be worked or navigated within the limits of this Act, unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned," or an apprentice "qualified as hereinbefore mentioned," and imposes a penalty not exceeding £5 for a breach of the section, unless the owner of the boat proves that he is unable for the usual compensation to obtain the services of a licensed lighterman or apprentice. Section 67 provides with regard to passenger boats that no unlicensed person shall row, steer, or navigate them for hire within the limits aforesaid, under a like penalty. Sections 68-79 contain various miscellaneous provisions having no bearing whatever upon the present question, and the same may be said of the rest of the Act (sections 81-103) following section 80, which gives the power to make bye-laws. It seems to us that there is no single provision or purpose of the Act which is subserved by the requirement that a steamboat towing barges shall have on board one licensed waterman to assist in the navigation and management thereof. The bye-law provides not even for compulsory pilotage, but merely for compulsory employment. A person who is to assist in the management and navigation of the vessel must necessarily be under the orders of the captain, or whoever represents the captain, he has no right to give an order or to take the helm, or to do anything but obey the captain's orders, a position for which any able-bodied man, accustomed to a tug, is just as competent as the waterman. It is a curious thing, and interesting as showing how little the framers of these bye-laws were thinking of anything tending to the convenience or safety of navigation, that the person who must be taken on board the tug is not even to be a lighterman, but a waterman, who according to the Act is a person having especially to

do with passenger boats. The Act gives no special privileges of employment to watermen or lightermen, except to the extent provided for by section 66 as to lightermen, and by section 67 as to watermen (including in both cases apprentices to the respective branches of the trade), and the bye-law attempts to extend these privileges and to force upon the owners of tug-boats members of the company to perform services for which, so far as the Act is concerned, the owners are at liberty to go into the open market. Section 66 has been relied upon in a way which is not very easy to follow, but seems to come practically to this —that the steamboat is concerned in the navigation of the lighters she tows and that therefore there ought to be a licensed person in charge of her, and that the bye-law enacts something less and is therefore not objectionable. It is true that in a sense the tug is concerned in the navigation, but she is not a lighter or other craft for the carrying of goods, and there is nothing in the Act anywhere giving the court of the company a power to interfere with the owner or master of the tug in managing his steamboat as he may think fit. The framers of the bye-laws have taken a very extravagant view of their powers of legislation, for they have not hesitated to enact in bye-law 98 that if any person shall act as master, or in command of, or assist in the management of, any steam or sailing boat or vessel whose voyage shall commence or terminate within the limits of the Act, until licensed by the court in the way provided by the Act, he shall be liable to a penalty. According to this bye-law, no person can use the waterway of the Thames, a highway from time immemorial, for any purpose if it be begun or ended within the limits in question, for any purpose of pleasure, trade, or business, without putting a licensed waterman or lighterman in command. I am not surprised that we were told that no attempt had been made to enforce the bye-law; but it affords a key to a good deal that would otherwise be startling in the bye-laws. We have no doubt therefore that the bye-law in question is radically bad. Were it even within the general scope of the powers to make bye-laws it would be in the highest degree unreasonable upon another ground. There is no exemption from the penalty, whatever be the circumstances under which the failure to take a waterman on board the tug occurs. There may be none available, or the one available may demand an exorbitant sum; the penalty attaches notwithstanding, and the saving provision which in the Act was made applicable to a case under section 66, and exempted the owner, if the lighterman could not be got for an ordinary wage, is wanting in the bye-law. But our objection goes far deeper, and could not be removed by any mere modification of this bye-law. It only remains to say a word or two about two cases which were pressed upon us by Mr. Ashton in the course of argument, in which certainly everything that ingenuity could suggest was urged on behalf of the case of his client. In *Elmore* v. *Hunter* it was held that where six barges were being towed by a tug, and there were only four lightermen in charge, section 66 of the Act was violated, for the reason that the barges were being "worked or navigated" notwithstanding that they were being towed. It is very difficult to see how any court could possibly have come to any other conclusion. What we have stated is the decision, and the whole of it, and it seems to us to have no bearing whatever upon the validity of bye-law 60, or any other that we know of. In *Rolles* v. *Newell* a prosecution was instituted under bye-law 59 of the Watermen's Company, which says that if any person when in charge of and navigating any steamboat on the Thames shall at the same time tow more than six barges exceeding ten tons each attached thereto, he shall incur a penalty. The person prosecuted had been in charge of a steamboat towing thirty-one such barges into a dock communicating with the Thames. The court held that under the circumstances of the case, to which it is not necessary further to allude, he had not in so doing been navigating the River Thames, and quashed a conviction that had taken place. The decision certainly has not the slightest bearing upon the present question, but Lord Coleridge speaks of the bye-law as in itself reasonable and useful. There had been no question raised as to its validity, and no reference to the powers under which the bye-law was made, and, therefore, there is no expression of judicial opinion that the bye-law was within these powers. It is perhaps unnecessary to express any opinion upon that question. Bye-law 59 is clearly of a very different character from bye-law 60. There is nothing on the face of it unreasonable, and it may be a useful regulation in the interests of public safety, which would be good enough if made by the authority of persons having power to legislate in that behalf. Bye-law 60, on the other hand, would seem to subserve no purpose except to find work, or at all events pay, for watermen. But we confess that, except in the very general words of the preamble, with which we have already dealt, we can find nothing in the Act from beginning to end to which bye-law 59 can be considered as ancillary.

Appeal allowed.

Solicitor for the appellant, *Arthur C. Kent.*

Solicitors for the respondents, *Sewell, Edwards, & Nevill.*

House of Lords.

From C. A. (England). July 19, 1898.

PLYMOUTH UNION *v.* AXMINSTER UNION. (*a.*)

Poor law—Settlement—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35—*Derivative settlement.*

An illegitimate pauper child whose mother had a derivative settlement, and who has never gained a settlement of its own, takes its own birth settlement.

Decision of the Court of Appeal *affirmed.*

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., Lopes and Chitty, L.JJ.) affirming that of Day and Lawrence, JJ.

The facts are set out in Lord Herschell's judgment.

Macmorran, Q.C., and *Corrie Grant.*

Asquith, Q.C., and *H. E. Duke.*

The House took time for consideration.

Lord HERSCHELL.—This is an appeal from an order of the Court of Appeal affirming an order of the Queen's Bench Division affirming an order of the Recorder of Plymouth on a case stated by him.

The question in dispute is whether Matilda Small, or Manley, a pauper lunatic, was settled in the appellants' union. She was born at Plymouth, in that union, and had never gained a settlement of her own. Her mother, Eliza Manley, a single woman, who also had gained no settlement of her own, was born within the respondents' union. It appeared at the hearing before the recorder that Eliza Manley was the legiti-

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

mate daughter of Henry and Matilda Manley, and that Henry Manley was born of English parents, and that he had lived with his father from boyhood at Bridport. The learned recorder states that he held, "if I could rightly do so, and if it is material," that Henry Manley had a settlement, though he did not make the necessary inquiries to ascertain what that settlement was, and that his daughter Eliza derived that settlement from him. And he adjudged and ordered that the pauper was settled in the appellants' union, that being the place where she was born, as he was of opinion that it could not be ascertained what settlement the pauper derived from Eliza Manley, her mother, without inquiring into Eliza Manley's derivative settlement.

The question in controversy turns upon the construction of section 35 of 39 & 40 Vict. c. 61. That section, after enacting that no person shall be deemed to have derived a settlement from any other, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or widowed mother up to that age, and shall retain the settlement so taken till it shall acquire another; and further, that an illegitimate child shall retain the settlement of its mother until it acquires another settlement, provides as follows: "If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

It is contended for the appellants that the provision I have just quoted is inapplicable to the present case, and that the pauper is not to be deemed settled in the parish in which she was born, but in the place of the birth settlement of her mother. It was conceded that the birth settlement of the mother was only her *primâ facie* settlement, or, as it was put, that it would be displaced if she had a higher settlement such as one derived from her father; but it was argued that until it was shown what the settlement of the father was, and therefore what the settlement she derived from him was, the enactment did not apply.

I concur with the courts below in thinking that this argument is not well founded; in my opinion it would defeat the very object which the enactment had in view. This plainly was to prevent the expense which was often incurred by parishes and unions through prolonged and elaborate inquiries into derivative settlements. It was thought that it would on the whole prove more beneficial to poor law authorities to lay down the artificial rule that where an inquiry into a derivative settlement would otherwise be involved, the place of birth of the pauper should be taken to be the place of settlement. If in order to bring the clause into operation it is necessary to proceed with the inquiry to the extent of ascertaining what the derivative settlement is, I cannot conceive why the place so ascertained should not have been treated as the place of settlement, and why another and wholly artificial place of settlement should have been substituted for it. I think the very purpose of the enactment was to preclude any such inquiry, and the language employed seems to me conclusive against the interpretation sought to be put upon it. The words are not without "ascertaining," but without "inquiring into" the derivative settlement of such a parent. As soon, then, as it appeared that the pauper's mother was the legitimate offspring of an English father, I think the case was brought within the enactment I am considering, and the learned recorder was right in declining to proceed with the inquiry into the settlement of the father, and in adjudging the pauper settled in the parish in which she was born.

It may well be that where nothing is known of the circumstance beyond the birth settlement of the pauper's parent, this is to be adjudged the place of the child's settlement, but that is a different case from the one with which your lordships have now to deal. Although there may be *dicta* in some of the authorities cited not altogether consistent with the conclusion at which I have arrived, I do not think it conflicts with any decision.

Lord MACNAGHTEN. — It seems to me that the learned recorder was right. I see no reason to alter or modify the opinion I expressed, perhaps unnecessarily, in the case of the *Reigate Union Guardians*, 38 W. R. 295, 14 App. Cas. 465. It appears to me that where there is an independent inquiry into the settlement of a child, if you find that the settlement of the parent of the child was a derivative settlement, you are not to pursue the inquiry any further. The child is to be deemed to be settled in the place of its birth. The Act prohibits all derivative settlements except in two specified cases. It could hardly have meant that in a case not falling within either of those exceptions the expense of an inquiry into a derivative settlement has to be incurred for the purpose of arriving at a conclusion which must be set aside as soon as it is reached. What the Act, I think, means is this, the door must be opened wide enough to see where the path beyond is leading to. If it is found that it leads in the forbidden direction, the door is to be shut at once, and the rule prescribed in the Act is to be applied.

The Lord Chancellor (Earl of HALSBURY), Lord MORRIS, and Lord SHAND concurred.

Appeal dismissed.

Solicitors for appellants, *Crowders & Vizard*, for *William Adams*, Plymouth.

Solicitors for respondents, *Geare, Son, & Pease*, for *William Forward*, Axminster.

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — Aug. 10, 1898.

ROBINSON & CO. (LIMITED) v. HEUER. (a.)

Contract of service—Master and servant—Negative stipulation against engaging in similar business—Breach of contract—Validity—Injunction.

H., the confidential clerk of R. & Co. covenanted that he would not, during his engagement, carry on or be engaged, directly or indirectly, in any trade or business of a similar nature to that of R. & Co., or any other business whatever, on pain of instant dismissal and forfeiture of salary.

Held (*reversing* North, J.), *on motion to restrain H. from engaging, directly or indirectly, in any business relating to goods of the description sold or manufactured by R. & Co., that such a covenant, limited to the period*

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

of H.'s engagement, was not unreasonable, and ought to be enforced by injunction.

Appeal of the plaintiffs from North, J.

By an agreement dated the 8th of February, 1895, Hermann Wilhelm Heuer entered the service of the plaintiffs as their confidential clerk for a term of five years as from the 1st of January, 1895, renewable at the option of the plaintiffs for a further term of five years. The plaintiffs were at liberty to discharge Heuer on giving him three months' notice, and without such notice Heuer was to remain in their employ for the term of five years or for the further term of five years, at the plaintiffs' option.

By clause 6 of the agreement Heuer agreed that he would not during his engagement enter into any business, either directly or indirectly, relating to goods of any description sold or manufactured by the plaintiffs, or into any other business whatever, under penalty of instant dismissal. Heuer further covenanted that if he should be dismissed from the plaintiffs' service, either during the first five years or the further period of five years of his service, he would not engage during the next ensuing three years in any business of a similar nature to that of the plaintiffs within 150 miles of Wolverhampton.

The plaintiffs carried on the business of hollow-ware merchants in Wolverhampton.

In 1898 Heuer, on the failure of certain negotiations between himself and the plaintiffs, left the plaintiffs' service and entered the service of a rival firm, calling upon the customers of the plaintiffs and soliciting orders from them on behalf of the rival firm. The plaintiffs then brought an action and moved for an interlocutory injunction to restrain Heuer until the trial from carrying on as principal, agent, servant, or otherwise, any trade, business, or calling relating to enamelled hollow-ware goods or other goods of any description sold or manufactured by the plaintiffs, or from travelling for or soliciting orders for any persons other than the plaintiffs in breach of the agreement.

North, J., following *Ehrmann* v. *Bartholomew*, 46 W. R. 509, [1898] 1 Ch. 671, refused the motion.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *Micklem*, for the appellants.—We treat the engagement as still subsisting. The defendant has not been dismissed, and our liability for his salary still continues. He cannot escape from his employment by absenting himself. We merely want to restrain his engagement in any competing business. The covenant in the agreement is severable—*Rogers* v. *Maddocks*, [1892] 3 Ch. 346, 41 W. R. Dig. 207—and we do not want to enforce a contract of personal service; the injunction we ask for is limited to a particular business and a definite time. We are willing to terminate the service forthwith, and take an injunction, limited to three years, in the terms of the second half of clause 6.

Everitt, Q.C., and *O. L. Clare*, for the respondent.—We cannot accept the plaintiffs' offer. The defendant may be liable in damages, but an injunction cannot be granted. If the covenant in the agreement is severable, then the first part of it is void, as it is far too wide. But the covenant is not severable, and is unreasonable: *Ward* v. *Byrne*, 5 M. & W. 548.

Eady, Q.C., in reply.—We are willing to take an injunction in the limited form suggested, and will undertake not to renew the service for a further period of five years. He referred to *National Provincial Bank of England* v. *Marshall*, 37 W. R. 183, 40 Ch. D. 112.

LINDLEY, M.R.—In this case we have been very much embarrassed by the peculiar form of the agreement, and by the course taken by both sides; but the result at which I have arrived is this—that the justice of the case really requires that some injunction should go. This defendant is certainly breaking his agreement, and is doing that which he has no business to do; and the question is whether he should be at liberty to do so or whether he is to be restrained. Now, the agreement is a very peculiar one. The plaintiffs are a company who carry on business in enamelled hollow-ware and as general merchants, and they took into their employ the defendant as their confidential clerk. That is a very serious matter. That opens to him all the secrets of their trade. The service is to commence from the 1st of January, 1895, and last for a term of five years from the above date, "except as hereinafter mentioned," which refers to powers of dismissal which I will deal with presently, with the option on the part of the plaintiffs of renewing the engagement for the further term of five years, so that, so far as this clause goes, they can convert this period of service into a period of ten years at their option. I pass over the rest till we come to the sixth clause, which is his agreement not to carry on business. That clause is composed of three parts, the first two of which are material. The first is that the defendant shall not during this engagement, without the previous consent of the plaintiffs, "carry on or be engaged, either directly or indirectly, as principal, agent, servant, or otherwise, in any trade, business, or calling, either relating to goods of any description sold or manufactured by the said William Robinson & Co. (Limited), their successors and assigns, or in any other business whatever, upon pain of instant dismissal and forfeiture of salary previously earned and unpaid"; and the first question is whether that clause, limited as it is by the words "during this engagement," is invalid in point of law or not. Now, to my mind, there is absolutely no authority whatever to show that that is an illegal agreement—that is to say, that it is unreasonable and goes further than is reasonably necessary for the protection of the plaintiffs. It is confined to "during the engagement," and that means simply this—so long as you are in our employ you shall not work for anybody else, or engage in any other business. There is nothing unreasonable in that at all. But when we consider the advisability of granting an injunction to enforce it, there is great difficulty. The real difficulty which has always to be borne in mind when specific performance or injunctions to enforce agreements involving personal service are in question, is this—that this court never will enforce an agreement by which one person undertakes to be the slave of another; and if this covenant were enforced in its terms it would compel the defendant personally to serve the plaintiffs for the period of ten years. That we never do; that is past praying for. Therefore an injunction in these terms cannot be granted, although the agreement is valid in point of law. But the plaintiffs do not ask for an injunction in the terms of this clause. They say, "We do not want you to compel him to serve us; all we want you to do is to hold him to so much of his bargain as relates to his competing with us"; and the plaintiffs ask for an injunction to restrain him from engaging, directly or indirectly, and so on, in any trade, business, or calling relating to goods of the description sold or manufactured by the plaintiffs. That is a totally different thing. That does not sin against the principle to which I have alluded. Even that may be a little hard, if it were for ten years, under the peculiar circumstances with which we have to deal; but the appellants have undertaken not to exercise the option of prolonging the first period of five years, and that, to my mind, gets rid of that difficulty.

Now, the next clause is important. This, be it observed, gives the plaintiffs liberty to dismiss the defendant if he commits any breach of this agreement. It provides that if during the period of five years, or the extended period, at the option of the plaintiffs, the defendant shall be dismissed, he shall not at any time within three years from the time of such dismissal, directly or indirectly, engage or be engaged either as principal, agent, or otherwise, in carrying on the business of an enamelled hollow-ware dealer at any place within 150 miles of Wolverhampton. That is a distinct agreement; there is nothing there about any other trade or business; and, to my mind, if the plaintiffs had taken the course of dismissing the defendant, and he had by his conduct done that which he has done, an injunction in the terms of the second clause would be almost a matter of course. But, however, there has been this cross-quarrel; the plaintiffs for reasons of their own, which I do not propose at present to go into, decline to dismiss the defendant. I see why, because they have launched their case on the other theory; they can dismiss him if they like, and that is what has been weighing on my mind so long—namely, whether we ought not to say, "You have your remedy in your own hands; if you choose to dismiss him, you will get an injunction." Counsel for the defendant say they will not accept anything of the sort, and that there is no evidence before the court that he threatens and intends to do what he should not. As a technical answer, I do not see how to get over that; as a practical business answer, I do not see that there is anything in it; but the fact is, that here there is a person who is in a position to do the most grievous injury to the plaintiffs in direct violation of his bargain, which is good in point of law, and which is enforceable within limits; and, to my mind, he ought to be restrained in the terms of the first paragraph of the sixth clause, leaving out, of course, the second part of the clause. It must be put in this form: The plaintiffs, by their counsel, undertaking not to exercise the option of extending the term conferred upon them by clause 2, we grant an injunction to restrain the defendant in the words of the sixth clause of the agreement "during this engagement," leaving out "or any other business." The costs ought to be the costs of the plaintiffs in any event both here and below. I think it is a gross and deliberate breach of a plain bargain.

CHITTY, L.J.—The relation of the plaintiffs to the defendant at the present time is that of master and servant. The defendant is the confidential clerk of the plaintiffs, and by the agreement he has bound himself to serve for a period of five years, with the option on the part of the plaintiffs and no correlative option on his part to continue the engagement if they think fit for a further period of five years. The appellants have given up that second period of five years as part of the terms on which the court grants the injunction. Under the fifth clause the defendant agrees during the term to devote the whole of his time, care, and attention to the business of the plaintiffs, and to obey their orders, and so forth; and then, to supplement that, and to support it by a definite negative agreement, we have the sixth clause. That clause is divided into several parts. We are concerned with two parts. The first is, that during the engagement, without the consent of the plaintiffs, he will not be, directly or indirectly, engaged in the particular business or in any other business. Now, it appears to me on the authorities that that, during his engagement, is a valid contract in point of law. It is not necessary to speak about the term "or any other business." As at present advised I see no objection to it; and the case seems to me to fall within the authority of *Pilkington* v. *Scott*, 15 M. & W. 657, and *Hartley* v. *Cummings*, 5 C. B. 247. The agreement, then, is during the engagement; and the strange thing is the contest the parties have carried on before the motion was made by the plaintiffs before North, J. The defendant said that he had dismissed himself, or had been dismissed; the plaintiffs said, "No, you have not; and what is more, we will not dismiss you"; and so the matter comes on before the Court of Appeal, the plaintiffs contending that the engagement is still on foot; and I think the result is that the engagement is still a continuing engagement, and the plaintiffs, therefore, are right. Now, the point in the case in the defendant's favour appears to me to be this: There are at the end of the clause relating to the continuance of the engagement the words "upon pain of instant dismissal and forfeiture of salary." I quite agree that where penalties are affixed to a contract the court can grant an injunction, notwithstanding the penalties; and that those words are not sufficient, as a general rule, to prevent the court granting an injunction. The materiality of them in the present case is this, that the plaintiffs had it in their hands to dismiss the defendant at once, and thereupon the defendant would have become subject to the less onerous covenant which appears in the latter part of the same clause. But the appellants proposed that they should give an undertaking to dismiss at once, and take the injunction in the more limited form. Counsel for the defendant stood upon their rights, and said, "There is no evidence that our client threatens or intends to break the covenant"; and technically they are right, because he has not at the present moment been dismissed, and that covenant only comes into operation upon dismissal. It might perhaps have been wise for the defendant to have accepted the olive-branch that was offered by the appellants, who were content to take an injunction in the less severe form. But now, coming back to the case upon the first part of the clause, here is a plain deliberate breach by the confidential clerk of the plaintiffs, who is now directly engaged in the particular business for other persons, rivals in trade of the plaintiffs; and in fact we have the case of a confidential clerk acting in deliberate violation not only of his agreement, but of his general relation of confidence towards his employers. That is a very strong case. The appellants did not ask for an injunction which would run exactly in the terms of this covenant in the first part of the sixth clause—they were willing to give up "or in any other business"; therefore I need not consider that part of the case beyond saying this, that in my opinion the covenant is clearly severable. We are not upon the question of whether this covenant is good or bad in law, but whether in this case the court ought to grant an injunction; and the difficulty that for a long time presented itself to my mind was whether we should not, by means of the injunction, be compelling the defendant in substance to serve the plaintiffs. Now, the great objection has been removed by what the appellants have undertaken to do. They have undertaken, in substance, to reduce this term of the engagement to a period of two years or so from the present time; and I think not only that it is reasonable, but I think justice requires that this confidential clerk should not in violation of his agreement go about betraying his masters. Therefore I see no objection to granting the limited injunction which is asked for at the bar, and which the Master of the Rolls has stated.

COLLINS, L.J.—My view has been so exactly stated

in the judgments that have been delivered that I should be afraid of detracting from what has been already said if I made any observations of my own.

Appeal allowed.

Solicitors, *Sharpe, Parker, & Co.*, for *Hunt & Skidmore*, Wolverhampton; *Rowcliffe, Rawle, & Co.*, for *Bremner, Sons, & Corlett*, Liverpool.

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 29; Aug. 10, 1898.

ATTORNEY-GENERAL *v.* EARL GREY. (*a.*)

Inland revenue—Estate duty—Gift inter vivos—*Settlement—Whether possession assumed to entire exclusion of settlor—Reservation of interest to settlor—Power of revocation—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-section* 2 (a) (c)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c).

By a deed, dated 1885, *G. transferred certain estates, including a mansion-house of which he was the owner, to the appellant, his nephew, subject, as regards property other than the mansion-house, to an annual rent-charge in favour of G. for life and subject also to the mansion-house being enjoyed as theretofore by G. By the same deed the appellant entered into several covenants relating to the estate, amongst which was one to pay the debts of G. out of the estate; and a power of revoking the deed and reassuming the property in the estate was reserved to G. upon the breach of certain of the said covenants by the appellant.*

G. died before the happening of any of the events upon which the power of revocation was exercisable, but after the Finance Act of 1894 *had come into effect. The annual value of the estate at the death of G. was considerably in excess of the rent-charge reserved.*

Held (affirming the judgment of the Divisional Court, 46 *W. R.* 251), *that, at the death of G., all the property was liable to estate duty under section* 1 *of the Finance Act of* 1894. *It was property which must be deemed to have passed on the death of G. within section* 38, *sub-section* 2, *of the Act of* 1881, *as amended by section* 11, *sub-section* 1, *of the Act of* 1889 *and section* 2, *sub-section* 1 (c), *of the Finance Act*, 1894.

Per Vaughan Williams, L.J.—*That there was a sufficient interest and power of revocation reserved in the property so as to bring it within section* 11, *sub-section* 1, *of the Act of* 1889, *for the appellant had not assumed* bonâ fide *possession and enjoyment "to the entire exclusion of the donor," G.*

This was an appeal from the judgment of a Divisional Court on an information by the Attorney-General claiming estate duty under the Finance Act, 1894.

1. By a deed dated the 19th day of October, 1885, and made between Henry (3rd) Earl Grey (since deceased), of the one part, and the defendant, then Albert Henry George Grey, Esq., of the other part, reciting that the said Henry Earl Grey was absolutely seised of or entitled to considerable family estates and to other estates and real property purchased or acquired by him in the county of Northumberland, but that a portion of the said estates was subject to several life annuities (which annuities amounted in the whole to £3,100 a year, but four of which, amounting together to £900 a year, have since ceased to be payable), and reciting that another portion of the said estates was subject to a mortgage for £200,000, and reciting that the said Earl Grey was also possessed of considerable personal estate comprising rents then already due and arrears of rent and the furniture and effects in and about the mansion-house in which the earl then resided at Howick, and farming stock, crops, and other effects, and reciting that the defendant Albert Henry George Grey was the nephew of the said Earl Grey and heir-presumptive to the peerage and that the said Earl Grey was desirous of giving his real and personal estate to the said A. H. G. Grey subject to the provisions therein contained and that it had been agreed between the parties thereto that the deed now in statement should be executed. It was by the now stating deed witnessed that in pursuance of the said agreement and in consideration of the natural love and affection which the said Earl Grey bore to his said nephew, and for the other considerations therein appearing, the said third Earl Grey did thereby convey to the defendant A. H. G. (now Earl) Grey, all those the manors, messuages, farms, lands, rent-charges, and other the hereditaments and real estate whatsoever and wheresoever of him the said third Earl Grey and all leaseholds and terms of years (if any) belonging to him to hold the same to the defendant A. H. G. (now Earl) Grey in fee simple, subject nevertheless as to the parts of the property charged therewith or affected thereby to the payment of the said annuities and to the mortgages affecting the same to the use that the third Earl Grey should thenceforth during his life receive an annual rent-charge of £4,000 to be issuing out of the said hereditaments (other than such part as the third Earl Grey was to occupy and enjoy under the trusts thereinafter declared). And to be paid quarterly as therein mentioned and subject to and charged with the said rent-charge all the hereditaments thereby conveyed were to be held to the use of the defendant A. H. G. (now Earl) Grey in fee simple; but as to the said mansion-house at Howick and the premises to be enjoyed therewith subject to the trusts and provisions thereinafter contained and as to the leaseholds or terms of years (if any) for the whole term or interest of the earl therein. And it was also witnessed that in further pursuance of the said and for the considerations aforesaid, the third Earl Grey did thereby assign unto the said A. H. G. (now Earl) Grey all rents then already due and all arrears of rent owing in respect of the said real estate or any part thereof, and also all furniture and effects in or about the said mansion-house and premises at Howick, and all stock, crops, and effects and other the personal property of the said third Earl Grey other than money belonging to him at his bankers or elsewhere, and private papers and correspondence, his wardrobe, ornaments, and effects in his own personal, use, to hold the premises thereby assigned to the defendant A. H. G. (now Earl) Grey as to the parts thereof affected by the trusts thereinafter declared upon the trusts, and subject to the provisions thereinafter contained concerning the same, and subject thereto as to the whole of the premises thereinbefore assigned to the defendant A. H. G. (now Earl) Grey absolutely for his own use and benefit, and it was by the deed now in statement declared that the mansion-house at Howick, together with the pleasure-gardens, and kitchen and fruit-gardens, stables, vineries, greenhouses, out-buildings, and appurtenances as then occupied and enjoyed by the third Earl Grey, should be held upon trust to permit him to occupy and enjoy the same as theretofore during his life, and that all the furniture, plate, books, pictures, and articles of household use or ornament, wines, stores, garden implements, horses, carriages,

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and other things whatsoever in or about the mansion-house and premises should be held upon trust to permit the said Earl Grey to use and enjoy the same in like manner during his life, and the defendant A. H. G. (now Earl) Grey covenanted with the said third Earl Grey that he (the defendant), his heirs, executors, administrators, or assigns, would do the following things—that is to say: (1) Pay the annuities mentioned in the first schedule thereto and all other annuities (if any) charged on any part of the property or payable by the said third Earl Grey as the same should respectively become due and so long as the same should respectively be payable. (2) Pay the said mortgage debt of £200,000 and all interest then or thereafter to become due thereon, and also every other mortgage debt and other charge to which any part of the property was subject, also a bond for £1,000 payable to the Hon. George Grey with all interest due and to become due thereon, and would perform all covenants, and discharge all liabilities, binding on the said third Earl Grey in respect of any property thereby assured, and indemnify the earl and his estate from all loss and damage in respect thereof. (3) Pay to the said third Earl Grey the said annual rent-charge of £4,000, and a proportionate part to the day of his death to his executors or administrators. (4) At the cost of the defendant, his executors, administrators, or assigns keep the mansion-house and building at Howick insured for the amount in which they were then insured, and expend all money received on any insurance in restoration, repairs, or rebuilding, and keep in repair, and properly uphold and maintain, the said mansion-house, buildings, gardens, and effects to be enjoyed by the said third Earl Grey as aforesaid, and also stock and manage the said gardens as the same had theretofore been managed, and at the request in writing of the said third Earl Grey or of his agent forthwith do and make any repairs in any of the premises so to be enjoyed which the said Earl or his agent might desire to have made or done. (5) At the like cost supply and deliver to the said third Earl Grey (free of cost to him) all such farm or garden produce as he or his agent might require for the use and consumption of the household at Howick. (6) Pay at the death of the said Earl Grey all his funeral and testamentary expenses including all stamp and other duties and also all the debts of the said Earl to the full exhaustion of all the property real and personal of the said third Earl Grey. (7) The lands at or near Howick then farmed by the said Earl Grey should not be sold or disposed of or let during the life of the said third Earl Grey, but should be farmed by the defendant A. H. G. (now Earl) Grey personally, in like manner as the same had theretofore been farmed by the third Earl Grey, and no buildings should be erected and no works should be established thereon without the consent in writing of the said third Earl Grey. (8) At the request of the said earl, his executors or administrators, to produce all receipts and vouchers for payments to be made under clauses 1, 2, 4, or 6 of the now stating covenant. And it was provided that in the event of the defendant A. H. G. (now Earl) Grey, dying in the lifetime of the said third earl or of any breach by the defendant, his heirs, executors, or administrators, of any covenant on his part therein contained, and failure to remedy such breach within thirty days after notice in writing so to do it should be lawful for the said third Earl Grey to revoke the deed now in statement either wholly or in part, but save in the event aforesaid the deed now in statement was to be irrevocable, but any revocation under that power was to be without prejudice to the title of any purchaser or mortgage from the defendant, his heirs, executors, or administrators, under a sale or mortgage made previously to such revocation.

2. By an indenture, dated the 26th of September, 1894, and made between the said Henry third Earl Grey, of the one part, and the defendant A. H. G. (now Earl) Grey, of the other part, reciting that the indenture now in statement was supplemental to the indenture of the 19th of October, 1885, hereinbefore stated, that the rent-charge of £4,000 had been duly paid and the covenants contained in the indenture of the 19th of October, 1885, on the part of the defendant had been duly performed, and reciting that the third Earl Grey in consideration of £5,000 to be paid to him by the defendant had agreed to sell and release to him the said rent-charge of £4,000, and also to release the covenant to pay the same, and also to release the covenant to retain unsold and to farm the lands near Howick mentioned in the principal indenture. It was witnessed that in pursuance of the said agreement and in consideration of the sum of £5,000 upon the execution of the indenture now in statement paid to the said third Earl Grey by the defendant, the said third Earl Grey as beneficial owner thereby conveyed and released unto the defendant all the said rent-charge of £4,000 to the intent that the lands and hereditament charged therewith might thenceforth be discharged therefrom; and in further pursuance of the said agreement and for the consideration aforesaid the said third Earl Grey released unto the defendant all the premises conveyed by the principal indenture from the power of revocation contained in the said indenture, and also released the said A. H. G. Grey from the covenant to pay the said rent-charge of £4,000, and from all claims under the covenant by the defendant contained in the principal indenture to retain unsold and to farm certain lands near Howick.

3. The said third Earl Grey died on the 9th day of October, 1894, and thereupon his nephew, the defendant, succeeded to the earldom. The average net annual income of the property comprised in the said deed of the 19th of October, 1885, after deducting interest on incumbrances and other charges and the cost of management, is and was before as well as after the date of the last-mentioned indenture very considerably in excess of £4,000.

4. Under the circumstances aforesaid estate duty under the Finance Act, 1894, had been claimed by the Commissioners of Inland Revenue from the defendant on the principal value (less the value of the encumbrances subsisting thereon) of the whole of the property comprised in the said deed of the 19th of October, 1885 (including the mansion-house at Howick and the effects therein, upon which alone such duty has been actually paid by the defendant on the 20th of March, 1895), as being property passing on the death of the said third Earl Grey within the meaning of sections 1 and 2 (1) (c) of the Finance Act, 1894, which incorporates the provisions of section 38 of 44 & 45 Vict. c. 12 as amended by section 11 (1) of 52 Vict. c. 7. But the defendant had refused and still refuses to pay such estate duty (save as to the mansion-house and effects) and he contends that no such duty has become payable. Moreover, the value of the bulk of the property comprised in the said deed of the 19th of October, 1885, was not taken into account in determining the amount of estate duty paid by the defendant on the mansion-house at Howick and accordingly further duty is payable thereon.

The Crown thereupon claimed: (1) That it should be declared that upon the death of the said Henry third Earl Grey estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value to be ascertained as in the said Act provided of all the property real and personal com-

prised in the said deed of the 19th of October, 1885, as property passing on the death of the said Henry third Earl Grey within the meaning of sections 1 and 2 (1) (c) of the last-mentioned Act, and having regard to section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889.

The Divisional Court (Grantham and Channell, JJ.) decided in favour of the Crown.

From this decision the defendant now appealed.

By the Customs and Inland Revenue Act, 1881, s. 38, sub-section 2 it is provided that "the personal or movable property to be included in an account shall be property of the following descriptions—viz.: (a) any property taken as a *donatio mortis causâ* made by any person dying on or after the 1st of June, 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased. (c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

By section 11, sub-section 1, of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), the aforesaid sub-section 2 is amended as follows: "The description of property marked (a) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

By section 2, sub-section 1, of the Finance Act, 1894 (57 & 58 Vict. c. 30) it is provided that "property passing on the death of the deceased shall be deemed to include . . . (c) Property which would be required . . . to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

Cozens-Hardy, Q.C., and *Bremner*, for the appellant.—The duty has already been paid in respect of the mansion-house, so that point is not in dispute. The question which arises here is whether estate duty is payable in respect of the rest of the estate. This estate, minus the mansion-house, does not come within section 2, sub-section 1, of the Finance Act, 1894. The appellant was given an estate subject to the payment of £4,000 per annum to the third earl, and this estate the appellant retained within the meaning of section 11, sub-section 1, of the Act of 1889 "to the entire exclusion of the donor." The power of revocation was a limited and conditional one, and the contingencies on which it would have been exercised never arose. There was here no absolute right to reclaim the property reserved to the donor, such as is referred to in section 38, sub-section 2, of the Act of 1881. The power there is a general one. In the present case it is a limited one. The appellant assumed *bonâ fide* possession and enjoyment within the requirement of the section. This was not a gift but a purchase for full value, and therefore the twelve months' period does not apply.

They cited *Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99; *Attorney-General* v. *Beech*, 46 W. R. 44, [1897] 2 Q. B. 535.

Sir R. E. Webster, A.G. (*Sir R. Finlay, S.G.*, and *Vaughan Hawkins* with him), appeared for the Crown.—This case is clearly within the language of section 38, sub-section 2 (a), of the Act of 1881 as amended by the Act of 1889. It is also within section 38, sub-section 2 (c), of the Act of 1881. If there be any disposition whereby the donor retains any interest or benefit the donee does not escape liability on the death of the donor. If property has been disposed of, and out of that property any benefit is reserved to the donor, such property is not intended to be exempt from taxation. Section 11, sub-section 1, of the Act of 1889 puts this beyond dispute. The only means of evading the tax is to assume absolute and immediate possession and enjoyment of the estate. In the present case, however, that condition was not fulfilled. The reservation is within the very words of section 38, sub-section 2 (c), of the Act of 1881. The third earl was in the position of being able to contract debts which would have to be satisfied out of the estates of the appellant. This was a most important reservation. There were powers of revocation in the deed which might easily have been exercised.

Bremner replied.

Cur. adv. vult.

On the 10th of August the following written judgments were delivered:

A. L. SMITH, L.J.—In my opinion the Crown succeeds this case, and the appeal by the present Earl Grey fails. By the Finance Act, 1894 (57 & 58 Vict. c. 30), not only property which passes upon death, but also property which shall be deemed within the meaning of the Act to pass upon death, is made liable to estate duty, and the question is whether the property upon which the Crown claims duty in the case, is property which is deemed to pass within the meaning of the Act upon the death of the late Earl Grey, which took place upon the 9th of October, 1894.

By deed bearing date the 19th of October, 1885, the late earl in consideration of the natural love and affection which he bore to his nephew, the present earl, conveyed to the present earl (the defendant in this information) all his manors, messuages, farms, lands, rent-charges, and other hereditaments and all leaseholds belonging to the late earl in fee simple, to the use that the late earl should during his life receive an annual rent-charge of £4,000 a year issuing out of the hereditaments thereby conveyed, and should be also entitled during his life to occupy and enjoy that part of the hereditaments which consisted of the mansion-house at Howick and its appurtenances, together with the furniture, plate, books, pictures, and articles of household use or ornament, wines, stores, garden implements, horses, carriages, and other things whatsoever in or about the said mansion-house and premises. By the deed the present earl covenanted with the late earl to pay certain annuities and mortgage and bond debts and to idemnify the late earl and his estate from all loss and damage in respect thereof, and to pay the late earl the annual rent-charge of £4,000 per annum, and at the death of the late earl to pay his funeral and testamentary expenses, including all stamp and other duties, and also the debts of the late earl to the full exhaustion of all property real and personal of the late earl.

By this deed it was provided that in the event of the present earl dying in the lifetime of the late earl, or by any breach by the present earl of any of the covenants on his part therein contained, it should be lawful for the late earl to revoke the said deed either wholly or in part, but save as aforesaid the said deed was to be irrevocable, and it was stipulated that any revocation under the powers was to be without prejudice to the title of any purchaser or mortgagee from the present earl under sale or mortgage made previously to such revocation. The above is a sufficient statement of the deed to raise the point which I have in hand; it will be found set out at length in the information in this case. By an indenture made on the 26th of September, 1894, between the late and present earl, the late earl, two weeks before his death—which occurred, as I have said, upon the 9th of October, 1894—in consideration of £5,000 paid him by the present earl, released unto the present earl the rent-charge of £4,000 a year, as also the power of revocation contained in the indenture of the 19th of October, 1885, and, as I understand, the late earl remained in possession of the mansion-house and its amenities as by the deed of the 19th of October, 1885, is provided, until his death.

The question is, whether the property contained in the indenture of the 19th of October, 1885, was property which is deemed to pass upon the death of the late earl within the meaning of the Finance Act, 1894, so as to be liable to estate duty. That brings me to section 2 (1) (c) of the Act of 1894. By it property passing on the death of the deceased shall be deemed to include "(c) property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881 [44 & 45 Vict. c. 12] as amended by section 11 of the Customs and Inland Revenue Act, 1889 [52 & 53 Vict. c. 7], as if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." In *The Attorney-General* v. *Beech*, 46 W. R. 435 [1898] 2 Q. B. 147, I commented upon this class of legislation, and I have nothing further to say thereon.

Now, what is it that the 38th section of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, as amended by the Finance Act, 1894, has enacted? Section 38 (1) of the Customs and Inland Revenue Act, 1881, must for the present purpose be read as follows: "Any real, personal, or movable property to be included in an account shall be property of the following descriptions—namely, (a) Any property . . . taken under a disposition . . . made by a person dying after the 1st of August, 1894, purporting to operate as an immediate gift *inter vivos* . . . which shall not have been *bonâ fide* made twelve months before the death of the deceased"—the clause does not apply to the present case—"or property taken under any gift whenever made"—this means whether made within or without twelve months before death—"of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." In my judgment the meaning of the section is, that if there be a gift, no matter when made, of property *inter vivos*, then the property must be included in an account and therefore liable to estate duty unless the donee has *bonâ fide* assumed possession and enjoyment of the property immediately upon the gift, and has thenceforward retained the possession and enjoyment thereof to the entire exclusion of the donor, or if he has taken and retained the possession to the entire exclusion of the donor, then that this possession and enjoyment has been without any benefit by contract or otherwise to the donor. To escape estate duty both these events must concur. This being my opinion as to the true construction of section 38 (1) (a) of the Customs and Inland Revenue Act of 1881 as it now stands incorporated into section 2 (1) (c) of the Finance Act, 1894, how upon the facts of the case can it be said that the present earl, the donee, has either *bonâ fide* assumed possession of the estate immediately upon the gift, or has thenceforward retained "the possession and enjoyment of the property contained in the deed of the 19th of October, 1885, to the entire exclusion" of the late earl, the donor, or that he has done so without any benefit by contract or otherwise accruing to the donor, the late earl? That the present earl, the donee, has contracted with the late earl, the donor, to pay him £4,000 a year as well as to bear the other liabilities of the late earl as appears by the deed of the 19th of October, 1885, for the benefit of the late earl, cannot be disputed, and whichever limb of the sub-section be taken, in my judgment the case comes within it, and therefore falls within the definition of property deemed to pass within section 2 (1) (c) of the Act of 1894, and consequently is liable to estate duty.

It was argued by the Crown that the case also falls within sub-section (c) of section 38 (1) of the Customs and Inland Revenue Act of 1881, and that under that sub-section the property was chargeable with estate duty as being property which was deemed to pass within section 2 (1) (c) of the Act of 1894. This may well be so, but as in my opinion section 30 (1) (a) of the Customs and Inland Revenue Act of 1881 is fatal to the appellant, the present earl, it is unnecessary in this case to give a judgment as to the meaning of sub-section (c), and therefore I say nothing about it. In my judgment the Crown succeeds, and the appeal must be dismissed with costs.

RIGBY, L.J.—The grant and assignment made by the third earl to the present earl by the deed of the 19th of October, 1885, was subject, first, as to all the hereditaments, other than such parts as the third earl would occupy and enjoy under the trusts thereinafter declared, to an annual rent-charge issuing thereout of £4,000; secondly, as to the hereditaments not charged with the £4,000 a year, and the personal property connected therewith, to a beneficial interest in the third earl; thirdly, to a covenant by the present earl to pay at the death of the third earl all the funeral and testamentary expenses and also the debts of the third earl to the full exhaustion of all the property real and personal of the third earl; fourthly, to a conditional power of revocation by the third earl.

It is plain, in my judgment, that under the abovementioned heads, benefits were secured to the third earl which made it impossible for the donee to assume or thenceforward retain the subject-matter of the gift to the entire exclusion of the third earl, or of any benefit to him by contract or otherwise. The benefits under heads 1 and 2 are so plain as to require no further notice. Under head 3 it would have been open to the third earl by the mere process of incurring debts and spending the sums borrowed, or by borrowing for the purpose of settling the sums borrowed and actually settling them in favour of other persons, to make the present earl liable to the full amount of the benefit taken by him under the deed. This would clearly be a benefit to the third earl, arising, at any rate, by contract, if not by way of charge upon the property granted and assigned. Although the power

of revocation is not absolute, it cannot be doubted that the possibility of its being exercised was also a benefit to the third earl, not so great as if the power were unconditional, but which might be measured by the extent to which it derogated from the value to the present earl of the property granted and assigned, which would be very considerable. From the execution of the deed of 1885 down to the 26th of September, 1894, there was no moment of time in which the property for the time being subject to the deed of 1885 was held by the donee to the exclusion of any benefit to the third earl. The deed of the 26th of September, 1894, only varied this state of things by releasing the benefits arising under heads 1 and 4, leaving those under heads 2 and 3 in full force. I do not see how it would be possible to avoid the conclusion that the whole subject-matter of the gift, so far as it existed at the death of the third earl, would have been liable to be included in an account under section 38 of the Act of 1881, sub-section (*a*), amended as in the Act mentioned. It does not seem to me to be necessary to determine whether in the present case sub-section (*c*) of section 38 of the Act of 1881, amended as mentioned in the Finance Act, is or is not applicable. The result is that all property granted or assigned by the deed of 1885, and existing at the death of the third earl, is to be deemed to have passed on his death, and therefore to be liable to estate duty.

VAUGHAN WILLIAMS, L.J.—This is a case of some difficulty. There are several grounds upon which the Crown contends that the property in question is liable to estate duty under the Finance Act, 1894, as property passing on the death of a deceased. By the Finance Act, 1894, s. 2, sub-section 1, "property passing on the death of the deceased shall be deemed to include . . . (*c*) property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

By the Customs and Inland Revenue Act, 1881, s. 38, sub-section 2: "The personal or movable property to be included in an account shall be property of the following descriptions." I need not read it at length; it may be taken as having been read. Sub-section (*a*) relates to *donatio mortis causâ*, and (*c*) says, "Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property." Then by the Customs and Inland Revenue Act, 1889, s. 11, sub-section 1, "Sub-section 2 of section 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows." Then (*a*), the amendment clause—I need not read the early part of it—concludes, "and the said description of the property shall include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

Now, it is argued on behalf of the Crown that the property in question is liable to estate duty, first, as being property passed under a voluntary settlement whereby an interest in such property for life or some other period terminable by reference to death is reserved expressly or by implication to the settlor, or whereby the settlor has reserved to himself the right to restore to himself or to reclaim the absolute interest in such property; secondly, it is argued that the property is liable to estate duty as being property taken under a gift, whenever made, of which property *bonâ fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

Now, with regard to the first ground the difficulty suggested on behalf of the appellant is that the property has not passed under a voluntary settlement within the meaning of clause (*c*) of sub-section 1 of section 2 of the Finance Act of 1894—that is to say, that the instrument passing the property on the death of the late Earl Grey is not a voluntary settlement within the meaning of section 38 of the Act of 1881 as a section enacted by reference in the Finance Act, 1894, and controlled by the definition in section 22 of the Finance Act, 1894.

Now, with regard to the second ground the difficulty suggested by the appellant is this, that the donee did "immediately upon the gift and thenceforward" assume possession and enjoyment of the whole of the property included in the gift to the entire exclusion of the donor or of any benefit to him, because the annual rent-charge of £4,000 a year is not part of the property included in the gift; but an estate prior to and overriding the gift, and, because the covenant by the donee to pay all the debts of the donor to the full exhaustion of the real and personal property, is not an admission of the donor to any possession or enjoyment of the property included in the gift or of any benefit to him, the donor therein, and because that covenant by the donee does not amount to the admission of the donor to the enjoyment of the property or to any benefit thereout and certainly does not amount to a charge thereon in favour of the late earl.

These difficulties are serious. It may be that they can be got over when the meaning of the words in the Finance Act is properly construed—indeed, I am going to a certain extent so to hold—but in my judgment you have no right in the construction of that Act to say, as I understand the counsel for the Crown to invite us to do, that in a particular case property is subject to estate duty although such property does not fall within the words of the Act imposing the duty if construed literally, because the whole gist and scope of the Act leads to the inference that it is impossible that property of the character in question should have been intended by the Legislature to be excluded from liability to the duty imposed by the statute, and you have no right to refuse to give effect to a definition in the Finance Act on the ground that the context requires that a different meaning should be given to the words the subject of the definition from that contained in the definition, if the only ground for refusing to give to the word the meaning according to the definition is that so to do would be to defeat what appears to be the general intention of the Act of Parliament. I will say no more on this point because I do not mean to decide it, but I prefer to base my judgment on the gift of property in the present case falling within the later words of sub-section 1 of section 11 of the Act of 1889. Now, even apart from the rent-charge the decision in *Crossman* v. *Reg.*, 35 W. R. 303, 18 Q. B. D. 256, shows that the covenant for the payment by the donee of the donor's debts would be a reservation of

an interest within the meaning of section 38 of the Act of 1881, because it was held in that case that the covenant of the donee to pay the donor for his life interest at 4 per cent. on the capital value of the personalty transferred by the gift was the reservation of an interest within the meaning of section 38, and it seems to me that the fact that the covenant to pay the donor's debts is not an interest or benefit determinable on death does not prevent the decision in *Crossman's case* applying to show that the covenant to pay the donor's debts is the reservation of an interest, although not an interest determinable on death, and as such negatives the exclusion of the vendor from any benefit in the property the subject of the gift, and I therefore concur in the judgment of the court below on the ground that in this case there was a gift of the property within the meaning of the section of the Act of 1889, and that the donee was not intended to, and did not in fact, assume possession and enjoyment to the total exclusion of benefit to the donor. Such an interest is totally different from the prior estate created by the use in respect of the rent-charge, and I mention this because I am inclined to agree with the appellant that the rent-charge must be treated as something entirely outside the gift.

Appeal dismissed.

Solicitors for the appellant, *Flux & Leadbitter.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 4, 1898.

PARR'S BANKING CO. *v.* YATES. (*a.*)

Limitations, Statute of—Guarantee—Banking account—Principal advanced six years before action—Interest accrued within six years—Appropriation of payments on account.

The defendant gave a guarantee to the plaintiff bank, whereby, in consideration of the bank making advances to one of their customers, the defendant undertook to guarantee the payment of all moneys from time to time owing to the bank in account with the customer, with interest, commission, and other banking charges. The customer's account was made up every half-year, the amount which had become due for interest, commission, and banking charges during each half-year being added to the principal and carried forward to the next half-year. The bank made advances to the customer during four years. More than six years after the last advance, the bank brought an action on the guarantee. The customer had from time to time made payments on account down to a short time before action brought.

Held, that the bank's claim under the guarantee in respect of the advances was barred by the Statute of Limitations; but that they were entitled to recover in respect of interest, commission, and banking charges which had become due within six years before action.

Held, also, that the rule by which payments on account are appropriated to interest before principal did not apply to such a banking account as that in question.

Appeal from the judgment of Bruce, J., at the trial of an action without a jury.

The action was brought to recover £1,000 upon a guarantee given by the defendant to the plaintiff bank to secure the current account of Duncan McLaren, who carried on business as D. McLaren & Co.

The guarantee was dated the 7th of February, 1887, and was as follows: "In consideration of your agreeing at my request to come under advances or liabilities to or for D. McLaren & Co. (the guaranteed party) in account current with you on condition that I should give this guarantee, I undertake to guarantee to you the due payment and satisfaction of all moneys and liabilities that may have been or may from time to time be owing to or incurred by you in account with the guaranteed party, with interest, commission, and other banking charges; and this shall be a continuing guarantee and shall not be withdrawn except at the expiration of six calendar months from the day of written notice being given by me to you for that purpose; but the amount ultimately recoverable hereunder shall not exceed £1,000 with interest thereon from the day on which the same shall be demanded from me until paid . . . and any settled or stated account by and between you and the guaranteed party or admitted by the latter shall from time to time be and be received in any court or under any circumstances whatsoever as conclusive and indisputable evidence against me of the balance or amount thereby appearing due from the guaranteed party to you."

Between the 8th of February, 1887, and the 3rd of December, 1890, the bank made advances to McLaren from time to time and debited his account therewith, and McLaren from time to time made payments which were put to his credit, but the account always showed a balance due from him to the bank. The account was made up every half-year, the amount which had become due for interest, commission, and bank charges during each half-year being added to the principal and carried forward to the next half-year.

On the 31st of December, 1890, the balance due to the bank was £3,247 14s. 5d. After that date the bank made no further advance, but the account continued to be debited each half-year with the amount which had become due for interest, commission, and bank charges. McLaren continued from time to time to make payments on account down to March, 1897, and on the 30th of June, 1897, the balance due from him was £1,979 1s. 6d.

The action was commenced on the 3rd of September, 1897. The defendant pleaded the Statute of Limitations.

At the trial Bruce, J., found as a fact that there had been an account stated between the bank and McLaren in 1895, which took the case out of the operation of the Statute of Limitations, and on that ground he gave judgment for the plaintiffs.

The defendant appealed.

Joseph Walton, Q.C., and *W. F. K. Taylor, Q.C.* (*Tobin* with them), for the defendant.—There was no account stated in this case. The plaintiffs' claim, as regards the advances, is barred by the Statute of Limitations, for their cause of action as to each advance arose when that advance was made: *Reeves* v. *Butcher*, 39 W. R. 626, [1891] 2 Q. B. 509. Interest being accessory to principal, their claim as regards interest is also barred. Moreover, the interest must be taken to have been paid by McLaren's payments on account; for it is a general rule that payments on account are to be appropriated to interest before principal: Lindley on Partnership, 6th ed., 235.

Carver, Q.C. (*Horridge* with him), for the plaintiffs.—The Statute of Limitations does not apply, for this is a continuing guarantee. At anyrate the plaintiffs can recover in respect of interest, commission, and charges which have accrued due within six years. The rule as to the appropriation of payments on account to interest is not applicable to a banking account such as that in the present case.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

A. L. SMITH, L.J.—On the facts I cannot agree with the finding of Bruce, J., that there was an account stated between the bank and McLaren in 1895. I must, therefore, deal with the other points which have been raised on this appeal. I am of opinion that as all the advances by the bank to McLaren were made before the 31st December, 1890, the claim of the bank as regards those advances is barred by the Statute of Limitations. But the guarantee was given not only in respect of the advances, but also in respect of interest, commission, and other banking charges. Interest, commission, and other banking charges have accrued due within six years before the action was brought; and inasmuch as they are guaranteed, I think that the plaintiffs are entitled to recover such interest, commission, and banking charges as have accrued due within the six years. In my opinion the rule as to the appropriation of payments on account to interest before principal does not apply to the case of a banking account in which the amount which becomes due for interest every half-year is added to the capital and carried forward to the balance of the next half-year. I therefore think that the judgment of Bruce, J., must be varied.

RIGBY, L. J.—I agree in thinking that there was no account stated. I also agree that so far as regards the principal sums advanced the plaintiffs' claim is barred by the Statute of Limitations. For those sums became due, and the bank's right of action against the guarantor in respect of them arose, more than six years before the writ. I do not think that the words "continuing guarantee" mean that the guarantor is to remain liable for all advances made to the principal debtor as long as the principal debtor remains liable. With regard to interest the question is not so easy, but I am of opinion that the true construction of the document is that the guarantor is not merely to be liable for interest as accessory to the principal, but that he is to be liable for all sums due on the account whether they consist of principal or interest. The plaintiffs' claim, therefore, is not barred as to interest which became due within six years of the writ. I also agree that the rule as to appropriation does not apply to a case like the present.

VAUGHAN WILLIAMS, L. J.—I am of the same opinion The plaintiffs' cause of action as to each particular item in the account, whether of advance, interest, or otherwise, arose when that item became due, and the Statute of Limitations ran from that time. I therefor agree that their claim, so far as advances are concerned, is barred. I also agree on the other points.

Judgment varied.

Solicitor for the plaintiffs, *Alfred Bright*, for *Batesons, Warr, & Wimshurst*, Liverpool.

Solicitors for the defendant, *Day & Russell*, for *R. Yates*, Liverpool.

High Court of Justice.

Chan. Div. Kekewich, J. — June 11, 1898.

WADE v. WADE. (a.)

Inland revenue—Estate duty—Settled property—Fund charged with specific sum—Residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-section* 1.

A settlor assigned a policy of assurance for £5,000 *on his own life to the trustees of his marriage settlement upon trust to raise out of the policy-moneys the sum of* £4,000, *to be held on the trusts therein mentioned, and upon further trust as to the residue of such moneys for the settlor's executors. The policy had been sold, and the proceeds of sale were now represented by a fund in court. The settlor died in* 1898.

Held, that sub-section 1 *of section* 14 *of the Finance Act,* 1894, *was intended as a protection to the person paying the estate duty, not as a provision for the incidence of that duty; and that the estate duty on the fund must be borne by the part remaining after payment of the* £4,000.

Petition.

In this case there was a fund in court to the credit of the present action consisting of a sum of £4,496 2s. 3d. consols and £29 17s. 7d. cash. This fund represented the proceeds of sale of a policy of assurance for £5,000 on the life of Robert Craven Wade, who had by one of two settlements, both dated the 11th of August, 1858, and made upon his second marriage, assigned such policy to the trustees thereof upon trust to raise out of the policy-moneys a sum of £4,000 to be held by them upon the trusts in favour of the wife and children of the marriage declared and contained in the other settlement of even date therewith, and the surplus moneys were thereby directed to be held in trust for the settlor's personal representatives.

By a subsequent deed of the 7th of July, 1864, R. C. Wade purported to assign to the trustees thereof the said policy for the purpose of making up the portions of all his children to the sum therein specified.

The present action had been commenced for obtaining the execution of the trusts of the indenture of the 11th of August, 1858, so far as they related to the policy. In pursuance of various orders in the action the policy had been sold and the proceeds paid into court, invested in consols, and accumulated during the life of R. C. Wade.

R. C. Wade died on the 6th of April, 1898. The trust fund was liable to pay duty upon his death.

This petition was presented by the present trustees of the settlement of the 11th of August, 1858, and by the wife and children interested thereunder, and prayed—(1) that the costs of all parties might be taxed by the taxing-master as between solicitor and client; (2) that the £4,496 2s. 3d. consols might be sold; (3) that out of the moneys to arise by such sale and the £29 17s. 7d. cash on deposit the said costs might be paid, and the amount of the estate duty payable on the death of R. C. Wade might upon the requisition of the Commissioners of the Inland Revenue be transferred to the account of the Receiver-General of Inland Revenue at the bank; (4) that out of the residue of the moneys to arise by such sale £4,000 might be paid to the present trustees of the indentures of the 11th of August, 1858; (5) that the residue of the moneys to arise by such sale might be paid to the present trustees of the indenture of the

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

7th of July, 1864, or that such other order might be made as to the court should seem meet.

The petition was served on the present trustees of the indenture of the 7th of July, 1864.

Warrington, Q.C., and *G. B. Hamilton*, for the petitioners.

Medd, for the respondents.—By section 14 of the Finance Act, 1894, the estate duty must be borne rateably and not paid primarily out of the residue of the fund: *In re Countess of Orford*, 44 W. R. 383, [1896] 1 Ch. 257; *In re Shaw*, 43 W. R. 315, [1895] 1 Ch. 343. The prayer of the petition is not right.

KEKEWICH, J.—It seems to me that section 14 of the Finance Act, 1894, is not intended to provide for the incidence of estate duty, but is intended to protect the executor or other person who, as between himself and the reversioner, is called upon to pay the duty, and, having paid it, looks to be recouped by virtue of the provisions of that section. He may not be entitled to get it without taking some further legal proceedings against the person who has to bear his share of the duty. The Act does not say that contracts are to be interfered with in any way; it leaves them to the usual laws of construction and legal principles. It seems to me therefore here that the settlor provided a sum of £4,000 to be set apart for certain purposes in priority to the persons entitled to the residue. The trustees were to receive the policy-moneys on condition that they were to take £4,000, and the rest was to go in a different way. The intention of the deed of the 11th of August, 1858, would be altogether defeated if the trustees therefore took the £4,000 less duty. No doubt it was quite competent for the Legislature to impose the liability for the duty upon the £4,000 as well as upon the residue, but the question is whether the Legislature has said so. In my opinion there is no doubt that the duty must be paid in a lump sum, and I think that the prayer of the petition with respect to the £4,000 is right.

Solicitors, *H. B. Wade; Maples, Teesdale, & Co.*

Chan. Div. } August 2, 1898.
Romer, J. }

In re HODGSON.
TAYLOR *v.* HODGSON. (*a.*)

Will—Construction—General words—"All other my real estate in the county of L."—Advowson in gross.

Held, on the construction of a will, that, under the circumstances of the above case, two advowsons in gross passed to one of the testator's sons under a gift of "all other my real estate in the county of L.," those words, though not apt words for the purpose, being such words as might pass the advowsons.

Crompton *v.* Jarratt, 33 *W. R.* 913, 30 *Ch. D.* 298, *distinguished.*

Summons.

This was an application for the opinion of the court upon questions of construction arising in the administration of the estate of the late George Hodgson.

The testator, by his will of May, 1895, after giving specific and pecuniary legacies and an annuity of £1,000 to his wife and disposing of the assets and goodwill of his business of a machine-maker at Bradford between his sons John and George, and, "subject to the option hereinafter given to my said sons successively in real and personal property belonging to me in the county of Lincoln," devised and bequeathed all the real and personal estate and effects whatsoever and wheresoever of or to which he should die possessed or entitled or have power to dispose of as follows: Two equal seventh shares to his said son John, two other equal seventh shares thereof to his said son George, and the remaining three equal seventh shares thereof to his three daughters in equal shares. The testator then directed and declared that his said son John should have the option of acquiring at the sum of £185,000, and as part of his said two seventh shares, "all that my manor of Nocton with the freehold messuage known as Nocton Hall and with the grounds and outbuildings thereto belonging and the lands held with the same, commonly known as 'The Nocton Hall Estate,' all situate in the county of Lincoln, and all other my real estate in the county of Lincoln," with the furniture, pictures, and chattels therein at the time of his death, such option to be exercised in writing within three months of the testator's death. A similar option was then given to the second son George in the event of John's refusal of this gift; and on such option being exercised, then he devised and bequeathed the said hereditaments and premises in the county of Lincoln, and the said chattels in Nocton Hall aforesaid, to the son so having exercised the said option as aforesaid, subject to his accounting for the sum of £185,000, the value of the said premises, as part of his two seventh shares, but such son was not to be called upon to pay that amount, but should be merely debited with the same in ascertaining his share.

The testator died in June, 1895, and the son John duly exercised the option given him to acquire the Nocton Hall estate and the chattels at £185,000.

In 1890 the testator had purchased the perpetual rights of patronage and presentation of and to the vicarages of Nocton and Dunston, at the same time and under the same contract that he purchased the Nocton Hall estate, which contained 7,287 acres and the manors of Nocton and Dunston, and all these hereditaments were conveyed to him by one deed, dated the 24th of January, 1890. The testator subsequently purchased small portions of real estate adjoining or mixed up with these estates, and the whole was known as the Nocton Hall estate. The advowsons were not appendant to the manors of Nocton and Dunston. Both churches were in the county and diocese of Lincoln, and were practically surrounded by the Nocton Hall estates.

One of the questions decided by the court was that the wording of the will, as stated above, coupled with the exercise of the option by John Hodgson, amounted to a specific devise and bequest to him of the manors of Nocton and Dunston and the Nocton Hall estates and the chattels in Nocton Hall. The question was then argued whether the advowsons of Nocton and Dunston also passed to him under this devise.

Neville, Q.C., and *Rowden*, for the plaintiff, one of the daughters of the testator, cited *Crompton* v. *Jarratt*, 33 W. R. 913, 30 Ch. D. 298, and *Kensey* v. *Langham*, Cas. temp. Talbot, 143 (manuscript note by the late Mr. Cox, of Lincoln's-inn, in the library of that society).

J. G. Wood, for another daughter.

Levett, Q.C., and *Ingpen*, for the son John Hodgson, cited *Anonymous Case*, 3 Dyer 323 (*b*).

Neville replied.

Farwell, Q.C., and *A. A. Adams; Alexander, Q.C.*, and *Dibdin; Vaughan Hawkins* and *R. F. Norton*, for other defendants.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

ROMER, J.—This is an extremely doubtful point, in my opinion, but the conclusion I come to is, that these advowsons ought to be held to pass by this devise. The words in the will "all other my real estate in the county of Lincoln," like the words "hereditaments situate in the parish of Doncaster" in the case of *Crompton* v. *Jarratt*, are both expressions which might include advowsons, though I agree they are not apt words to include them. I refer to what was said by Cotton, L.J., in the report of that case at 30 Ch. D. p. 316, and to the observations of Bowen, L.J., at *ib.*, p. 318. In *Crompton* v. *Jarratt*, the court, looking at the deed as a whole including the recitals, came to the conclusion that the words "hereditaments situate in the parish of Doncaster," though they might include the advowson in question in that action, did not pass it on the true construction of the deed of resettlement. They came to this conclusion looking at the deed as a whole, and considered that in that particular deed the words I have just mentioned ought not to be held to include the advowson.

Now, bearing that case in mind, I approach this will, and I think that I am entitled to consider these circumstances. It appears that this testator bought this property in 1890; it was a large estate, and he bought it as a whole, including the advowsons in question, and he held the estate, including the advowsons, as one estate up to the time of his death. The advowsons relate to two churches which are both surrounded by the estate, or, if I may use the expression, are situated on the estate. One church is within the park and close to the hall, the other is some little distance away. Now, looking at this will, am I not entitled to say here that the testator's intention was to put his son in his position as the owner of the estate as a whole? I think he did intend that; I cannot help thinking that the testator never contemplated that these two advowsons should be held separate and apart from the rest of this property; I think he intended his eldest son to hold this property as one as he himself has held it; and, indeed, I am not sure if the words "all other my real estate in the county of Lincoln" do not refer to these advowsons, to what they could refer. It does appear that after the date of his will, and after the date of the original purchase of the Nocton estates and these advowsons, the testator bought some four acres of land which were practically surrounded by this estate and added those acres to his property, but it appears to me that those acres would have passed under the earlier description in the will, "lands held with the same commonly known as the Nocton Hall estate," and would not have required those additional words which have been so much commented upon to pass them; so that if those words do not cover the advowsons it is difficult to say to what they could have applied.

But I do not rely so much upon that as I do upon the general tenor of this will construed, as I am entitled to construe it, with reference to the surrounding circumstances. I think that there is sufficient to enable me to say, in this case, being the case of a will with that general expression "all other my real estate in the county of Lincoln," that these words, though not apt words for the purpose, yet being such words as might pass them, do, in this particular case before me, pass these advowsons to the eldest son John; and I so hold.

Solicitors, *Peacock & Goddard; Swann & Co.*, for *Tweed, Stephen, & Dashper*, Lincoln; *Bell, Brodrick, & Gray*, for *Weatherhead & Knowles*, Bradford; *Seal & Co.*, for *North & Sons*, Leeds; *Flower, Nussey, & Co.*, for *Killick, Hutton, & Vint*, Bradford; *Ridsdale & Son*, for *Hartley*, Settle; *J. J. Harlow*, for *Grange & Wintringham*, Grimsby.

Q. B. Div.
(Day and Ridley, JJ.) July 1, 1898.

CRAWFORD v. THE CITY OF LONDON ELECTRIC LIGHTING CO. (*a*.)

Electric light—Inspector—Fees and reasonable expenses—Electric Lighting Orders Confirmation (No. 15) Act, 1890 (53 & 54 *Vict. c. ccxxxix.*), s. 14.

Section 47 of the Electric Lighting Orders Confirmation (No. 15) Act, 1890, *provides that all fees and reasonable expenses of an inspector shall, in the absence of any agreement, be paid by the undertakers. There is a proviso by which such fees and expenses are chargeable to the consumer in the event of any default or negligence being shown against him.*

Held, that the "fees and reasonable expenses" referred to in the first part of the section are limited to such fees and expenses as would be chargeable against the consumer under the proviso, and that, accordingly, the salary of the inspector, the expenses of an electrical laboratory, the wages of assistants, and the cost of the instruments, furniture, and fittings of the laboratory are not chargeable against the undertakers.

Case stated by an alderman of the city of London under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

The Electric Lighting Orders Confirmation (No. 15) Act, 1890, was enacted to confirm certain provisional orders made by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, relating to the city of London.

Section 35 provides as follows: "The local authority, so long as they are not themselves the undertakers for the purposes of this order, may from time to time appoint and keep appointed one or more competent and impartial person or persons to be electric inspectors under this order.

"If no electric inspector is appointed by the local authority, or if the inspection of electric lines and works is imperfectly attended to by the local authority, or if the local authority themselves become the undertakers for the purposes of this order, the Board of Trade, on the application of any consumer, or of the undertakers, may from time to time appoint and keep appointed one or more competent and impartial person or persons to be electric inspectors under this order.

"The duties of an electric inspector shall be as follows: (*a*) The inspection and testing, periodically and in special cases, of the undertakers' electric lines and works and the supply of energy given by them; (*b*) the certifying and examination of meters; and (*c*) such other duties in relation to the undertaking as may be required of him under the provisions of this order or of any regulations under this order.

"The local authority, with the approval of the Board of Trade, or the Board of Trade, if the inspector is appointed by them, may from time to time prescribe the manner in which and times at which any such duties are to be performed by an electric inspector, and also the fees to be taken by him, and such fees shall be accounted for and applied as may be directed by the local authority or the Board of Trade, as the case may be."

Section 36 is as follows: "The local authority may pay to any electric inspector appointed by them under this order such reasonable remuneration (if any) as they may from time to time determine, and such remuneration may be in addition to, or in substitution for, any fees directed to be paid to electric inspectors in respect of their duties under this order or any regulations of the Board of Trade made in pursuance

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

of this order or the principal Act, according as the local authority shall so determine."

Section 47 is as follows: "Save as otherwise provided by this order, or by regulations under this order, all fees and reasonable expenses of an electric inspector shall, unless agreed, be ascertained by a court of summary jurisdiction or (where the inspector is appointed by them) by the Board of Trade, and shall, in the absence of any agreement, be paid by the undertakers.

"Provided that where the report of an electric inspector, or the decision of the Board of Trade, shows that any consumer was guilty of any default or negligence, such fees and expenses shall, on being ascertained as above mentioned, be paid by such consumer or consumers as the court or board, having regard to such report or decision, shall direct, and may be recovered summarily as a civil debt. . . ."

An application was made by the appellants on behalf of the corporation of the city of London to the alderman sitting as a court of summary jurisdiction to ascertain the amount of fees and reasonable expenses of an electric inspector. The statement of expenses included the rent of an electrical laboratory, the gas, electricity, cleaning, coals, and insurance of the same, the wages of two assistants, the depreciation on the value of instruments, furniture, fittings, &c., and the salary of the electric inspector. The whole amounted to £1,226 2s. 7d. From this was deducted £84 fees received by the electric inspector from the respondents, making the total sum claimed £1,142 2s. 7d. The expenses were spread over a period of upwards of two years.

The inspector was appointed by the corporation at a salary of £250 a year. Two-thirds of his time was given to the work of inspection and the remainder to other duties connected with the corporation. All fees received by him were accounted for to the corporation.

The alderman held that the items of the account over and above the £84, admitted fees, could not be properly included in the expression "fees and reasonable expenses of an electric inspector" within the meaning of section 47. He found, further, that if the court should be of opinion that the other items could be included, they were reasonable, except the salary of the electric inspector, which he reduced by one-third.

Rose Innes, for the appellant.—The duty of the alderman is ministerial. He had no right to adjudicate whether or no the expenses were payable. His duty was merely to say whether the expenses were reasonable in themselves. The expenses referred to in section 47 are such expenses as are reasonably incidental to the office of inspector.

Roskill, for the respondents.—The expenses and charges claimed are not the "fees and reasonable expenses of an electric inspector" within section 47. The proviso shows what these fees and expenses are, for, by virtue of the proviso, in certain eventualities the consumer is to pay "such fees and expenses." How is it possible to say that the expenses of the laboratory, &c., can be apportioned so that a consumer shall pay it in the event of his making a default? The expenses intended are, no doubt, hotel expenses and cab fares incurred in the course of a particular inspection.

DAY, J.—I am inclined to think there is no ground for disturbing the decision of the alderman. At the same time, as the case is of importance, I shall be happy to facilitate any appeal if it is within our power to give a right of appeal.

RIDLEY, J.—I agree. I think that when you come to look at the whole of section 47 it becomes necessary to consider what expenses can reasonably be put upon the consumer. If it were not for the second paragraph, which says that the expenses may be put upon the consumer who is in default, it might be more difficult to read and to give a proper definition of the words "all fees and reasonable expenses" in the first paragraph of section 47; but when you follow that up and find that in case the consumer is in default the fees and expenses are to be paid by him, I do not think it possible to say that such expenses as are included in the list which the alderman has disallowed are expenses which could be charged on the consumer. It seems to me that the fees and expenses intended by the section are the fees and expenses connected with the inquiry or the testing of meters, wires, &c., which are upon the consumer's premises in respect of which the consumer may have been guilty of a default. There is no default of which a consumer could have been guilty which has any bearing on the expenses which the alderman has had to deal with. I think the decision of the alderman was right.

Appeal dismissed.

Solicitor for the appellant, *The City Solicitor.*

Solicitors for the respondent, *Ashurst, Morris, Crisp, & Co.*

Q. B. Div.
(Ridley and Channell, JJ.) } May 17, 1898.

BENFORD v. SIMS. (a.)

Animal—Cruelty—Summary conviction—"Cause" act of cruelty—"Knowingly advise and counsel" commission of offence—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.

By section 5 of the Summary Jurisdiction Act, 1848, *a person who shall counsel the commission any offence which is punishable on summary conviction shall be liable to be proceeded against and convicted, either together with the principal offender or before or after his conviction.*

Therefore a person who knowingly counsels the owner of a horse to perpetrate an act of cruelty upon the animal may be convicted upon an information under section 2 of the Cruelty to Animals Act, 1849, *for causing to be cruelly ill-treated the horse, although his advice to the owner was the remote, and not the proximate, cause of suffering to the animal, and no proceedings had been instituted against the owner.*

Case stated by T. W. Lewis, Esq., a stipendiary magistrate for the county borough of Cardiff.

An information was laid by the appellant, Frederick Benford, under section 2 of the Cruelty to Animals Act, 1849, against the respondent, Hugh Sims, a veterinary surgeon of Cardiff, for that he in December last did unlawfully cruelly ill-treat a horse by causing it to be overworked while in an unfit state.

The charge was heard by the learned magistrate on the 24th of January and dismissed, but on the application of the present appellant, he stated a case for the opinion of the High Court.

It appeared that early in 1897, Alfred Hunt, a coal merchant, who was the owner of the animal in question, consulted the respondent with reference to its lameness. Mr. Sims examined the animal, and advised that she should be turned out to grass for the summer. And this was accordingly done.

(a. Reported by ERSKINE REID, Esq., Barrister-at-Law.

In November, Hunt asked the respondent again to see the mare, and he then gave a written certificate, dated the 18th of November, 1897, in the following terms: "I have this day examined a bay mare, 'Kit,' the property of Mr. A. Hunt, and find the said mare to be renewing her hoof on the near fore foot. Nevertheless, the mare is free from pain and quite fit for her work.—(Signed) HUGH SIMS, M.R.C.V.S." The mare was then very lame. Having obtained the certificate, Hunt proceeded to work the mare from then until the 13th of December, when she was stopped by the appellant, an inspector for the Royal Society for the Prevention of Cruelty to Animals. The mare was then in charge of a driver, and was drawing a load weighing 34cwt. She was very lame on the near fore foot, which was deformed and extensively diseased, and was evidently in great pain.

On the following day she was examined by two veterinary surgeons, who stated she was suffering from laminitis, or fever in the feet, of long standing, and that even light work would cause her great pain, on the 18th of November, when the certificate was given. The appellant thereupon interviewed the respondent, who said: "The mare is suffering from navicular disease, and is growing a new hoof. She is better at work than standing in the stable or turned out to grass. She is in the same condition now as when I gave the certificate in November. She is working under my directions, and I accept full responsibility." The respondent pleaded not guilty and called witnesses.

The magistrate found as facts (1) that working the mare on the 13th of December was an act of cruelty; (2) that the act of cruelty was knowingly perpetrated by the driver, and knowingly caused to be perpetrated by the owner; (3) that the owner was a person in a position of authority to direct the driver to work the mare; (4) that the respondent was not a person in a position of authority to direct the owner to cause the mare to be worked; (5) that the respondent knowingly counselled the owner to cause the act of cruelty to be perpetrated; and (6) that the owner was in some degree influenced by such counsel to cause the act of cruelty to be perpetrated.

The magistrate dismissed the information, being of opinion that the act of cruelty proceeded from the exercise of the authority of the owner of the animal upon the driver in sending him to work the mare and so inflicting pain; that the respondent exercised no power, influence, or authority over the driver; that the advice or opinion of the respondent to the owner need not have caused him to work the animal; that, although his advice in some degree influenced the owner to work the mare, such advice was the remote cause of the cruelty in some degree, and not the approximate cause in any degree, and therefore not the "cause of cruelty" within the meaning of the statute, and that the respondent was charged with the offence committed by the owner, and not charged with the offence disclosed by the facts—namely, knowingly counselling an act of cruelty to be caused.

The question for the opinion of the court was whether the magistrate was right in acquitting the respondent of the offence charged.

Colam, for the appellant.—The decision in this appeal is one of great importance to the society because magistrates will not convict, if the owner of a horse, who is summoned for working the animal in an unfit state, can put in a veterinary surgeon's certificate that the horse is better at work than standing in the stable. Owners know that this is a fact, and rather than run the risk of a conviction get a certificate first from some small veterinary surgeon. [RIDLEY, J.—A horse may be fit enough to do light work and yet it may be an act of cruelty to make him pull two tons.] As a rule the magistrates will not go into the facts at all. Section 2 of the Cruelty to Animals Act, 1849, makes it an offence to cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, &c., any animal, and I submit that there is no logical distinction between "cruelly causing or procuring" an act of cruelty to be done, and the words in section 5 of Jervis's Act which are "aid, abet, counsel, or procure the commission of" any offence. If, as I submit, the words in the Act of 1849 do not limit the offence to the person who is the direct cause of the cruelty, then as Jervis's Act enables an accessory to be proceeded against as a principal the magistrate ought to have convicted the respondent. *Wilson* v. *Stewart*, 11 W. R. 640, 3 B. & S. 913, was referred to.

The respondent did not appear.

RIDLEY, J.—I should have been glad if there had been arguments on behalf of the respondent, as they might have assisted us in forming our conclusion; but that not being so, we are compelled to give our decision upon the materials before us. The magistrate has found that the respondent knowingly counselled the owner to cause the act of cruelty to be perpetrated, but that he has not caused the horse to be ill-treated within the meaning of the Cruelty to Animals Act, 1849, for the reason that although the advice of the respondent in some degree influenced the owner to cause the animal to be worked, such advice was the remote cause of the cruelty in some degree, and not the proximate cause of the cruelty in any degree, and therefore not the "cause of the cruelty" within the meaning of the statute. I think it is probably correct to say that the word "cause" used in section 2 of the Cruelty to Animals Act, 1849, is used in a stricter sense than the word "procure" or "counsel" used in section 5 of the Summary Jurisdiction Act, 1848, and that it is proper to inquire whether the person charged has been the immediate cause of the offence being committed; and I think that there is no evidence in the present case on which the magistrate ought to have found that, in that sense, the respondent was the cause of this act of cruelty. It might very well be that the veterinary surgeon in certain cases and on certain facts might be found to have actually caused the act of cruelty to the animal in question, although not the owner of it, and not in a position to order the owner to do anything. But it does not appear to me that such a state of circumstances existed in this instance. The magistrate proceeds to say that as the respondent was charged with the offence committed by the owner, and was not charged with the offence disclosed by the facts, he must be discharged. And the question now arises whether, under section 5 of the Act of 1848, it was not competent for the magistrate to proceed upon this information and upon the facts that he has found, and to convict the respondent.

The magistrate appears to have thought that the information should not have stated the principal offence, but the aiding, abetting, counselling, or procuring the commission of the offence, in order to enable the proceedings to properly result in the conviction of the respondent. In my opinion section 5 of the Act of 1848 ought to be read as meaning that the person who knowingly counsels such offence to be committed is to be proceeded against and convicted for the same either together with the principal offender or before or after his conviction, and may be treated throughout as the principal offender. It is true that in the analogous section in the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94)—namely,

section 1, which deals with accessories and abettors, the words used are that the accessory "may be indicted, tried, convicted, and punished in all respects as if he were a principal felon," whereas in section 2 of the Act of 1848 the words are "liable to be proceeded against," and in order to make the sections precisely analogous the words in the latter section should be "informed against," so as to expressly enact that the form of the information may be the same in the case of an abettor as in that of the principal. But I do not think that that distinction is sufficiently marked to compel us to say that section 5 of the Act of 1848 must be read as meaning that the abettor must, in the preliminary proceedings, be treated in form as a counsellor and abettor, and that he may then be convicted as a principal. The effect would be that in the information the offender must be treated as counselling and abetting the offence, and afterwards be convicted as though he was a principal offender. If the words were clear and certain we should be compelled to say that such was their meaning, but I do not find that that is so. The words are "to be proceeded against," and *primâ facie* I should be inclined to think that a preliminary proceeding such as the information might be included in those words, although not expressly referred to in the same way as the indictment is in section 1 of the Act of 1848.

It therefore appears to me that the magistrate might have convicted and might have found the respondent guilty under section 5 of the same offence as if he had been a principal offender. The case therefore must go back with an intimation of that opinion to the magistrate, directing him to convict.

CHANNELL, J.—I am entirely of the same opinion. It seems to me that if in this case the driver and veterinary surgeon had been charged together with committing this offence they might have been convicted, and the respondent would not have been able to establish a defence by saying that he did not commit the act himself, but only aided and abetted it. If that be so then it follows that the respondent ought to have been convicted. I desire to point out that this decision proceeds on the very special finding in this case, and that there is no ground whatever for supposing that a veterinary surgeon who gives a wrong opinion, and commits an error in judgment, is liable to be convicted of cruelty if the effect of his opinion being followed is that the act of cruelty did in fact result. If in such a case he acted honestly he would not in my opinion be to blame.

Case remitted.

Solicitor for the appellant, *S. G. Polhill.*

Q. B. Div.
(Wills and Kennedy, JJ.) } May 17, 1898.

JENKINS & SONS *v.* COOMBER. (*a.*)

Bill of exchange—Acceptance—Indorsement by way of security—Subsequent indorsement by drawers—Incomplete bill—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 55, 56.

The plaintiffs agreed with C., who owed them money, to draw a bill on him, and that C.'s father should indorse it as a surety for its payment. They thereupon drew a bill on C. to their own order, and, without indorsing it, handed it to C., who accepted it and then obtained his father's indorsement. He returned it to the plaintiffs, and they then indorsed it beneath the indorsement of C.'s father. The bill was dishonoured at maturity, and the plaintiffs then sued C.'s father as the indorser.

Held, that he was not liable as indorser under section 55 *of the Bills of Exchange Act,* 1882, *nor was he liable under section* 56, *as the bill was not negotiable at the time he wrote his name on it, as it was irregular and incomplete, owing to the plaintiffs not then having indorsed it.*

Held, further, that he was not liable as guarantor, since the requirements of the Statute of Frauds had not been complied with.

Steele *v.* McKinlay, 29 *W. R.* 17, 5 *App. Cas.* 754, *is still a binding authority, and the principles therein laid down have not been altered by the Bills of Exchange Act,* 1882.

This was an appeal by the plaintiffs from the Westminster County Court.

The action was brought by the holders of a bill of exchange against the indorser. The bill was in the following form:

"London, August 5, 1897.

"£57.—Three months after date pay to our order the sum of fifty-seven pounds for value received.

"J. Jenkins & Sons.

"To Mr. A. Coomber.

"Accepted; payable at the London and County Bank.—Arthur Coomber."

Indorsed "Alfred Coomber, J. Jenkins & Sons."

Arthur Coomber, the son of Alfred Coomber, the defendant, owed money to Jenkins & Sons, the plaintiffs, and by an arrangement between him and the plaintiffs the latter drew upon him a bill at three months to their own order, it being agreed that the defendant should indorse the bill to guarantee its payment. The plaintiffs without indorsing the bill gave it to Arthur Coomber, who took it to his father, the defendant, and got him to indorse it. He then returned the bill to the plaintiffs, who afterwards indorsed it.

The bill not being paid at maturity the plaintiffs brought an action against Alfred Coomber as indorser.

The learned county court judge, acting on the authority of *Steele* v. *McKinlay*, 29 W. R. 17, 5 App. Cas. 754, gave judgment for the defendant.

From this decision the plaintiffs now appealed.

C. L. Attenborough appeared for the appellants.—The decision of the learned county court judge was wrong. *Steele* v. *McKinlay* is now no longer an authority since the Bills of Exchange Act, 1882: see the remarks of Lord Herschell in the case of *Bank of England* v. *Vagliano Brothers*, 39 W. R. 657, [1891] A. C. 107, where at p. 144 he says, "I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." The plaintiffs became holders in due course, and even if they are not so, they are the holders within the definition in section 2. The defendant was an indorser. He put his name on the back of the bill and then completed the endorsement within the meaning of section 2 by delivery to his son.

Abrahams appeared for the respondent.—The question here is not whether the defendant is the indorser, but whether the plaintiffs have a right against him under the circumstances of the case and the order of the indorsements. The defendant merely

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

wrote his name on the back of the bill as a surety for his son. It was not intended that the Bills of Exchange Act, 1882, should alter the law merchant under which an indorser is not liable to a drawer who is a prior party to a bill. Further, he cannot be made liable as a guarantor as the Statute of Frauds has not been satisfied in this case. The plaintiffs were not holders in due course as defined in section 29, and the defendant's signature, therefore, did not impose any liability upon him. The bill was never complete and regular on the face of it: *Wilkinson* v. *Unwin*, 29 W. R. 458, 7 Q. B. D. 636.

Attenborough in reply.—*Steele* v. *McKinlay* is distinguishable from this case, as here it is admitted that it was the intention of the parties that the defendant should be liable, and he ought not to be able to escape that liability merely because the plaintiffs indorsed the bill after instead of before the defendant.

He also cited *Holmes* v. *Darkee*, 1 Cab. & Ell. 23.

WILLS, J.—I am of opinion that the decision of the county court judge was right. There was no notion of repealing by the Bills of Exchange Act, 1882, the law laid down in *Steele* v. *McKinlay*, and I think that that case is still a binding authority. It is clear that section 56, which would give the plaintiffs a right of action against the defendant, has not been satisfied in this case, for this bill was irregular and incomplete. Section 56 provides that a person who signs a bill otherwise than as drawer or acceptor incurs the liabilities of an indorser to a holder in due course. But section 29 says that a "holder in due course" is a holder who has taken a bill complete and regular on the face of it. Section 56 therefore does not apply here. Then it was said the defendant is liable under section 55, sub-section 2, because he indorsed the bill. It is clear that every writing on the back of a bill is not an "indorsement" within the meaning of the Act. The Act does not clearly define what actually constitutes an indorsement, but section 2 says "an indorsement means an indorsement completed by delivery." In *Steele* v. *McKinlay* Lord Watson points out the distinction there exists between an indorser of a bill and a person who writes what if he had a right to indorse would be an indorsement on the bill, although he has no right to the contents. And he says that a person who, intending to become a party to a bill, indorses it, should by the law merchant be held as much liable as a proper indorser. The difficulty in *Steele* v. *McKinlay*, as in this case, was that, though the person who wrote his name on the back of the bill may have intended to become a party to the bill, nevertheless he never did in fact become so because the bill was not then made complete by the indorsement of the drawer. In the cases cited on behalf of the appellants the bills were complete when the indorsements in question were made, but in the present case the bill was not negotiable as it had not been indorsed by the drawers. The result of those cases is that where there is an agreement between the parties which precludes the notion that the holder is liable to the indorser the holder is not prevented from suing the indorser on the ground of circuity of action. The general principle is examined and laid down in *Steele* v. *McKinlay*, and the contract of indemnity is not one which is recognized by the law merchant, but arises solely from an agreement between the parties. As Lord Watson points out in that case, it does not give a primary liability upon the bill as against the defendant. If there is a contract of suretyship it must conform with the requirement of the Statute of Frauds, but the alleged agreement here does not satisfy those requirements. I think, therefore, that this appeal must be dismissed.

KENNEDY, J.—I am entirely of the same opinion. It has been suggested that *Steele* v. *McKinlay* is no longer a binding authority, and that the principles therein laid down have been varied by the Bills of Exchange Act, 1882. I see nothing to justify that proposition. This bill was irregular according to the law merchant, and as an agreement of suretyship it does not satisfy the requirements of the Statute of Frauds, and therefore it is clear that the defendant is not liable upon it to the plaintiffs.

Appeal dismissed.

Solicitors for the appellants, *Attenborough & Son.*

Solicitors for the respondent, *Biggs, Roche, & Co.*

Lunacy.

(Lindley, M.R., and Chitty and Collins, L.JJ.) June 14, 1898.

In re THE EARL OF SEFTON. (*a.*)

Lunatic—Directing committee to accept a devise to lunatic upon condition of resettling other property—Jurisdiction of court—Benefit of lunatic—Pecuniary benefit—Statute Prerogativâ Regis (17 *Edw.* 2, *stat.* 1, *c.* 10)—*Lunacy Act*, 1890 (53 *Vict. c.* 5).

The court has jurisdiction to order that the committee of a lunatic shall accept a devise made to the lunatic upon condition of resettling certain other property, and shall execute the resettlement. This jurisdiction arises from the inherent authority of the court, and is not affected by the Statute Prerogativâ Regis *or by the Lunacy Act*, 1890.

The court, in exercising its jurisdiction, ought to be guided by a consideration of what is for the benefit of the lunatic, but, semble, *is not bound to regard only his pecuniary benefit.*

Lunacy application.

The Earl of Sefton had become a lunatic in consequence of a serious accident which he sustained, and was not likely to live long. His father, the previous Earl of Sefton, who died in June, 1897, was tenant for life of settled estates producing a net rental of about £30,000 a year, and was also absolute owner of estates producing about £21,000 a year. The present earl had, before he became a lunatic, and before his father's death, barred the entail, but without the consent of his father as the protector of the settlement, and had therefore acquired only a base fee. By his will the late earl gave his settled estates, subject to a term of 1,000 years given to trustees for certain purposes, to the present earl for life, with remainder to his issue in tail male; and then for similar estates to a younger son of the late earl and his issue; with remainders over. The will directed that every person who should thereunder become entitled (subject to the term of 1,000 years) as tenant for life or tenant in tail male by purchase to the possession of the devised estates, and who should also become entitled as tenant in tail male or in tail, whether by purchase or by descent, to the possession of the settled estates should, within one year after becoming so entitled under both the will and the settlement (or, if he was an infant, within a year

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

after attaining twenty-one), disentail the settled estates and re-settle them on the same trusts as the devised estates. If the person so becoming entitled did not do this, the estate devised to him was to cease and determine. The testator also bequeathed a sum of £10,000 to the present earl if he should execute the re-settlement, and directed that in that event the present earl's debts (which were stated to amount to £31,000) should be paid by the executors.

Some of the next-of-kin of the present earl took out a summons asking that the committee might be directed to execute, in the name of the lunatic and on his behalf, a re-settlement in accordance with the testator's will. The master refused the application, which was then made to the Lord Justices in Lunacy. It was opposed by the earl's next younger brother, the Hon. Osbert Mollineux, who would be a loser if it were successful.

Farwell, Q.C., and *W. H. Cozens-Hardy*, for the application, referred to *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69; *In re Marriott*, 2 Molloy 516; *In re Hewson, D'Almaine* v. *Moseley*, 23 L. J. Ch. 256, 2 W. R. Ch. Dig. 53; *Wilder* v. *Pigott*, 31 W. R. 377, 22 Ch. D. 263; Shelford on Lunacy, 2nd ed., pp. 309-10; Pope on Lunacy, 2nd ed., p. 365; Lunacy Act, 1890, ss. 108 (2), 117, 120, 121, 123, 128; *Ashby* v. *Palmer*, 1 Mer. 296; Cruise on Fines and Recoveries, vol. 5, p. 129; *Mansfield's Case*, 12 Rep. 123: *In re Grimstone*, Amb. 706; *In re Beridge*, 50 L. T. Rep. 653, 32 W. R. Dig. 124; *In re Drummond*, 1 My. & Cr. 627.

P. C. Lawrence, Q.C., and *Sargant*, for the committee of the lunatic, submitted the question to the court, stating that in the committee's opinion the lunatic was at present amply provided for; and that the question of his pecuniary benefit did not really arise.

Warrington, Q.C., and *Arkle*, for the Hon. Osbert Mollineux, the person next in remainder, referred to the Trustee Act, 1893, s. 31; the Statute *De Prerogativâ*; *Ex parte Dikes*, 8 Ves. 79; *Attorney-General* v. *Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672; *In re Pares, Lillingston* v. *Pares*, 28 W. R. 193, 12 Ch. D. 333; *In re Harwood*, 36 W. R. 27, 35 Ch. D. 470.

Farwell, Q.C., replied

LINDLEY, M.R., said: I do not think we are in a position to do what we should like to do—take a little more time to consider this case. Time presses. If this election is to be made at all, it must be made practically at once; and, having had an opportunity of considering the matter, I have come to a tolerably clear opinion that we have jurisdiction to make this order, and that we ought to exercise that jurisdiction. [His lordship stated the facts, and proceeded:] Bearing in mind that under his father's will the present earl gets not only a large estate, but also other benefits—the legacy of £10,000 and the payment of his debts—it is obvious that from one point of view, and that one which the court will take into consideration, it is to his advantage to accept this devise. What, then, ought to be done? If this gentleman is in the least degree likely to live, and is actuated by the feelings by which sons usually are or ought to be actuated, there can be no question that he would, if he could exercise any choice, accept the Sefton estates on the conditions stated in the will. There are obvious family advantages in so doing. I am not at all prepared to say that it is the duty of the court to look only to the question of the lunatic's pecuniary benefit. It is for his benefit to do what his father wished, and to keep the two estates together. It is in this case for his pecuniary interest, because he will get a great deal more money if he accepts the devise. It is for the benefit of the lunatic that he should perform the condition upon which alone he can obtain, or at least can keep, the Sefton estate. I say keep it, rather than get it, because under the will he has got it, and he will lose it if he does not resettle it. Let us look at the matter, first, apart from the Lunacy Act, 1890. I go by steps. Speaking generally, without reference to the Statute *De Prerogativâ Regis*, I take it that these propositions are elementary and indisputable: first, a lunatic can accept a gift of property, or a bequest or a devise of property; second, a lunatic can accept a gift or legacy upon conditions, provided that the gift and those conditions are for his benefit; thirdly, if a lunatic is entitled to property upon conditions it is the duty of his committee to do all that is necessary to preserve the property by performing the conditions. Authority for the last of these propositions will be found in Collinson's Lunacy, vol. 1., p. 294: "If any part of the estate be liable to forfeiture, or held upon conditions, it is his [the committee's] duty, if possible, to protect it from the forfeiture, to satisfy the conditions, and, when necessary, to apply to the chancellor for directions." All that I take to be perfectly settled law. Now, suppose one of the conditions is that the lunatic shall give up some interest in real property to which he is entitled, the general principle just laid down will apply to that case. There is nothing I know of in the statutory law contrary to that view, except the provision in the old Statute *De Prerogativâ*. That Act has been construed in such a way as to prevent the court from selling or mortgaging the estates of lunatics for the purpose of raising money, even when the lunatic was in danger of arrest under a *ca. sa.*, or was in prison. That was rather a narrow construction, perhaps. But the language of the Act is important. The purpose of the enactment is that if the lunatic recovers, what is not required for his maintenance will be handed over to him, and if he dies it will go as his property ought to go. In no way is it to be alienated. The courts have held that they had no power to alienate the lunatic's property, even for the lunatic's benefit, the object of the Act being to preserve the property for him or his representatives. But it seems to me that we shall be introducing for the first time a still narrower construction, if we say, under the stress of this Act, which was passed for a totally different purpose, that we are incompetent to sanction giving up a small part of the lunatic's real estate for the purpose of saving for him a far larger part of it. I agree it would not do to say that because we think our predecessors made a mistake we are going to construe the Act differently. But I am not disposed to press a narrow construction beyond what is necessary. It seems to me we should be making a very bad precedent if we were to hold that this statute of Edward 2, passed to preserve the property of lunatics, prevented us doing what is for the advantage of the lunatic, even in relation to property, and also in other ways. If, then, we have jurisdiction in the matter, it seems to me it follows as a matter of course, in these circumstances, without invoking the Act of 1890 at all, that we ought to exercise that jurisdiction.

I will now say a word or two about the Lunacy Act, 1890. It was very strenuously contended by Mr. Farwell that certain sections in that Act authorized the court to make the order here asked for. I think we should be making a bad precedent if we were to say that. We cannot, I think, bring this case within the language of the Act of 1890 without unduly straining that language; and I base my judgment upon the in-

herent jurisdiction of the court, which is not bounded by the cases enumerated in that Act. With respect to section 124, of which we have heard so much, and which enacts that "the committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly," I do not invoke that at all. That section, I think, is put in to supply a possible defect or remove a possible doubt. That view does not, however, prevent the court from doing the very same thing under its general jurisdiction. I look upon that section simply as an enabling clause. I cannot help thinking that we should be doing quite wrong were we to give effect to any contention which cuts down the power of the court in this matter.

If the case had not been so pressing I should have liked to look at some authorities, to make sure that I have not made any mistake. As to the principles upon which I have proceeded I do not feel the slightest doubt. I think this application ought to be granted.

CHITTY, L.J.—I am of the same opinion upon the question whether to grant this application would be for the benefit of the lunatic. I have no hesitation in stating my conclusion that it will be for his benefit. I think we ought not in these cases simply to take a narrow view of pecuniary benefit, but ought to act for the lunatic as he, if a person of sound mind, would probably act for himself. He would be guided, as a reasonable man, by a desire to comply, if possible, with his father's wishes. But I am satisfied that even in a merely pecuniary sense it is for his benefit. If he accepts the devise and complies with the conditions he will get a legacy of £10,000, and his debts, to the amount of £31,000, will be paid. The lunatic has a base fee under a settlement, in an entailed estate, which will endure as long as there is issue male of his body. The Sefton estates are stated to be of about equal value with those devised to the lunatic by his father's will. Now, that will imposes upon him the condition that he shall resettle the lands in which he has this base fee, so as to make those lands follow the limitations of the estate settled by the father's will. Those limitations are usual, ordinary, and proper. Now, the lunatic cannot in any circumstances hold the entire interest which he now has in the Troxteth estate and also take the estate limited to him under the will. The case is therefore not simply one of aliening the lunatic's estate, but rather of giving him the largest measure of benefit he can in the circumstances obtain in real estate.

This short statement now brings me to the Statute *De Prerogativâ*. I premise that I have no hesitation in saying that a lunatic can accept a devise if it be for his benefit; and that the question whether it is for his benefit is for this court, which has been entrusted with the custody of lunatics, to determine. The object of the Statute *De Prerogativâ* seems to have been to preserve the estate for the benefit of the lunatic, and to prevent it being wasted. That has been construed as a prohibition against alienation, as one method of dealing with lands which would not be for the benefit of the lunatic. I think a somewhat narrow construction was put upon that statute when it was held that lands could not be aliened by way of sale, or in other cases where it might be plainly for the benefit of the lunatic that such an alienation should take place. But the law is settled by the older decisions. I think, however, that those decisions do not drive us to the extreme length contended for. It is quite consistent with the language of the statute, that in order to keep the greater, better, and more valuable part of the property to which the lunatic is entitled there should be jurisdiction in the King, and in this court, which has been entrusted with the custody of lunatics, to throw away the worse and less valuable part. These constitu e the short grounds on which I think that, quite apart from the Lunacy Act, 1890, we have in these circumstances jurisdiction to elect, for the benefit of the lunatic, that he shall take under the devise and comply with the conditions it imposes.

I will add one word about the Act of 1890. There is no advantage in going through all the various clauses to which we have been referred under Part IV. I state the sum of my opinion when I say that none of those clauses apply to this particular case. At the same time I think these specific provisions have not cut down the general jurisdiction of this court. As to section 124, that does not in terms refer to such a case as this, but is an enabling section. It does not cut down the right of this court, where it has the jurisdiction, to give effect to that jurisdiction by directing that the proper conveyances should be executed. I do not think, although I have referred to it during the argument, that it is necessary to pursue, in any detail, the question of the working of the jurisdiction in cases where it is simply equity that insists upon a man who takes under a will observing some condition of the gift. Here there is a condition at law.

COLLINS, L.J.—I am of the same opinion. I cannot doubt that if the lunatic were now in possession of his senses he would regard it as for his benefit, and moreover as a duty, to make the election. The court has now to make that election for him. It is only by taking the narrowest view of the meaning of "benefit" that the order asked for can be said not to be for his benefit. Indeed, assuming that there is no possibility of his recovery, it can in no sense be said that it is not for his benefit. I am quite satisfied that in making the order we are acting for the benefit of the lunatic. Having listened carefully to the argument on the Act of 1890, I was not satisfied that under that Act we had power, without unduly straining its words, to do what is here asked. But on the large question of the jurisdiction under the Statute *Prerogativâ Regis*, I have not myself been able to entertain any doubt that were we to refuse this application we should be defeating the purpose of that Act. The obvious purpose of the Act is to preserve for the lunatic his lands and tenements, so that they may be handed back to him on his recovery, or properly disposed of after his death. I can imagine that, on a narrow construction of the Act *Prerogativâ Regis*, alienation even for payment of the lunatic's debts might be disallowed. Here the case stands thus. If we do not elect the lunatic must lose some of the property to which he is entitled; if we do he will keep more. That is the only way I can understand the central provision of the Act. Therefore I have had no difficulty about that part of the case.

I rejoice that my brothers, who know so much about the machinery of the Lunacy Acts, have been able to arrive at the conclusion that the order asked for can be made.

Application granted.

Solicitors, *Gedge, Kirby, & Millett; Field, Roscoe, & Co.*, for *Gibbons & Arkle*, Liverpool.

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — Aug. 10, 1898.

JOHN v. JOHN. (a.)

Practice—Receiver—Ejectment action—Disputed title—Defendant in receipt of rents—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.

The appointment of a receiver in an action pending to recover possession of land is discretionary on the part of the court, and on all such applications the surrounding circumstances must be considered. If on the evidence before the court it is satisfied that the plaintiff has shown a good title, and that the tenants are in jeopardy through the defendant being in possession, a receiver will be appointed.

Appeal of the defendant from North, J.

The plaintiff in the action claimed to be entitled, as tenant in tail male, to real estate in Cornwall under the will of his great-grandfather, George John, who died in 1847. A great-grandson of the testator, George Dennis Trevelyan John, had been in possession or receipt of the rents for forty-two years before his death on the 31st of January, 1898. The plaintiff alleged that G. D. T. John took an equitable estate for life only, and that on his death the property passed to the plaintiff as tenant in tail male.

On the death of G. D. T. John, his mother, the defendant, went into possession and receipt of the rents, claiming that her son had been entitled in fee, and that she was now entitled as his devisee in fee.

The plaintiff moved in the action of ejectment for the appointment of an *interim* receiver of the rents.

North, J., being of opinion that the plaintiff had shown a clear title, made the order appointing a receiver.

The defendant appealed.

Haldane, Q.C., Macnaghten, Q.C., and *Carson,* for the appellant.—The court will not appoint a receiver in an ejectment action to the prejudice of a defendant in possession unless there are special circumstances, such as a scramble for possession, as in *Foxwell* v. *Van Grutten,* [1897] 1 Ch. 64, 45 W. R. Dig 127; or where the property is being wasted. There are several questions in dispute here, and the plaintiff has not established his title. If an order is made the result will be that in every ejectment action a plaintiff, by moving for the appointment of a receiver, will be able to force a defendant in possession to disclose his title before the trial.

Swinfen Eady, Q.C., and *Stock,* for the respondent.—*Foxwell* v. *Van Grutten* laid it down that the appointment of a receiver in an ejectment action was in every case discretionary. Here it is quite clear that the defendant has no title, and therefore a receiver ought to be appointed.

Haldane, Q.C., in reply, referred to *Talbot* v. *Hope Scott,* 6 W. R. 269, 4 K. & J. 96.

LINDLEY, M.R.—I do not think that we shall be introducing any revolutionary practice if we affirm the decision of North, J., which I am convinced is right. The only difficulty is occasioned by the decision in *Foxwell* v. *Van Grutten.* We must first look at section 25 of the Judicature Act, 1873. Sub-section 8 of that section applies to what are called ejectment actions, such as actions for the recovery of land. Therefore we have to consider in each particular case whether it will be just or convenient to appoint a receiver. In considering each case we must first look at the person who is in possession, and consider how long he has been in possession, and the title by which he holds, if he chooses to disclose it, and then at all the other circumstances which may be material; and in doing this the risk to which the tenants may be exposed of having to pay their rents a second time must not be lost sight of. Whether that point was taken into consideration in *Foxwell* v. *Van Grutten* does not appear, but the key to the conclusion at which I have arrived in this case is that I do not believe in the title of the defendant. I do not decide against her, and it may be that at the trial of the action I shall be converted by the arguments of counsel, but at present I do not believe that on the construction of this will the defendant has a title. As I am of that opinion, and I believe in the title of the plaintiff, I think it would be wrong to refuse the appointment of a receiver. Those are the short grounds for dismissing this appeal.

CHITTY, L.J.—I am of the same opinion. The jurisdiction of the court under section 25, sub-section 8, of the Judicature Act, 1873, is discretionary, and every judge in exercising his discretion must exercise it judicially and not arbitrarily. I think it is "just or convenient," or, as Sir G. Jessel used to read it, "just *and* convenient," that in the circumstances of this case a receiver should be appointed, and that this conclusion is consistent with the function which the Legislature has cast upon the court in these cases of saying whether the appointment is just or convenient. One element which must not be lost sight of is the position of the tenants. They have not appeared in any way or asked to be protected, but it is apparent that they are exposed to a double claim at this moment. It may be that if any leases have been granted by G. D. T. John, he having held the property in such a manner that he had a leasing power under the statute, the plaintiff would have the right to distrain for rent; so the tenants are in jeopardy. I do not rest my decision on that ground alone; it is only a circumstance which has to be considered. North, J., has looked at the will and come to the conclusion that the defendant cannot make out any title at all. I do not think it is necessary to go so far as that; there may be some learned arguments to be urged at the trial. But as the case stands at present I agree with North, J. These are the two main circumstances which we must take into consideration. Another is that the defendant is not in possession of any mansion-house, and will not be turned out of actual possession. She is only living in furnished rooms, and that shows that she is a person of small means and that the tenants are in jeopardy. Therefore, in my opinion, a receiver ought to be appointed.

COLLINS, L.J.—I am of the same opinion. I was impressed by Mr. Haldane's argument that the exercise of this discretion in cases of ejectment must involve to some extent an interference with a defendant's rights, inasmuch as he is entitled simply to stand on his possession. Therefore his position is a strong one, and it is recognized and safeguarded by the Judicature Act. But the court has a discretion to appoint a receiver in such cases, and I cannot see how we can work the two principles together without one infringing to some extent on the other. The discretion does affect the position of a defendant in an ejectment action. The court has to exercise a discretion, and that must be on the facts, and the right of the court to exercise it will involve a change, and may compel

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

the defendant to give up the advantage she now holds, and may make it necessary for her to disclose to some extent her defence. The plaintiff will go into his own title, and it will be very difficult for the defendant to avoid doing so. That is the logical effect of the discretion given by the Act, and we must accept the conclusion that the Legislature has done that intentionally. We are bound to bear in mind the fact that the Legislature has tried to preserve to a defendant his former position, and the other circumstances on which the court would act, but the essential matter is the view which the court takes as to the probability of the plaintiff's success. We cannot decide it now, but we ought to form an opinion; and if the view we take of the defendant's case is adverse to her, we ought to affirm the conclusion at which we have arrived on the materials before us. Though that conclusion is not final, it is convenient to act on it. That is the governing factor in the question of discretion. If the defendant is thoroughly solvent, and it is likely that the plaintiff will succeed, and that the rents will be recovered from the defendant, that will be one reason for not treating so seriously the position of the tenants. But if the defendant is impecunious and her title is so shadowy that she is not likely to succeed, then the position of the tenants is a very important factor—a factor which does not appear to have been taken into consideration in *Foxwell* v. *Van Grutten*. Therefore, having the duty cast on us of exercising our discretion, we are bound to uphold North, J., in interfering for the protection of the tenants and the plaintiff.

Appeal dismissed.

Solicitors, *Collyer-Bristow, Russell, Hill, & Co.*, for *J. W. Tyacke*, Helston; *Coode, Kingdon, & Cotton*, for *Borlase, Milton, & Borlase*, Penzance.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — Aug. 2, 1898.

In re GRINDEY.
CLEWS *v.* GRINDEY. (a.)

Trustee — Breach of trust — Debt left outstanding — Liability — Ambiguous will — No application to court — "Acted honestly and reasonably" — Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

The executors and trustees of a will did not call in a debt belonging to their testator, and did not apply to the court for directions. It was doubtful, on the construction of the will, whether the testator had or had not directed them to "maintain" the debt, which was producing 5 per cent. in its existing condition; and they acted on the view that he had. Eventually part of the debt was lost.

Held, that the trustees had acted "honestly and reasonably," both in not calling in the debt, and (its amount being small) in not incurring the expense of an application to the court, and were therefore, under section 3 of the Judicial Trustees Act, 1896, *entitled to be relieved from personal liability.*

Appeal from Kekewich, J.

Sampson Grindey, a farmer, by his will dated the 9th of April, 1892, appointed his two sons, Isaac and Sampson, who were farmers, and one Templeman, a bank manager, to be trustees and executors, and proceeded as follows: "I give, devise, and bequeath to them all my real and personal estate, whatsoever and wheresoever, hereinafter called my trust estate, upon trust to maintain the same and every part thereof in the like mode of investment as the same shall be at my decease, until my said son Sampson Grindey shall attain the age of twenty-four years; and for this purpose I empower my trustees to carry on my farming and grazing business in the same manner as it has been hitherto carried on by me, and to employ in the said businesses any portion of my said trust estate as they may deem necessary, and without any liability for any loss whatever which they may sustain in doing so." When Sampson Grindey attained twenty-four the trustees were to stand possessed of the whole of the trust estate upon trust as to certain specified parts thereof for the testator's wife during widowhood, and at her death they were to sell and convert the same, and hold it upon the trusts therein declared. The residue was to be equally divided among all the testator's children except Isaac Grindey. The will also contained an investment clause, and a power to the trustees to postpone sale or conversion of any part of the estate so long as they should think fit. The testator died in 1892, and his will was duly proved by the three executors. Sampson Grindey attained twenty-four in 1895. At the time of the testator's death there was due to him from one Thomas Fernihough a sum of £166, secured by a promissory note dated in 1890, payable on demand, and bearing 5 per cent. interest. Interest had been regularly paid during the testator's life, but after his death the trustees never called upon Fernihough to pay either interest or principal. The debtor was agent of the owner of farms on which the testator, and afterwards his two sons, Isaac and Sampson, were tenants. He continued in excellent credit to the end of his life, but after his death in 1894 it was found that his estate had been insolvent since before the testator's death. The greater part of the debt was thus lost.

Two children of the testator, beneficiaries under the will, brought an action against the executors and trustees for the purpose of having them declared liable, on the ground of breach of trust, to make good the loss of principal and interest.

Kekewich, J., held that the trustees had acted honestly and reasonably, within the meaning of section 3 of the Judicial Trustees Act, 1896, in leaving the debt outstanding, and relieved them from liability in respect of the capital, but held them liable to make good the loss of interest.

The plaintiffs appealed.

Warrington, Q.C., and *J. M. Stone*, for the appeal, cited *In re Brogden, Billing* v. *Brogden*, 37 W. R. 84, 38 Ch. D. 546; and *In re Stuart, Smith* v. *Stuart*, 46 W. R. 41, [1897] 2 Ch. 583.

Renshaw, Q.C., and *Ingle Joyce*, for the defendants.

Warrington, Q.C., replied.

LINDLEY, M.R.—This case is not altogether free from difficulty, but I rather think that the conclusion at which the learned judge has arrived is the right one; though I am not prepared to give the same reasons as he did for that decision. I start with the Act of Parliament which governs the case, the Judicial Trustees Act, 1896. Section 3 of that Act was inserted for the benefit and protection of trustees who have committed a breach of trust, but have acted honestly and reasonably. [His lordship

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

read the section, and continued:] The language used, "is or may be personally liable," appears to me to point to doubtful questions of construction. I shall allude to that matter presently.

The facts of this case are simple enough. [His lordship stated them, and proceeded:] The persons beneficially interested now say that the trustees ought to have called in the money within twelve months after the death of the testator, and that as they did not do so they are responsible for the loss, and must make it good. That might have been the trustees' position if it had not been for the Judicial Trustees Act, 1896. They had a curiously-framed will, and it was their duty to carry out the trusts of that will. Looking at the will, I cannot say that a reasonable business man would have been to blame if he had thought that it was no part of his duty to call in this money, at least until one of the legatees required him to do so. I think a business man might fairly come to the conclusion that it was not the intention of the testator that this promissory note should be called in. Now, if that was a reasonable view to take, then, whether it is, absolutely, right or wrong, it appears to me that section 3 does apply, and the case is one in which the court has power to relieve the trustees from liability. The sum at stake is too small for us to say that it would have been right and proper for the trustees to ask the court for directions. This is not like a case in which, a big sum being at stake, you might say that it was unreasonable for the trustees to take such a risk on themselves. In a case like this it is reasonable to save the expense of an application to the court.

The will is very peculiar. There is no specific direction to get in anything: that is left to the ordinary law. [His lordship read the clause above set out, and proceeded:] Now, what does the testator mean by "maintain the same and every part thereof in the like mode of investment as the same shall be at my decease"? How can you apply that to a part of his estate which was not "invested" at all in any proper sense of the word? The language of the clause shows that the testator is using the words in a very loose sense; and it is difficult to ascertain exactly in what sense. I must say I think the testator did not look upon this money as invested; but considering the very loose language of his will, I am not prepared to say that he did not mean to treat it as invested. If we had to make up our minds upon that question, I should find considerable difficulty. But the question we have to decide is simply this: is it a reasonable and proper conclusion to arrive at, that the trustees must have seen from this will that it was their duty to call in this debt? I do not think we can say that it is. Having regard to the loose language of the will, I thing they might reasonably consider that it was no part of their duty to spend money in applying to the court. I think it follows, from the combined effect of the will and of the Act of Parliament, that Kekewich, J., was right in holding that the trustees ought to be relieved from personal liability for the loss of this money. I think the appeal ought to be dismissed.

CHITTY, L.J.—I am of the same opinion. The section is not very easy to construe, but in my opinion a narrow construction ought not to be put upon it, having regard to the language used, and of the general object of the enactment, which is plainly to relieve honest trustees who have acted reasonably. "Reasonably" must mean reasonably as trustees. In this particular case the testator has made a will in which he gives no specific directions to his trustees to call in debts. He was carrying on business, and of course had book debts. That was the state of things which existed at his death, and which would be contemplated by him when he made his will. The promissory note, having regard to the whole amount of his property, is for comparatively a small sum of money. This promissory note had, I think, been treated by the testator in his lifetime as an investment; because he had the interest for two years—in fact, a longer period than the trustees retained the security. In respect of that retainer the trustees are now charged with breach of trust. There is no difficulty in which trustees have been oftener entangled than in that of an obscure will. In dealing with this section I think we may properly take into consideration the nature of the will itself, and the difficulty in which it places the trustees. There is a possible construction of this will which I think could reasonably be entertained by ordinary business men; I will not say by men in the position of farmers, because I am not satisfied that the Act is meant to apply to any particular class of trustees, or to their special knowledge or business qualifications. But the opening sentences, in which the testator gives all his property, "whatsoever and wheresoever, . . . upon trust to maintain the same and every part thereof in the like mode of investment as the same shall be at my decease"—I think ordinary business men might reasonably, having regard to what the testator had done, consider that this debt was intended to be part of the estate which is to be maintained in the same condition as it was, until it was necessary to have the money in hand for the purpose of division. Therefore, when I come to the question, what is the effect of the Act, and have to construe the words "acted honestly and reasonably," I think the court is justified in taking into consideration, in deciding whether the trustees have acted reasonably, the fact that the will gives rise to a question of construction, on which I think it unnecessary for the court itself to pronounce a final opinion. The money was laid out in this way by the testator himself, the security was a debt bearing interest; and, on the whole, I think the trustees' view that it ought to be treated as an investment was reasonable.

Then, that being so, I turn back for a moment to the prior question, whether they acted honestly. Mr. Warrington argued that they had not acted "honestly," because they were actuated by motives arising from their own interests. The debtor was agent for two farms of which two of the executors were tenants. But it would be straining language against the trustees to say that they were actuated by any sinister motive. Without pursuing that matter further, I am satisfied that these trustees acted honestly. It is said that they might have obtained the directions of the court as to whether they should or should not call in this debt. The practice of the present day does no doubt enable trustees to apply to the court for its direction or opinion at a comparatively small expense, contrasted with the old method of filing a bill and administering the whole estate; but, even so, something like £50 would have been expended in an inquiry which would have involved considering the position of the debtor and other matters of that class. I have no ground for saying that it was not a proper motive in the trustees to say, in regard to this small matter, that they would not put the trust estate to that expense. Moreover, they were getting 5 per cent on the loan, and they could get only about 3 per cent. on the money if they called it in.

The result is that I think this is a case in which the trustees "ought fairly to be excused," having acted honestly and reasonably, for their breach of trust, and for failing to obtain the direction of the court. I think the decision of Kekewich, J., ought to be affirmed.

COLLINS, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors, *G. F. Hudson, Matthews, & Co.*, for *John Bamford, Son, & Wilson*, Ashbourne, Derby; *Rowcliffes, Rawle, & Co.*, for *Holland & Rigby*, Ashbourne, Derby.

High Court of Justice.

Chan. Div. North, J. July 21, 1898.

In re ALLEN.
BASSET *v.* ALLEN. (*a.*)

Administration—Locke-King's Act, 1854 (17 & 18 *Vict.* c. 113) — *Republication — Statute of Limitations— Money charged on land—Presumption of payment— Real Property Limitation Act*, 1874 (37 & 38 *Vict.* c. 57), s. 8.

A testator made a will in 1845, *leaving real estate on trust for sale, and, after directing payment of his debts, directed that the income should be paid to his widow during her life. By a codicil in* 1855 *the testator specifically devised certain portions of the real estate to his wife for life, with remainder over, and in other respects confirmed his will. The testator's whole property was subject to a mortgage for* £3,000, *not created by the testator, and also to charges created by him.*

The testator died in 1855, *and in* 1865 *the real estate (other than the specifically-devised portion) was sold, and the mortgage debt of* £3,000 *and the charges paid out of the proceeds. The widow died in* 1895. *After the sale, and until her death, she received the income of the residue of the proceeds of sale, and also the rents of the unsold specifically-devised real estate.*

Held, that the property specifically devised by the codicil was liable to contribute towards payment of the £3,000, *as it was not a debt of the testator; and, as the codicil confirmed the will,* 17 & 18 *Vict.* c. 113 *applied.*

But held, that, owing to the delay from 1865 *to* 1895, *the liability was barred by the Statute of Limitations.*

Adjourned summons.

By his will dated the 16th of February, 1839, James Martin devised all his real estate upon trusts in favour of Mary Martin for life and from and after her decease devised the same to trustees for a term of 500 years upon trust to raise the sum of £3,000, and subject thereto devised his real estate to John Allen in fee simple. James Martin died in 1843, and Mary Martin died on the 13th of November, 1864.

John Allen created mortgages amounting to £2,700 in all. By his will dated the 11th of January, 1845, he devised all his real estate upon trust for sale and directed that the income of the proceeds of sale after payment of his debts should be paid to his wife Martha Allen for her life, and from and after her decease that the same should be divided among his children living at her death or the issue of those who had then died leaving issue *per stirpes*.

John Allen made a codicil to his said will on the 30th of January, 1855, and thereby revoked the devise of Ladywell and 6½ acres of land and the bequest of a leasehold house and 12 acres at Whetstone, and devised and bequeathed the same to the use of Martha Allen for life with remainder to John Perkins Allen and Thomas Perkins Allen in equal shares, and in other respects the testator confirmed his said will.

The testator died on the 13th of February, 1855, and his will was proved on the 5th of May, 1855, by his widow alone. The only real estate which the testator had was that devised to him by James Martin.

In 1865 the real estate, other than the specifically-devised portion, was sold for £7,860 15s. 11d., and the mortgage of £3,000 and the charges were paid off out of the proceeds.

Martha Allen died on the 28th of May, 1895.

The question now arose whether the property specifically devised by the testator's will was liable to contribute towards the testator's debts.

E. P. Hewitt, for the trustees.

Ingpen, for the widow and devisee in trust of John Perkins Allen.—As regards the property specifically disposed of, the charges were properly paid out of residue. Locke-King's Act only applies to wills made after 1854. Even if it were applicable, there is here a blended fund given on trust to pay debts, and this is a "contrary intention" within the Act. The second Act (Locke-King's Amendment Act, 1867) does not apply, and I escape from the first Act.

He cited *Maxwell* v. *Hyslop*, L. R. 4 Eq. 407, 15 W. R. Ch. Dig. 155; *Maxwell* v. *Maxwell*, 19 W. R. 15, L. R. 4 H. L. C. 506; *Newman* v. *Wilson*, 31 Beav. 33, 11 W. R. Ch. Dig. 129.

Vernon Smith, Q.C., and *Smith*, for Martha Perkins Batchelor (a daughter of the testator and mortgagee of the son's interest under the will).—The £3,000 at least was not a debt of the testator, and there can be no "contrary intention" as to this, which was charged on the property the testator took. He, in fact, only took an equity of redemption, and there could be no claim against him personally, as he merely took the property *cum onere*. The will was before Locke-King's Act (17 & 18 Vict. c. 113), and the codicil comes within the proviso. In *Rolfe* v. *Perry*, 11 W. R. 674, 3 De G. J. & S. 481, the republication consisted of the appointment of executors.

T. H. Attwater, for another beneficiary in the same interest.

NORTH, J.—The will was made before the Act (Locke-King's Act), and if there had been no codicil the Act would not have applied. The codicil confirms the will except as regards specific bequests. The question is if a direction to pay debts includes mortgage debts, and there is no doubt that if the testator had not made the codicil the mortgage debts would have been paid out of personal estate, and not out of the property specifically devised. The effect of the testator confirming his will by a codicil after the Act came into operation is exactly the same as if he had made a codicil in the same language as the will. The second Locke-King Act only applies after 1867. The residuary estate and the estate which is not specifically devised has to bear the burden. The £3,000, however, is in a different position, for the estate came to the testator charged with that sum; he only, in fact, took the equity of redemption. He was not personally liable to pay that sum, so that the direction to pay debts does not apply.

The question whether the liability of the specifically-devised property to contribute towards the payment of this sum of £3,000 had been barred by the Statute of Limitations was then argued.

Ingpen.—The mortgages were paid off in 1865, and no capital or interest was paid from 1865 to 1895. The widow was legal tenant for life under the codicil,

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

and there are no trustees. The trustees of the will are now barred by the Real Property Limitation Act, 1874, s. 8.

Vernon Smith, Q.C., and *Smith*.—The statute did not begin to run until the widow's death. If the widow had paid interest upon a proportionate amount of the charge, she must have paid herself. As the person entitled to the rents was also entitled to the interest, the rights of the trustees are not barred: *Topham* v. *Booth*, 35 W. R. 715, 35 Ch. D. 607; *Burrell* v. *Earl of Egremont*, 7 Beav. 205. *In re England*, 44 W. R. 119, [1895] 2 Ch. 820, turned on the fact that a devisee in fee was not under any obligation to persons coming after him.

Ingpen, in reply.—To keep the charge alive it must be brought within the proviso in section 8. The persons claiming under the codicil are not liable. The debt was gone in 1865, and it has not been shown that there was any intention to keep it alive for the benefit of the residuary estate.

NORTH, J.—I think that *In re England* does apply. The whole estate was charged with this sum of £3,000. In 1865 the estate was sold, and nothing was done to keep that charge alive. The widow died in 1895, and the question is whether the £3,000 paid out of residue ought to have been paid partly out of the property which was specifically devised. It is suggested that there was something equivalent to payment of interest on it by the widow, but I do not see how anything of the sort is made out in this case. The widow did not keep down the interest. She was under no obligation to pay what nobody required her to pay. In my opinion, the claim is barred by the Statute of Limitations.

Solicitors, *Preston, Stow, & Preston*, for *R. B. Berridge*, Leicester; *J. T. Rossiter*, for *E. B. Tilley*, Bath.

Chan. Div.
Kekewich, J. } Nov. 2, 3.

LONG v. THE VESTRY OF THE PARISH OF FULHAM. (a.)

Metropolis—Management—Trespass by vestry—Laying of new drain—Compensation—Damages—Consent of London County Council—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 57, 59, 60, 69.

Where a metropolitan vestry acting on the reports of its officers had passed resolutions recorded on its minutes, and, in accordance with such resolutions, but without obtaining the leave of the county council, entered upon the plaintiff's premises and inserted a new system of drainage:

Held, that, on the proper construction of the Metropolis Management Act, 1855, *the vestry had committed a trespass, and had done an illegal act for which they were liable in damages; but, the plaintiff not having suffered injury, and having consented to the work, judgment was given for the vestry, the defendants, with costs.*

Summons.

This was an action brought by Henry Long, the owner and occupier of certain freehold premises in Farm-lane, against the Fulham Vestry, claiming damages for the trespass of the defendants, for digging and undermining the earth in the said premises and laying a sewer therein, for depriving the plaintiff of the use and occupation of the said premises for several days, and for the depreciation in value of his said premises in consequence of the illegal construction of the said sewer. The plaintiff also claimed an injunction to restrain the defendants from repeating their acts.

It appeared that for thirty years prior to September, 1897, during the whole of which period the plaintiff had owned the premises, the sewage of the same had been discharged by a short pipe at the back into the drain of the adjoining premises on one side, and the rain and refuse waters discharged by a short pipe at the back into the drain of the adjoining premises on the other side, nor was there any drain or sewer under the plaintiff's dwelling-house.

The acts complained of by the plaintiff were done during the months of September and October, 1897, and were carried out by a gang under a foreman instructed by the vestry's surveyor, who took his authority from the resolutions entered on the minutes of the sanitary committee of the vestry. The plaintiff, so far from refusing his consent to the doing of the work, himself attended to the necessary removal of furniture.

Some time after the completion of the work, the plaintiff, by his solicitors, sent to the vestry a request for compensation, and the vestry wrote to deny all liability. The plaintiff then brought this action for damages for trespass and for an illegal act.

Cooney, for plaintiff, said that the work, which was not the relaying of an old sewer, but the construction of a new one, was done without his consent and without the previous approval of the London County Council and in excess of the powers conferred on the vestry by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 69: *Brownlow* v. *Metropolitan Board of Works*, 12 W. R. 871, 33 L. J. C. P. 233, and *Broadbent* v. *The Imperial Gaslight Co.*, 5 W. R. 272, 26 L. J. Ch. 276; and that the vestry and its officers had not complied with the requirements of 18 & 19 Vict. c. 120, ss. 57, 59 and 60: *Vestry of St. Leonard's, Shoreditch* v. *Holmes*, 50 J. P. 132 (where such acts as were complained of were held illegal by Day and Smith, JJ., even though there a statutory notice had been served by a statutory officer). The plaintiff sued for damages for illegal acts.

Macaskie and *Walsh*, for defendants, who had previously offered forty shillings to the plaintiffs as sufficient to satisfy the whole of the claim and had paid that sum into court, alleged that the plaintiff had given his verbal consent to the work.

KEKEWICH, J.—On the construction of the Act (18 & 19 Vict. c. 120), I am in favour of the plaintiff; old drainage cannot properly be described as a sewer so as to bring it within the Act in favour of the defendants. Even if it were a sewer, there has been no "diversion," but a construction of a "new drain," which required the consent of the London County Council, the absence of which in the present case is fatal. The vestry having done without authority that for which they wanted authority, have committed a trespass, in point of law. Therefore there can be no compensation, but they are liable in damages, if the plaintiff can prove that he has suffered; but this he has failed to do. As a result of this unjustifiable insertion of a new system of drainage into his house, there has been no diminution in its letting value, and, on the balance of evidence, none in its selling value; the probability is rather the other way. The plaintiff has therefore proved a technical trespass but no damage. If the case rested there, judgment would be for defendants, but with-

(a.) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

out costs. But it has been proved to my satisfaction that the plaintiff did consent to the work being done, and was not coerced in any way of duress. Therefore, judgment is for defendants, with costs.

Solicitor for the plaintiff, *A. Mozley-Stark.*

Solicitor for the defendants, *T. Blanco White.*

Chan. Div. Romer, J. } July 19, 20; Aug. 10, 1898.

COLEMAN *v.* NORTH. (*a.*)

Contract—Voluntary trust—Intended transfer of property—Representations influencing conduct.

N., a promoter of, and vendor to, an unsuccessful mining company, publicly and in good faith promised to create a trust, under which the company and its shareholders would have benefited, but died before the trust was created.

Held, that a person who heard of the contemplated trust could not, in virtue of the fact that he bought or held shares of the company in confidence of N.'s promise being carried out, establish a case of contract as against N., and, in the absence of any fraud or special representation, neither N. nor his executors would be estopped from denying liability, notwithstanding that N. himself might have benefited by the promise having been made.

Action.

This was an action by the shareholders of the Londonderry Gold Mine against the executors of Colonel North, to enforce Colonel North's undertakings or promises to place any profits made by him as promoter and vendor at the disposition of the shareholders in the event of their incurring loss through failure of the adventure.

It appeared from the plaintiffs' statement of claim that the Londonderry Gold Mine was a company incorporated in November, 1894, for the purpose of acquiring and working certain gold claims near Coolgardie, Western Australia.

Lord Fingall and Colonel North were the promoters of and vendors to the company.

All the shares of the company offered for public subscription were applied for and duly allotted, and the company proceeded to work the mine.

Shortly afterwards bad news from the mine was received and published in England as to the value of the mine. Colonel North thereupon offered by several letters published in the newspapers to vest his share of the net profits accruing to the vendors on the sale to the company, in trustees for the benefit of the shareholders until the company had earned profits equal to 100 per cent. of the issued capital; and affirmed his belief in the value of the property.

After considerable delay a draft deed of trust was prepared. In May, 1896, and before the execution of the deed, Colonel North died, and at his death the profits, the subject of the draft trust deed, had not been transferred to the trustees. The plaintiffs alleged that on the faith of the letters of Colonel North they refrained from taking proceedings against him and his co-vendors, and continued to hold their shares and to acquire others, and that the fall of the shares was thereby checked and that large dealings in the shares took place on the London and Paris Stock Exchanges; they contended that, in these circumstances, Colonel North or his executors were bound by the representations made by Colonel North, and must carry out the trust.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Neville, Q.C., and *R. J. Parker*, for the plaintiffs.

Farwell, Q.C., and *Clare*, for the defendants.

Besides the cases mentioned in the judgment, counsel referred to *Alderson* v. *Maddison*, 29 W. R. 105, 5 Ex. D. 293, at p. 296; *Dashwood* v. *Jermyn*, 27 W. R. 868, 12 Ch. D. 776; *Coverdale* v. *Eastwood*, 21 W. R. 216, L. R. 15 Eq. 121, p. 131; *Dillwyn* v. *Llewelyn*, 10 W. R. 742, 4 De G. F. & J. 517, p. 521; *Laythoarp* v. *Bryant*, 3 Scott, 238; *Carlill* v. *Carbolic Smoke Ball Co.*, 41 W. R. 210, [1893] 1 Q. B. 256.

ROMER, J.—I may repeat for myself in this case what Turner, L.J., said in *Milroy* v. *Lord*, 4 De G. F. & J., 264, at p. 274, 11 W. R. Ch. Dig. 120, that under the circumstances it would be difficult not to feel a strong disposition to give effect to the settlement that was contemplated, and that certainly I have spared no pains to find the means of doing so consistently with what I apprehend to be the law of the court; but after full and anxious consideration I find myself unable to do so, for, after all is said and done, the circumstances of this case, in my opinion, only show a promised gift, not completed at the death of the man who promised, and which cannot be enforced against his executors. The case only differs from others of the class in matters of degree—that is to say, in the great publicity given to the promise, the number of persons interested in its performance, and the great reliance placed by them upon its being performed. The plaintiffs, however, try to establish a contract, and, by their counsel, urge that there was sufficient consideration for it. But before going into nice questions as to what is or is not a sufficient consideration, I must find a contract, and that is precisely what I am unable to do in this case. As Lord Blackburn said, dealing with a point of this kind in *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467, at p. 487: "To make a contract there must be a bargain between both parties." And here I can find no bargain and no parties to any bargain.

It was suggested on the plaintiffs' behalf that Colonel North bargained with the company or with its shareholders, or some of them, that they should refrain from taking certain proceedings against him in consideration of his settling the profits made by him, as vendor to the company of the mines the company was formed to buy and work. There was no bargain of any sort between Colonel North on the one hand, and any company or person or persons on the other, that any proceedings or claims against him should be abandoned in consideration of his settling his profits.

There was, further, a suggestion that, because Colonel North publicly promised to settle the profits, any person who acted on the faith of that promise by holding or buying shares in the company became entitled to say there was a contract between him and Colonel North. What Colonel North had, in my opinion, publicly promised to do was to make a gift under which the company and the shareholders would have benefited. This promise was made in good faith, and I have no doubt that, had Colonel North lived long enough, he would in some shape or form have substantially carried out his promise. But a person who heard of the contemplated gift could not, because he bought or held shares of the company, in reliance on Colonel North as a man of honour carrying out his promise, say that thereby he had established a contract between him and Colonel North that the promised gift should be completed. The shares of the company generally rose, or may have risen, in market price because Colonel North had promised, and *bonâ fide* intended, to make a gift to the company or the share-

holders; and Colonel North, when selling some of his shares, may have got the benefit of this rise in the market; but these facts did not alter the nature of Colonel North's promises, or, in the absence of any fraud or special representations, estop Colonel North or his executors, or put him in the position of a person who had entered into a contract with the company or its shareholders generally. A person who in good faith announces certain contemplated gifts by him may thereby derive many advantages, but this will not, apart from some special case made of contract or estoppel, make him liable if he does not complete his gift. I have already pointed out that no case of contract has been established before me, and I can find here nothing in the nature of an estoppel, either at law or equity, which would prevent Colonel North's executors from raising their present contention against the company and its shareholders. As to equitable estoppel, I may refer to what Lord Selborne said in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, 22 W. R. 194, L. R. 6 H. L. 352, at p. 360.

The only remaining contention of the plaintiffs is that Colonel North had declared himself a trustee of his profits, and therefore nothing was necessary to be done to complete the gift, and the trusts can be enforced. But here, again, the facts will not enable me to uphold the plaintiffs' contention. So far as I can see, Colonel North never contemplated making himself a trustee, and never, in fact, made himself a trustee of the profits. Throughout he contemplated having trustees of his gift appointed and the exact trusts carefully settled. From time to time he appears to have changed the nature of the trusts he proposed to create in many important particulars, and up to the time of his death the form of the trust deed he proposed to execute was never finally settled. As Turner, L.J., said in *Milroy* v. *Lord*, after observing that a voluntary settlement might be created, either by the settlor transferring the property to a trustee, or constituting himself a trustee of it, "the cases, I think, go further to the extent that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust" (4 De G. F. & J., at p. 274). In the present case there is really nothing to lend any support to the view that he made himself a trustee beyond certain general remarks by him at a meeting of the company on the 16th of August, 1895, as to his having given his profits back to the shareholders, and so forth. But at the same meeting other observations by him show what he meant—namely, that he proposed to hand over the profits to trustees upon some trusts which would practically be for the benefit of the shareholders, and in that sense the shareholders might regard the matter as if he had handed back the profits. It is clear that no terms of trust were ever finally settled by Colonel North up to his death, and that throughout he acted as one having the ordinary right of a voluntary donor who had not completed his gift, to amend the terms of that gift as he thought best to attain the general objects he had in view. For these reasons it appears to me that the action fails and must be dismissed, but, under the circumstances, I dismiss it without costs.

Judgment for the defendants.

Solicitors, *Clarke & Blundell; Budd, Johnsons, & Jecks.*

Chan. Div. } Aug. 10, 1898.
Romer, J. }

In re FISHER AND GRAZEBROOK'S CONTRACT. (a.)

Vendor and purchaser—Contract—Trustees for purposes of Settled Land Act—Settled Land Act, 1882, s. 22.

Where, to the knowledge of a purchaser from a tenant for life selling in exercise of powers conferred on him by the Settled Land Acts, there are no trustees for the purposes of the Act, the purchaser cannot be compelled to pay the purchase-money into court or to accept the title, unless such trustees are appointed.

This was a summons under the Vendor and Purchaser Act, 1874, for the determination of a question arising under section 22 of the Settled Land Act, 1882.

In March, 1898, Fisher entered into a contract with Grazebrook for the sale of a freehold house known as Caenwood Grange, Beulah-hill, Norwood. The said house formed part of the residuary estate of William Hayes and Fisher was entitled thereto in fee subject, to an executory gift over in the event of his death without issue. He had contracted to sell the house as a person having the powers of a tenant for life. On examining the title the purchaser's advisers took the objection that there were no trustees within the meaning of and for the purposes of the Settled Land Acts, and that the purchaser was bound to see that at the time of completion at least there must be such trustees duly appointed. The vendor's advisers contended that whether there were such trustees or not, and even if the purchaser knew there were no such trustees, yet if the purchase-money was paid into court in accordance with the provisions of section 22 of the Settled Land Act, 1882, the purchaser would get a good title, and insisted on his carrying out the purchase without trustees being appointed. The purchaser objecting, the vendor took out this summons for a declaration that a title in accordance with the contract had been shown by the vendor, and that the purchaser on paying the purchase-money into court to a proper account under the provisions of the Settled Land Acts, 1882 to 1890, would obtain a good discharge for the same.

W. B. Coltman, for the vendor, for the summons.—The purchaser will get a good title if he pays the purchase-money into court in pursuance of section 22 of the Settled Land Act, 1882.

H. D. Grazebrook, the purchaser, appeared in person and contended that he was not bound to take the title unless trustees were appointed for the purpose of the Settled Land Acts. Section 22 of the Settled Land Act of 1882 presupposes the existence of trustees.

He referred to the judgment of Kay, J., in *Hatten* v. *Russell*, 36 W. R. 317, 38 Ch. D. 334; also *Mogridge* v. *Clapp*, 40 W. R. 663, [1892] 3 Ch. 382; *Wheelwright* v. *Walker*, 31 W. R. 363, 23 Ch. D. 752; *Hughes* v. *Flanagan*, 30 L. R. Ir. 111, 40 W. R. Dig. 228.

ROMER, J.—Before the time for completion, the purchaser wanting to get a discharge from his purchase-money, has notice that there are no trustees in existence. The vendor, the tenant for life, then requires him to pay his money into court under section 22 of the Act and to take a conveyance. In my opinion the tenant for life is not entitled to require under these circumstances the purchaser to do so. Section 22, which provides for payment into court of the

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

purchase-money, presupposes the existence of trustees. That was pointed out and decided first in *Hatten* v. *Russell*, where Kay, J., as he was then, points out "that that option cannot properly be exercised and cannot really be exercised at all if there are no trustees." The same point arose in the case of *Mogridge* v. *Clapp*. In that case again Kay, L.J., at p. 400 ([1892] 3 Ch.), says: "By section 22 capital money arising under the Act must be paid to trustees or into court at the option of the tenant for life. But he can only have such option *primâ facie* when there are trustees, so that the purchaser could hardly pay his purchase-money without ascertaining that there were trustees to whom it might be paid." I quite agree that if the purchaser in this case thinking that there were trustees and in ignorance of the fact that there were no trustees, had paid his money into court, he would have got a good title. But he has notice that there are no trustees, and he refuses to complete. In my opinion in those circumstances such a title as the tenant for life requires him to take ought not to be forced upon him. I was referred to the observations made by the Master of the Rolls in the case of *Mogridge* v. *Clapp*, where he said, "Even if the plaintiff had known that there were no trustees it would not follow that his title would be bad." But he was dealing with the special case of a lease, and on the very same page (395) the Master of the Rolls, with reference to a sale, after observing that *Wheelwright* v. *Walker*, was a case of sale and that the purchaser did not propose to pay the money into court, says this, "I also think that the omission to take these steps might prevent the tenant for life from obtaining specific performance against an unwilling lessee." Still more, it appears to me, would the tenant for life have been unable to compel a purchaser to take a conveyance in the case where the purchaser knew before he paid his money and got a conveyance that there were no trustees in existence. Such a title as this, in my opinion, ought not to be forced upon a purchaser having regard to the very great doubt whether or not in such a case he would not get a defective title. The case of *Hughes* v. *Flanagan*, although not a binding authority upon me, is a strong case for showing, to say the least of it, that the purchaser in this case, if he did pay his money into court under the circumstances with the knowledge he had and obtained a conveyance from the tenant for life, would obtain a doubtful title. Such a title as that ought not to be forced upon him. For these reasons I dismiss the application with costs.

Solicitors, *Currie, Williams & Co.; Peard & Sons.*

Chan. Div.
Byrne, J. } July 4, 7, 1898.

LORD HASTINGS *v.* NORTH-EASTERN RAILWAY CO. (*a.*)

Rent—Way-leaves—Rent or sum in gross—Tenement—Statute 32 Hen. 8, c. 34—Railway Company.

Way-leaves over land are an incorporeal hereditament and a tenement, and sums of money covenanted to be paid for such way-leaves granted for a term of years are not sums in gross, but are rents, the right to which follows the reversion after the term, under the statute 32 Hen. 8, c. 34.

This is the case even where some of such sums are payable to the lessor in respect of traffic passing over the lands of others and not over any part of his own.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

This was an action for sums payable in respect of wayleaves granted for a term to a railway company; and it involved the question whether such sums were or were not in the nature of rents following the reversion of the property.

By the Blyth and Tyne Railway Act, 1852, the Blyth and Tyne Railway Co. were empowered to agree with any party empowered by the Lands Clauses Consolidation Act, 1845 to sell lands, for granting to the railway company rights of way and other rights for the purpose of maintaining or improving the railway thereby authorized, and persons so empowered were enabled to make grants to the company accordingly.

At the date of the indenture next mentioned a Bill was pending in Parliament for enabling the said railway company to make and maintain various branch railways. This Bill subsequently became law as the "Blyth and Tyne Railway Consolidation and Extensions Act, 1854," and one of the said branch railwas was "the Morpeth branch" railway.

By an indenture of the 18th of May, 1854, Jacob Lord Hastings, over whose land the new railways were to pass, covenanted with the Blyth and Tyne Railway Co. and their assigns, and the company covenanted with the said Lord Hastings, his heirs and assigns, that immediately after the passing of the said Bill, Lord Hastings by indenture under his hand and seal would make, and the company would accept, a grant of way-leave and right and liberty of way and passage over and along such portion of the lands of Lord Hastings as thereinafter mentioned. The orm of the indenture to be executed was then set out, and it witnessed that in consideration of the rents reserved and covenants contained, the said Lord Hastings granted to the company and their assigns full way-leave or right of way, and liberty, power, and authority to and for the company to make the said branch railways, or such parts thereof as were to pass through the lands of Lord Hastings, upon those lands, to hold the same to the company and their assigns for the term of 1,000 years, yielding and paying certain sums therein mentioned, being (amongst others) on coals, coke, culm, and cinders conveyed over and along any part of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act, 1854, which should be shipped at the Port Blyth (other than certain coals, &c., therein mentioned) the sum of 3s. per ton, each ton consisting of 18 chaldrons and ½ chaldron. And the said form of indenture contained the usual powers of distress and entry upon the said railways in case "the said rents or sums hereby reserved" were unpaid for thirty days or forty days respectively, and a covenant by the railway company with Lord Hastings, his heirs and assigns, to pay to him and them "the said several rents and sums of money hereinbefore reserved" in manner therein mentioned.

The defendants were the statutory transferees of the Blyth and Tyne Railway Co., and they had recently conveyed over the Morpeth branch railway coals, coke, and cinders which had been shipped at the Port Blyth. The plaintiff, upon whom the lands of the said Lord Hastings had devolved, brought this action for an account of such coals, &c., and for payment of 3s. upon every "ton" thereof.

The case was heard by Byrne, J., on the 11th and 13th of June, and on the 27th of June his lordship decided that the 3s. was payable upon all coal, &c., passing over any part of the Morpeth branch railway (and shipped at Blyth), and not merely upon such as passed over the lands of the plaintiff; and he gave judgment for the plaintiff on all points except upon the question whether the sums sued for were rents

which passed with the ownership of the lands and of the reversion after the said term of 1,000 years, or whether they were payments in gross not issuing out of the land and not payable in respect of it, and consequently not due to the plaintiff.

The action now came on for argument upon this point.

Eve, Q.C., and *George Henderson*, for the plaintiff.

Eady, Q.C., Astbury, Q.C., and *Mackarness*, for the defendants.—The grant of way-leaves is not a demise of the land: Co. Litt. 47A; *Hancock* v. *Austin*, 11 W. R. 833, 14 C. B. N. S. 634. The land was not parted with; there was merely a liberty or licence given over it; *Clifford* v. *Hoare*, 22 W. R. 828, L. R. 9 C. P. 362; Burton's Compendum, chap. 6, sec. 2, p. 333.

The following cases were also referred to: *Keppel* v. *Bailey*, 2 My. & K. 517, at p. 535; *Tulk* v. *Moxhay*, 2 Phillips 774; *Spencer's case*, 5 Rep. 16A.

July 7.—BYRNE, J.—The interest conferred upon the railway company—viz., a way-leave over land of the grantor, with the right to make a railway thereover, and with the other powers given to them, is, in my judgment, an incorporeal hereditament, a property, and an estate capable of being inherited by the heir (if granted to an individual) and of being assigned to a purchaser. It is a "tenement" within the definition of Lord Coke, 1 Inst. 20A being an inheritance concerning or annexed to or exercisable within a corporate inheritance. I have nearly followed the judgment of the court in the case of *Martyn* v. *Williams* 5 W. R. 351, 1 H. & N. 817, at p. 827, and following the further reasoning in the same case, I think that the plaintiff is the owner of the reversion within the statute of 32 Hen. 8. To quote from p. 830 of the report: "There is in reality the relation of reversioner and owner of particular estate between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land would revert to the plaintiff as upon the expiration of an ordinary lease. In the ordinary case of owner in fee simple and tenant for years, in which the relationship of reversioner and tenant within the statute certainly exists, the owner of the fee, upon the determination of the term, has vested in him a larger and more extensive interest in the *corpus* of the land than the tenant for years had. His interest in the minerals and timber, and, indeed, in the soil itself, is very different from that of such tenant." In the case of *Norval* v. *Pascoe*, 12 W. R. 973, 34 L. J. Ch. 82, the decision in *Martyn* v. *Williams* was followed by Kinderslay, V.C., who dealt with other authorities bearing on the matter. In both the cases I have referred to the subject-matter was a lease or licence for a term to dig china clay, with ancillary powers; and in the present case the subject-matter is a lease or licence for a term of a way-leave for a railway to be made and used for traffic over the grantor's land. In general structure it follows the form of what is called "Lease of a way-leave" given in Mr. Davidson's Precedents, 2nd ed., vol. 5, part 1 (Leases). I think that the subject-matter in the present case is such as to bring it within the principle of the decided cases, and I refer particularly to *Buckeridge* v. *Ingram*, 2 Ves. jun. 652, and *The Earl of Portmore* v. *Bunn*, 1 B. & Cr. 694, for instances of analogous rights. In the latter of these an action was brought to recover rent against the assignee of the licence for a term to cut a channel to the River Wey, and, although the actual decision turned upon a variance between the declaration and the evidence, it was distinctly held that a mere easement upon the soil of others to make channels and towing-paths is a real hereditament. The covenant to pay rents or annual sums in the present case is in favour of the grantor, his heirs and assigns, and although it is quite true that some of such rents or sums are, as I have held, payable, even although the traffic does not pass over any part of the plaintiff's lands, and that they are calculated in part on such traffic, nevertheless I consider that the rents are payable in respect of the hereditaments leased, and that the plaintiff is entitled to sue exactly as the original lessor might have done.

Judgment for the plaintiff.

Solicitor for the plaintiff, *Horace Peel.*

Solicitors for defendants, *Williamson, Hill, & Co.*, for *A. Kaye Butterworth.*

Q. B. Div.
(Day and Lawrance, JJ.) June 8, 1898.

ALTREE v. ALTREE.
STAFFORDSHIRE FINANCIAL CO. (LIMITED)
(*Claimants*). (*a*.)

Bill of sale—Validity—Address of grantee—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *schedule.*

A bill of sale given by way of security for the payment of money is void, under section 9 *of the Bills of Sale Act of* 1882, *if the address of the grantee be omitted. It makes no difference that the grantee is a registered company.*

Appeal from the Lichfield County Court.

Goods taken in execution were claimed in an interpleader issue under a bill of sale, of which the claimants were the grantees. The bill of sale was given by way of security for the payment of money by the grantor thereof. The material words were as follows: "This indenture, made the 12th day of March, 1898, between John Altree, of Triangle Farm, Chase Town, in the parish of Hammerwick, in the county of Stafford, farmer, hereinafter called 'the borrower,' of the one part, and the Staffordshire Financial Co. (Limited), hereinafter called 'the lenders,' of the other part . . ." No other description, and no address, of the grantees appeared in the bill of sale.

The county court judge held that the bill of sale was void under section 9 of the Bills of Sale Act, 1882.

Section 9 of the Bills of Sale Act, 1882, provides: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." The form given in the schedule begins as follows: "This indenture, made the —— day of ——, between A. B., of ——, of the one part, and C. D., of ——, of the other part, witnesseth . . ."

J. B. Matthews, for the claimants.—As long as the variation in the form is not a material variation the bill is not invalidated: *Ex parte Stanford, In re Barber*, 34 W. R. 237, 287, 507, 17 Q. B. D. 259; *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506; *Linfoot* v. *Pockett*, 44 W. R. 66, [1895] 2 Ch. 835. The Act does not require that the bill shall be in the

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

form provided, but in accordance with the form. All that is essential is that the grantee shall be described sufficiently for identification. In the case of a registered company the name alone is sufficient, because no two companies can be registered under the same name. The address would therefore have been mere surplusage. It has been the practice of conveyancers to describe a company by giving its name only. *Parsons* v. *Brand*, 38 W. R. 388, 25 Q. B. D. 110, and *Sims* v. *Trollope & Sons*, 45 W. R. 97, [1897] 1 Q. B. 24, are not in point since they refer only to the address and description of the attesting witnees.

Counsel referred also to *Simmons* v. *Woodward*, 40 W. R. 641, [1892] A. C. 100; *Murray* v. *Mackenzie*, 23 W. R. 595, L. R. 10 C. P. 625; *Parsons* v. *Brand*; *Dolcini* v. *Dolcini*, 43 W. R. 542, [1895] 1 Q. B. 898; *Smith* v. *Hammond*, 44 W. R. 478, [1896] 1 Q. B. 571.

Disturnal, for the execution creditor, was not called on.

DAY, J.—The objection taken to this bill of sale is well founded. Section 9 of the Bills of Sale Act of 1882 provides that a bill of sale shall be void unless made in accordance with the form in the schedule to the Act. When one looks at the form in the schedule one finds that the grantee is described as "C.D. of ——." The county court judge held that the bill was not in accordance with the form because the blank space after the name of the grantee was not filled up, and no description or address was given of the grantee. I think the county court judge was right and that the bill of sale is bad.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Smiles & Co.*, for *L. W. Lewis & Sons*, Walsall.

Solicitors for the respondent, *Pitman & Sons*, for *Barnes & Son*, Lichfield.

IN BANKRUPTCY.

Q. B. Div.
(Wright and Kennedy, JJ.) Aug. 2, 1898.

In re STEVENS.
Ex parte THE BOARD OF TRADE. (a.)

Bankruptcy — Discharge — Bankrupt convicted under Debtors Act—Special reasons for not refusing discharge—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8 (2)—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 14, 15.

By section 8 (2) *of the Bankruptcy Act*, 1890, "*The court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act*, 1869, . . . *unless for special reasons the court otherwise determines.*"

The court has no discretion to grant a discharge in cases falling under the above section, unless there are circumstances in the case upon which special reasons can clearly be founded, and such circumstances should be particularly set forth in the order of discharge.

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Appeal by the Board of Trade against a decision of his Honour Judge Whitehorne, Q.C., in the county court at Birmingham, granting the bankrupt his discharge subject to a suspension of two years.

The bankrupt had been adjudicated in 1892, and had been convicted of misdemeanours under sections 14 and 15 of the Debtors Act, 1869, and undergone a sentence of six months' imprisonment.

He applied for his discharge in 1898, and the official receiver's report on the application not only set out the conviction, but several other circumstances, such as assets under ten shillings in the pound, which would have made it impossible, even in the absence of any conviction, for the judge to have given a less suspension than two years.

By section 8 (2) of the Bankruptcy Act, 1890, "The court shall refuse the discharge in all cases where the bankrupt has committed a misdemeanour under the Debtors Act, 1869, . . . unless for special reasons the court otherwise determines." In the present case the judge found that there were special reasons for not refusing the discharge.

The order of discharge stated no facts on which "special reasons" could be based, except that some of the jury at the criminal trial had recommended the bankrupt to mercy. The judgment stated that the bankrupt was a young man, and had been sufficiently punished by the sentence he had undergone. In a note appended to the judgment the learned judge stated that he had questioned the bankrupt himself and come to the conclusion that his crime was largely due to "confusion and distress"; and that it would be for the benefit of his creditors to grant him his discharge as soon as possible.

The Board of Trade appealed against the order of discharge.

Muir Mackenzie, for the appellants.—The judge cannot find that there are special reasons for not refusing a discharge without there being facts upon which to ground those reasons. The official receiver's report in this case disclosed no special reasons, and the only fact on which they were based seems to have been the statement made in court on the hearing of the application that some of the jury had recommended the bankrupt to mercy. The judge's opinion that the bankrupt's crime was due to confusion and distress is no fact upon which special reasons can be founded.

He cited *In re Richardson and Webster*, 4 Morr. 22; *Ex parte Castle Mail Co., Re Payne*, 35 W. R. 89, 18 Q. B. D. 154; and *In re Hedley, Ex parte The Board of Trade*, 43 W. R. 464.

F. C. Willis, for the bankrupt.—There were the special reasons in this case that the bankrupt had been undischarged since 1892, and that his conviction rendered it difficult for him to obtain employment; and the official receiver did not contend in the court below that there were no special reasons.

WRIGHT, J.—In this case the learned judge's order recites the proceedings and the fact that the debtor was convicted of misdemeanours under the Debtors Act, 1869, therefore by section 8 (2) of the Bankruptcy Act, 1890, *primâ facie* the court would have no power to grant his discharge. The enactment, however, is qualified in this way: "Unless for special reasons the court otherwise determines." Now, it seems to me that in a case where the court finds there are special reasons, it should clearly specify upon what those reasons are based.

The order in this case assigns as a special reason, and as the only special reason, that the jury strongly recommended the bankrupt to mercy. It seems to

me that that would not be a special reason in any case, and, as it turns out here that the recommendation was only made by some of the jury, there is really nothing in it at all.

Yet the order may have been carelessly drawn up, so we will look at the judgment; but in the judgment no particular ground for special reasons can be found; it only states that the bankrupt is a young man, and has been punished for his crime by the imprisonment he has undergone. Then, in a note appended to the judgment, the learned judge states that he examined the bankrupt, and came to the conclusion that his crime was the result of confusion and distress, that he had resolved to live an honest life and pay his creditors, and that it would be for the benefit of his creditors to grant him his discharge. I cannot see how the creditors would benefit by his discharge, and on the whole I conclude that the learned judge gave more weight than he was entitled to to the circumstances which inclined him to mercy, and that in strictness the discharge should have been absolutely refused.

KENNEDY, J., concurred.

Appeal allowed.

It was subsequently arranged by consent that the bankrupt's discharge should be granted, subject to a judgment for £2,000 and a suspension for two years.

Solicitor for the appellants, *The Solicitor to the Board of Trade.*

Solicitor for the respondent, *Maurice Moseley*, for *Weeks & Co.*, Birmingham.

Prob. Div. & Adm. Div. Admiralty. } July 7, 1898.

"THE FULHAM." (a.)

Ship—Salvage—Detention of salved property by receiver of wreck—Services rendered to property within British waters—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 510, 546, 547, 548, 552, 565, 571—*Meaning of "salvage due under this Act."*

It is provided by section 552 *of the Merchant Shipping Act,* 1894, *that, where salvage is due to any person under this Act, the receiver shall, if the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel, or cargo, or apparel.*

Held, that the words "salvage due under this Act" in this section, were not confined to cases where salvage was made payable by the express enactments of the Act, but extended to cases where salvage might become payable under the decree of any court having jurisdiction recognised or conferred by the Act to decree the payment of salvage.

This was an action instituted on behalf of the Britain Steamship Co. (Limited), the owners of the British steamship *Fulham*, against Thomas Hudson, receiver of wreck and collector of customs in the port of Plymouth, to recover the sum of £60 as damages sustained by them by reason of the detention of *The Fulham* from the 18th of December, 1897, when the vessel was ready to proceed to sea, until the 20th of December, 1897, when the said steamship was released; such detention being alleged to have taken place in consequence of the action of the defendant in the circumstances mentioned in the statement of claim.

On this point the statement of claim stated that about the 14th of December, 1897, *The Fulham*, whilst on a voyage from Salina to Dunkirk, was short of fuel, and on or about the 16th of December, when in the English Channel at a distance of about twenty miles from the port of Plymouth, *The Fulham* was taken in tow by the steam-tug *Flying Buzzard* and brought into Plymouth on the same day; that, acting on the suggestion of the master or owners of *The Flying Buzzard*, the defendant directed and secured the arrest and detention of *The Fulham* as from the 16th of December by placing a man on board her; that no legal proceedings were taken by or on behalf of the owners of *The Flying Buzzard* until the 20th of December, 1897, when a writ was issued in the Admiralty Division of the High Court of Justice claiming salvage remuneration; and that on the 18th of December bail was tendered to the defendant in any amount required by the claimants and an undertaking for bail was further offered by solicitors acting for the owners of *The Fulham*, but the defendant refused to accept any such undertaking as aforesaid or allow the release on any bail whatever. The statement of claim further alleged "that the said detention and arrest of the said steamship was wholly illegal, and was not to any extent warranted or justified by the terms of the Merchant Shipping Act, 1894, or any other statute having relation to the function of a receiver of wreck, and that the defendant in arbitrarily refusing to accept bail or the solicitors' undertaking for bail on the 18th of December was guilty of gross dereliction of duty, and was legally liable for the consequences thereof.

The defendant appeared and delivered a defence wherein, after admitting the statements in the statement of claim as to the services rendered by *The Flying Buzzard*, and the towing of *The Fulham* into the port of Plymouth, and that he had detained that vessel while in Plymouth Harbour, pleaded that he had detained her at the request of the master of *The Flying Buzzard* to whom salvage was then due under the Merchant Shipping Act, 1894, for services rendered in assisting *The Fulham*, and otherwise; that on the 18th of December, 1897, two sureties were proposed to the defendant as security on behalf of the plaintiffs by the plaintiffs' solicitors, but the proposed security did not satisfy the defendant and he so informed the said solicitors, and refused to release the said vessel; that save as aforesaid no bail was tendered, nor was an undertaking offered by the plaintiffs' solicitor, nor did the defendant refuse to accept any such undertaking or allow the release of the vessel on any bail whatever, but the plaintiffs' solicitors were informed by the defendant that the vessel could be released on bail being given to his satisfaction, and that on the 20th of December, 1897, security was given by the plaintiffs to the satisfaction of the defendant, and the defendant accordingly released the vessel on that day. The defence further alleged that the defendant would rely on section 552 of the Merchant Shipping Act, 1894.

June 10.—The suit was heard before Barnes, J., when one witness was examined on behalf of the plaintiffs, and the defendant gave evidence on his own behalf.

Robson, Q.C., and *J. A. Hamilton*, for the plaintiffs.—The defendant had no jurisdiction or power to

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

arrest or detain *The Fulham*. The power conferred by the Merchant Shipping Act, 1894, s. 552, is limited to cases where salvage is "due under the Act"—that is, to cases where salvage is claimed by life salvors under sections 544 and 545 of the Act, which make life salvage payable in certain cases; or where salvage is made payable by section 546 of the Act in the cases of services rendered to wrecks or vessels stranded or in distress in or near the coasts of the United Kingdom. Now, the services rendered by the owners, master, and crew, of *The Flying Buzzard* were not life salvage services: *The Cargo ex Woosung* (*2nd suit*), 3 Asp. Mar. Cas., N. S. 50, 44 L. J. Adm. 45; and were not services to property stranded or in distress in or near the coasts of the United Kingdom, but services to property in distress on the high seas twenty miles from the coast. The expression "on or near the coasts of the United Kingdom" must clearly be limited to services rendered within a marine league from the coast—[They referred to *The Leda*, 4 W. R. 322, Swa. 40; *The Mac*, 7 P. D. 126, 30 W. R., Dig. 106]—and *The Fulham* being safely in tow of *The Flying Buzzard* when she was within that distance of the coast cannot be said to have then been in distress. The plaintiffs are therefore entitled to recover the damages they claim, the detention of their vessel being without jurisdiction.

Sir Robert Finlay, S.G., and *Sutton*, for the defendant.—The defendant acted in every respect legally when he detained *The Fulham*, inasmuch as a claim for salvage "due under the Act" was made against her by the owners of *The Flying Buzzard*. The expression "salvage due under the Act" does not only refer to life salvage claims within the Act and claims for salvage rendered to wrecks or vessels stranded or in distress in or near the coasts of the United Kingdom, but refers to every claim for salvage on property within the district of the receiver which may become due and payable by the judgment of any of the courts or tribunals on which the Merchant Shipping Act, 1894 confers jurisdiction, or which are mentioned therein as courts or tribunals before which salvage claims may be determined: see Merchant Shipping Act, 1894, ss. 544 to 550 and 571. Especially is this the case as to claims for salvage over which the Admiralty Division is given jurisdiction by section 565, as that section really deals with all claims for salvage to property whether in or near the coasts of the United Kingdom or otherwise. There is nothing in the Act leading to the narrow construction for which the plaintiffs contend being put on the powers of detention given to receivers of wreck, and the Legislature has in fact given the receiver of wreck of the district under the 552nd section the power of detention on behalf of the salvor which the salvor himself had by virtue of his common law lien for salvage, a lien which existed wherever the services were rendered. [They referred to *Harford* v. *Jones*, 1 Lord Raymond 393; Williams and Bruce Admiralty. Practice, 2nd ed. p. 132.] By section 551 the receiver in whose district salved property is found may, on application of either party, appoint a valuer to value the property where any dispute as to salvage arises, and by sections 523-526 a receiver may deal with any unclaimed wreck found in any part of her Majesty's dominions, including therein any derelict found in or on the shores of the sea in any part of her Majesty's dominions. If the powers of a receiver as to the detention of salved vessels was meant to be confined to salvage earned on or near the coast these last-mentioned sections would equally have been limited to cases where the dispute was as to such salvages and to derelicts abandoned on or near the coasts of the United Kingdom. But the services rendered to *The Fulham* were salvage services rendered to the lives of those on board *The Fulham*, as well as to herself and her cargo, and the defendant was, in fact, justified in detaining her even under the construction the plaintiffs put on the 552nd section—a greater salvage reward always being due where lives and property are saved by salvors. Moreover, there was a continuous salvage service to property performed by the salvors as long as *The Fulham* was in tow of *The Flying Buzzard* and until she arrived in safety at Plymouth, and salvage services were rendered to her—a distressed vessel—when she was "on or near coasts of the United Kingdom" even if these words are confined to services rendered within the territorial limits. The words "near the coasts" are wider than the words "on the coasts" and may well include services rendered within twenty miles of the shore.

At the close of the arguments Mr. Justice Barnes intimated that the opinion of the court was, that in arresting and detaining *The Fulham* the defendant had acted justifiably if he had had, under the Merchant Shipping Act, 1894, jurisdiction to so arrest and detain her, and that as to the question of jurisdiction the court would take time to consider.

Cur. adv. vult.

July 7.—BARNES, J.—[His Lordship stated the facts, and continued:]

Upon these facts the question is raised as to whether or not the defendant was entitled to arrest and detain *The Fulham* under the powers conferred on him under the 552nd section of the Merchant Shipping Act, 1894. There was a further point made at the hearing before me that the defendant on the 18th of December improperly refused to accept security on the undertaking of the plaintiffs' solicitors to give security, but after hearing evidence on both sides on this point I decided that, assuming the defendant had power to arrest and detain the vessel at all, he did not improperly detain her. The plaintiffs' case was that their solicitors offered sureties or an undertaking to put in bail and that the defendant improperly refused to accept either. The defendant stated that he required the sureties to justify or the assent of the salvors to the sureties. The sureties did not justify and the assent of the salvors was not given until the 20th of December, when the vessel was released. I was of opinion that the defendant was entitled to act as he did. He was bound in the interests of the salvors to take the proper steps to satisfy himself that the security offered was adequate, and the usual course is to require the sureties to justify unless the salvors dispensed with justification, and as soon as the salvors assented to the sureties he released the ship. Until then security to the reasonable satisfaction of the defendant under the 552nd section had not been given.

The question now to be decided depends entirely upon the construction of certain sections of the Merchant Shipping Act, 1894. The plaintiffs' contention is that no salvage is "due to any person under the Act," and that therefore the defendant had no right to detain the vessel. The argument in support of this view is that by the words in section 552 "salvage due to any person under this Act" is meant salvage made payable by sections 544, 545, and 546; that the operation of the 552nd section is confined to such salvage, and that the salvage in question in this case did not become payable under any of these sections. Sections 544 and 545 consolidating the sections of earlier Acts make salvage payable for saving life in certain cases, and section

546 is in these terms: "Where any vessel is wrecked, stranded, or in distress at any place at or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck there shall be payable to the salvor by the owner of the vessel, cargo, apparel, or wreck a reasonable amount of salvage, to be determined in case of dispute in manner hereafter appearing." Apart from any argument as to life salvage the argument is that *The Fulham* was not in distress at any place "on or near the coasts of the United Kingdom," because the spot where she was found was twenty miles off the coast, and that such a spot is not within the meaning of the words "on or near the coast." The broad contention on behalf of the defendant is that section 552 is applicable not only to cases of salvage made payable by sections 544, 545, and 546, but to all claims for salvage which may become payable by the decree of any court having jurisdiction under the Act to determine disputes as to salvage. The point is not free from doubt, though the doubt is less to my mind than it would have been had a similar point been raised under the Acts consolidated by the Act of 1894, which differs somewhat from the earlier Act. On the whole I am of opinion that the defendant's contention is correct. Under section 547 of the Act of 1894 disputes as to the amount of salvage, whether of life or property, and whether rendered within or without the United Kingdom, are, if not settled by arbitration, agreement, or otherwise, to be determined summarily as provided by the Act—that is to say, in England, in certain cases of consent or limited amounts, by a county court having Admiralty jurisdiction, otherwise by the High Court in England. By section 565 the High Court, and in Scotland the Court of Session, are to have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the boundary of any county, or partly on the high seas and partly within the boundary of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land. This section comprises the general jurisdiction which the Admiralty Court, now forming part of the High Court, exercise in salvage cases in respect of services on the high seas, and repeats the provisions of earlier statutes under which the jurisdiction of the Admiralty Court was extended to cases of salvage occurring within the boundary of a county. The words in section 552, "where salvage is due to any person under this Act," can hardly be construed literally because whether a claim is made for salvage the right to recover which is expressly conferred, or for salvage recoverable in courts which have jurisdiction conferred upon them by the Act, in either case the salvage award strictly speaking becomes due by the judgment of the court. The term "due under the Act" appears to have been used as a general expression to cover any salvage which the Act contemplates being awarded by the courts mentioned in it, the jurisdiction of which is conferred or recognized by it. Moreover, since the Admiralty Court had jurisdiction within the boundary of a county, it is difficult to see in what cases a claim for salvage can be made under section 546 which could not have been made without it; so that it seems unreasonable to limit section 552 to one class of salvage and not to extend its provisions to salvage claims generally for which process may be issued.

Two other points were taken by counsel for the defendant. The first was that in any view of the case the defendant was entitled to detain the vessel because the salvage services in question had been rendered partly in saving life. *The Fulham* was in a position in which there would be some risk to the lives of those on board her. In the salvage suit against her and her cargo and freight, which was heard by me, an award of £900 was given to the salvors for bringing her into Plymouth, and I found, on the advice of the Elder Brethren of the Trinity House, who assisted me, that there was risk of her going ashore and being lost. So that as there was some risk of life which would form an element in considering an award on a claim substantially made for saving the property, it cannot be said that the defendant had no jurisdiction whatever to detain the vessel. The plaintiffs' counsel made no effective answer to this point.

The other point was that *The Fulham* was in distress at a place on or near the coasts of the United Kingdom because she was, it was contended, "near" the coasts within the meaning of section 546, and also because part of the assistance rendered to her was rendered within the three-mile limit as she was towed into Plymouth. I cannot, however, read the words "near the coasts" as covering a place twenty miles off the coasts. The same language is to be found in other sections of the Act, particularly sections 511 and 535, and I am of opinion that when the terms of these sections are considered the words "near the coasts" do not apply to such a case as that before me. Some limit must be placed on the term, and having regard to all the sections dealing with wreck and salvage as at present advised I think the limit should be the territorial limit, though it is not necessary in this case to express a final opinion upon the point. Nor is it necessary to decide whether section 546 would apply because part of the services was rendered within the territorial limit. It is in my opinion extremely doubtful whether the section could be made to apply on this ground to the facts of this case. I, however, uphold the defendant's main contention, and give judgment for him with costs.

Solicitors for the plaintiffs, *Holman, Birdwood, & Co.*

Solicitor for defendant, *Solicitor to the Board of Trade.*

House of Lords.

From C. A. (England). June 16, 1898.

CARLTON STEAMSHIP CO. *v.* CASTLE MAIL PACKETS CO. (*a.*)

Ship — Charter-party — Berth for loading—Order by charterers—"To load always afloat"—Detention—Tides—Liability.

A charter-party provided that a ship was to proceed to a certain dock at M., or so near thereto as she could safely get, and there load, always afloat, as and where ordered by the charterers. The character of the harbour at M. was such (as both parties were aware) that it was impossible to load always afloat. The ship proceeded to the named dock, and was ordered by the charterers to a berth where she loaded part of her cargo, but, in consequence of falling tides, left the dock for the necessary interval, and then returned and completed her cargo.

Held, that the charterers were not liable for the detention of the ship.

By Lord Herschell. — *The obligations and rights created by the charter-party must be construed with reference to the natural conditions of the particular harbour specified as the place of loading by the charter-party.*

Decision of the Court of Appeal (46 *W. R.* 68, [1897] 2 *Q. B.* 485) *affirmed.*

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., and Rigby, L.J.; A. L. Smith, L.J., dissenting), reported 46 W. R. 68, [1897] 2 Q. B. 485, reversing that of Mathew, J., at the trial of the action without a jury. The action was brought by the appellants, the owners of the steamship *Carlton*, against the charterers, to recover damages in respect of detention of their ship.

The facts are set out at length in Lord Watson's judgment.

Robson, Q.C., and *Scrutton*, for the appellants.—The obligation under this charter to load began when the ship entered dock, and the reasonable time for loading must be calculated from that time. The charterer had made no provision to keep berth vacant. He could have done so had he pleased, and the onus of proof is on him, and here there is an absence of evidence. [They referred to *Jackson* v. *Union Marine Insurance Co.*, 23 W. R. 169, L. R. 10 C. P. 125; *Geipel* v. *Smith*, 20 W. R. 332, L. R. 7 Q. B. 404; *Tapscott* v. *Balfour*, 21 W. R. 245, L. R. 8 C. P. 46; *General Steam Navigation Co.* v. *Slipper*, 10 W. R. 316, 11 C. B. N. S. 493; *Hick* v. *Raymond & Reid*, 41 W. R. 384, [1893] A. C. 22; *Wright* v. *New Zealand Shipping Co.*, 4 Ex. D. 165, 27 W. R. Dig. 199.] The respondents should have loaded continuously: *Nielsen* v. *Wait*, 34 W. R. 33, 16 Q. B. D. 67. The berth was not one suited for the purpose: *The Alhambra*, 29 W. R. 655, 6 P. D. 68; *Shield* v. *Wilkins*, 5 Exch. 304.

J. Walton, Q.C., and *J. Fox*, for the respondents, were not heard.

The House took time for consideration.

Lord HERSCHELL.—[His lordship went through the facts of the case, and continued:] It is said that the charterers were bound to know the condition of the harbour, and that they were under some obligation in that respect which did not rest on the shipowner. I do not propose to discuss the extent of the knowledge of one party or the other. But I cannot see that the obligation is different in one case or the other, or that the charterer is specially bound to know the conditions of the harbour; because, without inquiring into the actual knowledge possessed, I can entertain no doubt that the obligations and rights created by the charter-party must be construed with reference to the natural conditions of the particular harbour, which is the place of loading according to the charter-party. It was suggested that there are cases in which particular berths are less favourable than others for loading cargoes, and that where the charterer has the right to name the berth it would be unreasonable that he should name a berth which would prolong the loading to the detriment of the shipowner. That is a question which I do not think it necessary to consider, because considerations would arise in that case which have no place in the present. The difficulty in the present case existed in respect not of a particular berth, but of the entire dock. The charter-party provides no lay days. The obligation, therefore, was to load within a reasonable time. The question is, What elements are to be taken into account where a vessel is to load within a reasonable time? The judgment in the case of *Hick* v. *Raymond*, in this House, clearly lays down the conditions, and it was there held that the obligation is performed within a time which is reasonable when the circumstances which caused delay are not imputable to personal fault or negligence; and Lord Watson stated that the rule as to reasonable time is not to be confined to contracts for goods to be carried by sea, but that a party must be held to have fulfilled his obligation so long as the delay is attributable to causes beyond his control, and he has acted neither negligently nor unreasonably. If that be the true test, it is difficult to see why the natural conditions of the harbour, which prevented the loading except after some delay, are not to be taken into account in determining whether there was unreasonable delay or not. It is said that you are not to take that into account, because the stipulation is inserted for the protection of the shipowner, and you ought to discuss the question of reasonable time as if there were no such stipulation. But there is no such thing as "reasonable time" in the abstract. The question is whether, having regard to all the stipulations of the contract and to all the conditions, there has been anything like negligence or wilful delay. It is quite inadmissible to shut out consideration of the actual circumstances. You must not exclude any terms of the contract between the parties. Taking the law to be as I have stated, is there any case here made out that the charterer took more than a reasonable time to load this vessel? It is admitted that the vessel could not by any human being have been loaded before she was in fact loaded. Then it is said that by this charter-party the charterer was bound as soon as the vessel arrived to name a berth where she could lie always afloat. But where is any such obligation to be found in the charter-party? There is no provision to that effect. If it exists, it can only be because that must be inferred to have been the intention of the parties. But it is impossible to find by implication in this contract any such condition. It is obvious that the time of the arrival of the vessel in the port depends largely upon the shipowner. Until she arrives the charterer has no control over her, and it is clear that in such a port the ship might arrive at a time when it would be impossible to name a place where she could load a cargo. It would be unreasonable to suppose that the parties contracted to accomplish the impossible. I am disposed to surmise that these contingencies were not foreseen. But we must consider the charter-party according to its terms. It is urged that it was

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

hard upon the shipowner; that is naturally his view, but it can have no effect on the rights of the parties as they are to be ascertained. For these reasons I confess that I am unable to see any ground for differing from the decision of the Court of Appeal, and I move your lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord WATSON.—The respondent company had, on the 1st of February, 1897, contracted to provide steam tonnage for the conveyance of a quantity of material to be used in the construction of the Pretoria-Pietersburg Railway, from Maryport, and other ports in the United Kingdom or the Continent, to Delagoa Bay. With a view to part fulfilment of that contract, they, on the 22nd of February, 1897, chartered from the appellant company the steamship *Carlton*, about 4,000 tons burden. At the date of the charter-party *The Carlton* was at Barry, taking in her bunker coal, and by its terms she was to proceed "to Senhouse Dock, Maryport, or so near thereto as she may safely get, and there load in the customary manner (Sundays and holidays excepted), always afloat, as and where ordered by the said charterers, a full and complete cargo of rails and (or) accessories, say about 2,850 tons, and not more than 3,000 tons, and therewith proceed to Delagoa Bay." No time is specified for the arrival of *The Carlton* at Maryport beyond the expectation that she would reach that harbour on Wednesday, the 24th of February; but it was stipulated that in the event of the ship not being at their disposal at Maryport not later than the 5th of March, the charterers should have the option of cancelling the charter. It was by the charter-party provided that demurrage, if any, was to be paid for at the rate of £30 for each working day, "except in cases of strikes, lock-outs, labour disturbances, trade disputes, accidents, or other hindrances beyond charterers' control." The depth of water in the Senhouse Dock, Maryport, depends upon the state of the tides, and may be affected to some extent by the winds which happen to prevail at the time. Each period of high water lasts for about a fortnight, during which there may be a depth of upwards of 17 feet relied on. Between these periods there is an interval of six or seven days, during which the depth of water in the dock may not exceed 14 feet 6 inches in the morning, or 14 feet 7 inches in the evening. *The Carlton* arrived in the basin of Maryport Harbour on the night of Saturday, the 27th February, and on the morning of Sunday, the 28th, she went into the Senhouse Dock. At that time, owing to her bunker coal being on board, the ship was not upon an even keel, her draught forward being 11 feet and aft 17 feet 5 inches. On Monday, the 1st of March, the charterers' agent gave an order to the master in these terms, "You will please place your steamer into the middle berth east side Senhouse Dock, where your cargo is waiting shipment." From that time the controversy began which has developed into this litigation. On the evening of Friday, the 5th of March, *The Carlton* was admitted by the harbour-master to the berth to which she had been ordered, which had just been vacated by *The Abermaed*. At that date the current period of spring tides had so far elapsed that it had become impossible to begin and complete the loading of the ship before the return of the neaps. Between the Friday evening and the morning of Tuesday, the 9th of March, 675 tons of cargo were put on board, after which the ship drew 15 feet 9 inches forward and 16 feet 11 inches aft. The tides were then gradually ebbing, and even with the amount of cargo already on board, *The Carlton* could not have lain afloat in the dock during the neaps. Accordingly, on the Tuesday morning *The Carlton* left Maryport Dock and went to Barrow, where she offered to ship the remainder of the cargo. Whilst matters stood in that position an application was made to Mathew, J., to determine the relative rights and obligations of the shipowners and the charterers, but a compromise was effected, by which it was arranged that, without prejudice to the rights of either party, *The Carlton* should return to the Senhouse Dock at Maryport, there load the remainder of her cargo, and get away by the next spring tides after the 17th of March. In pursuance of that arrangement *The Carlton* returned to her berth in the Senhouse Dock upon the morning of Tuesday, the 16th of March, and immediately commenced loading. On Saturday, the 30th of March, she left the dock with 2,860 tons of rails on board. On the 12th of March, 1897, the appellants brought the present action, in which they claim demurrage or damages, in respect of (1) detention of their ship for fifteen days; (2) port and other charges during that period; and (3) dead freight upon the cargo short shipped. The third of these claims is not now insisted on, and need not be further noticed. Mathew, J., entered judgment for the appellants, for an amount to be agreed upon by the parties, or, in the case of their differing, to be settled by the court. His order was set aside, and judgment entered for the respondents, by a majority of the Court of Appeal, consisting of Lord Esher, M.R., and Rigby, L.J., Smith, L.J., dissenting. If *The Carlton* had reached Maryport, as their owners anticipated, on Wednesday, the 24th of February, she would, if her berth had been then available, have been able to lie afloat from the commencement to the completion of her loading; and it is clear that, had her loading not commenced until the 16th of March, the whole cargo might have been put on board continuously whilst she was afloat. The appellant company maintain that, under the charter-party, as soon as *The Carlton* arrived at Maryport it was the duty of the respondents forthwith to provide a berth for her, in which she could at once, and without any delay, proceed to take on board her cargo continuously, and then remain afloat until her loading was completed and she left her port. I do not think that any such obligation is imposed upon the respondents by the language of the charter-party, which is exceptional; and in construing the terms of that instrument it appears to me to be legitimate to take into account the fact, which was not disputed, that the character of the harbour of Maryport was known to the appellants as well as to the respondents. As was pointed out by Rigby, L.J., the correspondence produced shows that the owners of *The Carlton* were quite alive to the risk, if not the certainty, to which their ship was exposed of touching and resting upon the ground at some states of the tide. In my opinion the construction for which they contend is unreasonable and objectionable. It makes the nature of the obligation incumbent upon the charterers variable, and entirely dependent upon the time at which *The Carlton* might find it convenient or possible to arrive at the harbour. If she arrived about the commencement of a period of spring tides, it might not be difficult to find a berth for her at which she could begin and complete the loading of her cargo, she being during the whole time afloat. On the other hand, if she arrived towards the termination of the same period, it would be simply impossible to provide a berth for her in the Senhouse Dock where, if she began to take in cargo at once, she could remain afloat until her loading was completed. The charter-party does not contain any provision to the effect that the ship shall "lie afloat" at all times whilst

she is in the harbour of Maryport. It merely provides that she is to "load in the customary manner, always afloat." These words, according to their natural meaning, go no farther than to impose a qualification of the charterers' right to load by negativing his right to put cargo on board except at times when the ship is afloat. In these circumstances I concur in the result which commended itself to the majority of the Appeal Court. I think that *The Carlton* was rightly directed to a berth where, if she had chosen to wait, she could have continued afloat until the whole of her cargo was continuously shipped; and that the respondents cannot be held responsible for delay occasioned by natural and physical causes which were beyond their control.

Lord MACNAGHTEN. — I am of the same opinion. Maryport is a tidal harbour. Tables are published showing the expected height of water for every day of the year. A shipowner may be presumed to know the draught of his own ship with the c rgo on board which he proposes to carry. It must, therefore, be taken that the shipowner in this case entered into the charter-party with the knowledge that in the ordinary course of navigation his ship, if she arrived at her destination at certain states of the tide, would be delayed in shipping her cargo, assuming that she was going to ship it (as provided by the contract) "always afloat." The substantial question is, Who is to suffer for that delay—the shipowner or the charterer? There is no special provision throwing the loss on the charterer. The loss has arisen in the ordinary course of navigation. And therefore, as it seems to me, the shipowner must bear it. I quite agree with the Court of Appeal in their view of the order which was given to the shipowner to proceed to the berth in Senhouse Dock. It seems to me to have been a proper and a reasonable order. It was for the shipowner to consider, having regard to the state of the tides, whether he would go to the berth at once and take in part of his cargo, or wait until he could ship the whole of it continuously "always afloat." To complete the loading, whether he began it at once or not, he would have to wait till the next spring tide—that, say Mathew, J., and Smith, L.J., is an unreasonable time to wait. I cannot understand how it can be unreasonable when it is the period required by the character of the harbour, the laws of nature, and the regular recurrence of spring tides. Having regard to the known accommodation of this harbour and upon this contract, it seems to me that it would be most unreasonable to hold that at the time when this vessel arrived, and in the state of the tides, the charterers were bound to provide a berth with a depth of water which both parties knew was physically impossible. I agree that the appeal must be dismissed.

Lord SHAND.—I am of the same opinion. The port of Maryport is one at which vessels of a large draught can only be loaded at intervals, when high spring tides occur, and consequently a vessel of large tonnage arriving at an unsuitable time may have to submit to considerable delay before getting a cargo on board, if the owner requires that the loading shall be carried on and completed while the ship remains "always afloat." It appears to me that those who contract as charterers and shipowners in regard to such a port must alike be held to make their contract of charter-party with reference to the natural condition of the harbour. If they have failed to inform themselves, and to provide for circumstances which from the nature and configuration of the harbour may delay the loading of a ship, because the requisite depth of water can only be had at intervals when specially high tides occur, they may enter into improvident arrangements and agreements, but this cannot affect the legal construction of the contracts entered into as having reference to a harbour which has known disadvantages. Again, I further think that in the construction of the contract of carriage or charter-party no distinction can be drawn between the charterer who is to supply the cargo and the shipowner who is to load the ship. The latter has undertaken to ship and carry the cargo from a port where from the nature of the harbour delay more or less may occur according to circumstances, and particularly the time of arrival, and the berths or means of loading available, and the charterers' obligation, in the absence of special stipulation, is to furnish the cargo within a reasonable time on the ship's arrival. In my opinion the legal construction and effect of the charter-party in this case, in which the charterer is by the shipowner restricted as to the loading by the provision that during the loading the ship shall be "always afloat" is that, after notification that the ship has arrived at the port ready to receive cargo, the charterer became bound to furnish the cargo at a suitable berth when that could be had within a reasonable time; where, having regard to the draught of the ship and the depth of water which is available, the loading could be effected without causing the ship to ground; but that his obligation goes no further. The shipowner has stipulated that his vessel shall be loaded only when she can be kept afloat, and as from the nature of the harbour this can be done only when certain high tides occur, it seems to me to be clear that time lost after the arrival of the ship in waiting for the necessary tides and depth of water must be lost to the shipowner. The charterer has done all that is possible, and all that can, I think, be inferred from his obligation under the charter-party if he provides the cargo as soon as, having in view the nature of the harbour, the loading can be proceeded with and effected without grounding the ship. Accordingly I have only to add that the respondent in this case fulfilled this obligation. The contract admitted of being fulfilled in its very terms, although in certain contingencies delay would certainly occur in the loading. I can find no breach of contract on the part of the charterer. He could not, consistently with the shipowner's stipulation that the loading should take place only when the ship was afloat, do more than he did. The unfortunate delay was the result of a stipulation by the shipowner, necessary no doubt for the safety of his ship, but having made the stipulation he must bear the loss consequent on its fulfilment. The learned judge in the Court of Appeal who differed from the majority of the court, put the case of a delay in the loading which might last for six months, or one month, under such a charter-party as the present. It is difficult to suppose that any shipowner would make a contract so improvident as to produce this result. But with the utmost deference to the very learned judge, I can only say that even in such a case the responsibility of the charterer would not thereby be enlarged. The shipowner must still bear the consequence of the delay. But it may very well be that as the consequence of the adventure was found to be so disastrous to the shipowner, on the authority of the cases cited by Mr. Robson, he might be held entitled to abandon the contract and leave the harbour unloaded—a course which would certainly not entitle him to make a claim of damages like the present, in which no provision is made for such a contingency, nor even

for a limited number of lay-days on the lapsing of which a claim for demurrage would arise.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for appellants, *Botterell & Roche.*

Solicitors for respondents, *Parker, Garrett, & Holman.*

Court of Appeal.

From Q. B. Div. (A. L. Smith and Collins, L.JJ.) — Nov. 8.

WATSON v. PETTS. (a.)

Practice—Appeal from chambers—Court of Appeal—Matters of practice and procedure—Prohibition to county court—Judicature Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.

Where a judge at chambers has made an order either granting or refusing an application for a writ of prohibition to a county court, the appeal from such order lies to the Divisional Court, and not direct to the Court of Appeal.

Appeal by the defendant from an order of Lawrance, J., at chambers, refusing to grant a writ of prohibition to restrain a county court judge from proceeding further on an order made by him.

The order of the county court judge directed the defendant to pay costs in a matter which, the defendant alleged, was beyond the jurisdiction of the county court judge.

Clarke Hall, for the plaintiff, took a preliminary objection.—The appeal lies to the Divisional Court and not to this court. The refusal to grant a writ of prohibition is not a matter of practice or procedure within the meaning of section 1, sub-section 4, of the Judicature Act, 1894.

He referred also to section 132 of the County Courts Act, 1888.

J. M. Stone, for the defendant.—The appeal is rightly brought to this court. This is a matter of practice and procedure within the meaning of the Act. It involves an important question as to the practice and procedure of the county court.

A. L. SMITH, L.J.—We have had an opportunity of consulting with our brother Lords Justices, with the exception of Rigby, L.J., on the point raised, which is whether, when an application is made at chambers for an order to prohibit a county court judge from proceeding further in a matter before him, and that application is refused, the appeal is to the Queen's Bench Division or direct to the Court of Appeal. This depends on the question whether an application for a prohibition to restrain an inferior court from exceeding its jurisdiction is a matter of practice or procedure within the meaning of section 1, sub-section 4, of the Judicature Act, 1894. We are of opinion that it is not, and that the appeal therefore is to the Divisional Court and not to this court in the first instance. The practice and procedure mentioned in the section covers matters of practice and procedure in connection with a cause or matter in the High Court, and not a matter in which a county court judge is sought to be prohibited from exceeding his jurisdiction in his court. In this case it is said that the county court judge did something in his court without jurisdiction, and an application is made to a judge at chambers, not in any cause or matter in the High Court, but in relation to that which the county court judge did in his court. Sub-section 4 does not apply, and the appeal from the order made on that application must go to the Divisional Court and not to this court, because it is not transferred by that sub-section direct to this court.

Preliminary objection allowed.

Solicitors for the plaintiff, *Chester & Co.*

Solicitors for the defendant, *G. F. Hudson, Matthews, & Co.,* for *John Bamford, Son, & Wilson,* Ashbourne.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) — Oct. 31.

REG. v. THE JUDGE OF THE NORTHALLERTON COUNTY COURT. (a.)

*Bankruptcy—County court—Jurisdiction of county court judge in bankruptcy—*Certiorari—*Order for arrest of debtor—"Has absconded or is about to abscond"—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 25, 100, 102 (2)—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 7.

A writ of certiorari *does not lie to bring up an order made by a county court judge sitting in bankruptcy.*

The effect of section 25 (1) (a) *of the Bankruptcy Act,* 1883, *as amended by section* 7 *of the Bankruptcy Act,* 1890, *is that an order may be made for the arrest of a debtor if, after a bankruptcy notice or a bankruptcy petition, it appears to the court that there is probable reason for believing that the debtor has absconded before, or has absconded or is about to abscond after, the notice or petition for any of the purposes mentioned in the section.*

Appeal from the judgment of a Divisional Court (Wright and Darling, JJ.), discharging a rule *nisi* for a writ of *certiorari* to bring up and quash a warrant issued by the judge of the Northallerton County Court for the arrest of a debtor under section 25 of the Bankruptcy Act, 1883.

On the 23rd of April, 1898, a petition in bankruptcy was presented against the debtor, Frederick Herbert Skinner, in the Northallerton County Court.

On the 9th of May a receiving order was made, and on the same day the official receiver posted a notice to the debtor's address requiring him to attend a meeting of his creditors on the 11th of May.

The debtor having made default in attending the meeting, an application was made to the county court judge on the 13th of May for an order directing a warrant to be issued for his arrest under section 25 of the Bankruptcy Act, 1883.

Sub-section 1 (a) of that section enacts that the court may by warrant cause a debtor to be arrested, "if after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears to the court that there is probable reason for believing that he is about to abscond with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him."

Section 7 of the Bankruptcy Act, 1890, enacts as

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

follows: "Section twenty-five of the principal Act (relating to the arrest of a debtor under certain circumstances) shall be read and construed as if the words 'believing that he has absconded or is about to abscond' were substituted for the words 'believing that he is about to abscond.'"

On the hearing of the application evidence was given showing that on the 12th of April, 1898, the debtor was insolvent and was being pressed by his creditors, and that on that day he departed from his dwelling-house for the purpose of delaying his creditors and escaping payment of his debts.

The county court judge made an order directing a warrant to be issued for the arrest of the debtor, and a warrant was issued accordingly. The warrant recited that "by evidence taken upon oath it hath been made to appear to the satisfaction of the court that there is probable reason to suspect and believe that the said Frederick Herbert Skinner is avoiding examination in respect of his affairs, and is otherwise delaying or embarrassing the proceedings in bankruptcy against him."

The debtor was arrested under this warrant on the 31st of May, but three days later he was released on his making an affidavit of apology and undertaking to give all information which might be required.

The debtor then obtained a rule *nisi* for a writ of *certiorari* on the grounds that the county court judge had no jurisdiction to order the warrant to be issued, and that it was irregular on the face of it.

The Divisional Court discharged the rule, on the ground that by section 100 of the Bankruptcy Act, 1883, a county court judge exercising bankruptcy jurisdiction had all the powers of a judge of the High Court, and therefore, on the principle of the decision in the case of *In re New Par Consols* (*Limited*), 46 W. R. 369, [1898] 1 Q. B. 669, a writ of *certiorari* would not lie to bring up an order made by a county court judge exercising bankruptcy jurisdiction.

The debtor appealed.

R. G. Glenn and *Horridge*, for the debtor.—The warrant was issued without jurisdiction. First, there was no evidence that the debtor had absconded or was about to abscond for any of the purposes mentioned in section 25 of the Bankruptcy Act. Secondly, if he did abscond at all, it was not after the presentation of the bankruptcy petition, as required by sub-section 1 (*a*), but before it. The words "after a bankruptcy notice has been issued under this Act, or after the presentation of a bankruptcy petition by or against him" are words governing the whole of the sub-section, even when it is amended by section 7 of the Bankruptcy Act, 1890. The warrant is also bad on the face of it, in that it does not state that the debtor absconded or was about to abscond. This case is not governed by *In re New Par Consols* (*Limited*), for in that case the county court judge was not acting outside his powers.

Sir R. B. Finlay, S.G., and *Muir Mackenzie*, for the official receiver.

Cur. adv. vult.

Oct. 31.—A. L. SMITH, L.J., read the following judgment: The question in this case is whether the Divisional Court was right in refusing a *certiorari* to bring up to be quashed a warrant of arrest under which the applicant, Skinner, had been arrested and subsequently discharged. I agree with what my brother Wright said as to the inutility of the application, for Skinner, long before the motion was made on his behalf, had been discharged from custody; but as the point is brought up here upon appeal, and stoutly argued for the applicant, it must be determined. Skinner is a solicitor, and in the month of April, 1898, he was in embarrassed circumstances and upon the 12th of that month he left his home. His uncle gave evidence, which was before the learned county court judge, that Skinner was upon the 12th of April hopelessly insolvent, that his creditors were pressing him, and that the uncle believed that Skinner had departed from his dwelling-house for the purpose of delaying his creditors and escaping payment of his debts. This and other like evidence being before the county court judge sitting in bankruptcy, he had ample evidence upon which to find as he did that Skinner had absconded, which gave him jurisdiction to order the issue of a warrant for the arrest of the applicant, under section 25 of the Bankruptcy Act, 1883, as amended by section 7 of the Bankruptcy Act, 1890, assuming that those sections taken together have not the limitation now contended for on behalf of the applicant. It is said that these sections gave no jurisdiction to the learned county court judge to order the issue of a warrant — first, because there was no evidence to give ground for believing that Skinner had absconded or was about to abscond with a view of avoiding payment of his debts; but this point is totally untenable in fact; and secondly, because the county court judge sitting in bankruptcy could only order the issue of a warrant of arrest if a debtor was about to abscond after a bankruptcy notice had been issued or after presentation of a bankruptcy petition, and, as Mr. Skinner left his home before either the one or the other, his arrest was ordered without jurisdiction. In my judgment, section 7 of the Bankruptcy Act, 1890, was enacted by way of amendment to section 25 (1) (*a*) of the Bankruptcy Act, 1883, to meet this point. Section 25 (1) (*a*) of the Bankruptcy Act, 1883, coupled with section 7 of the Act of 1890, reads thus: "If after a bankruptcy notice has been issued under this Act, or after the presentation of a bankruptcy petition, it appears to the court that there is probable reason for believing that the debtor has absconded or is about to abscond," then a warrant may be granted. The words "has absconded," when taken in conjunction with "about to abscond," are in my judgment without limitation as to time, and mean has absconded before, or has absconded or is about to abscond after the notice or petition; and, indeed, what good reason is there to induce the court to hold that there is no jurisdiction to order the issue of a warrant if the debtor has absconded the day before the notice or petition, whereas there is jurisdiction if he absconds or is about to abscond the day after? I see no sense in this, and in my judgment the Solicitor-General is right upon his construction of these two sections taken together. A third point was then taken for the applicant, and it was said that the warrant was bad upon its face, because it did not show the offence committed by the debtor. Be it so. But the county court judge was sitting in bankruptcy when he made the order for the issue of the warrant, and this is beyond dispute. Now, what is his jurisdiction when sitting in bankruptcy? By section 92 (1) of the Bankruptcy Act, 1883, it is enacted that "the courts having jurisdiction in bankruptcy shall be the High Court and the county courts." By section 93 (1) it is enacted, "From and after the commencement of this Act the London Bankruptcy Court shall be united and consolidated with and form part of the Supreme Court of Judicature, and the jurisdiction of the London Bankruptcy Court shall be transferred to the High Court." By section 100, "A county court shall for the purposes of its bankruptcy jurisdiction in addition to the ordinary powers of the court have all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in manner prescribed." By section 102 (2),

"A court having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other court, nor shall any appeal lie from its decisions except in manner directed by this Act." And by section 104 (1), "Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction." In my judgment the result of these sections is that the position of a county court judge sitting in bankruptcy and exercising bankruptcy jurisdiction and acting within that jurisdiction is a position similar to that of a judge of the High Court exercising his jurisdiction, and that, as long as a county court judge is exercising bankruptcy jurisdiction, the remedy by which to question an order made by such a judge, when exercising such jurisdiction, if such order requires alteration or amendment, is by application to the judge himself sitting in bankruptcy, and then perhaps by appeal to the Divisional Court, and not by *certiorari* to bring up the order into the Queen's Bench Division. This is the procedure which this court held in the case of *In re New Par Consols* to be the proper procedure under sections in the Winding-up Acts, which as to this are equivalent to section 100 in the Bankruptcy Act, 1883. The present case appears to me to be even a stronger case than *In re New Par Consols*, and for the reasons above given I think that this appeal should be dismissed, and with costs.

RIGBY, L.J., concurred.

VAUGHAN WILLIAMS, L.J., read the following judgment: Having regard to the decision of the Court of Appeal in the case of *In re New Par Consols*, a decision which binds this court, I do not see how it can possibly be said that the order of the county court judge can be made the subject of a writ of *certiorari* by the Queen's Bench Division, and I think, therefore, that this appeal must be dismissed. In that case it was held by the Court of Appeal that, inasmuch as a county court judge had jurisdiction to wind up the company and had for the purposes of that jurisdiction all the powers of the High Court, and was therefore for that purpose placed on an equal footing with the judge of the High Court, the prohibition would not lie, and I agree with A. L. Smith, L.J., that on the principle of that decision a writ of *certiorari* cannot be issued to bring up the order of the county court judge exercising jurisdiction in bankruptcy, and, I think, could not be brought up, even though the county court judge might have misconstrued the section under which he purported to issue the warrant in question, or even though the warrant in question might have been bad on the face of it as being based *ex facie* and by its terms on facts which, under the Bankruptcy Acts, would not have justified the issue of the warrant of arrest, or had been based upon affidavits which did not disclose any conduct of the debtor justifying the arrest. It is sufficient to say that the Queen's Bench Division has no power to prohibit a judge of the High Court or to issue a *certiorari* to bring up his order, nor, according to the decision in the *New Par Consols case*, to prohibit the county court judge or bring up his order in a matter in respect of which he is by statute invested with the powers of the High Court, and therefore placed on an equal footing with a judge of the High Court. The cases in which a *certiorari* has gone to bring up the order of an inferior court exceeding its jurisdiction, even when a *certiorari* has been taken away by statute, do not seem to me to touch the present case, because the basis of the decision in the *New Par Consols case* was that the judge of the county court exercising jurisdiction in a matter in which the statute gave him seisin was not an inferior court, because in such a matter the statute gave him all the powers of a judge of the High Court. This being so, it is not necessary for me to express any opinion on the decision which binds me or upon any of the contentious impeaching the order of arrest to which I have referred, or as to how far the issue of the writ is discretionary. A judge of the High Court in the exercise of his jurisdiction cannot be controlled by writs of prohibition or *certiorari*, but only by appeal, and if the county court judge in the exercise of bankruptcy jurisdiction is, as would seem to be the case from the decision in *In re New Par Consols*, placed on an equal footing, he is judge of law and fact, and his judgments are subject to appeal only and cannot be reviewed by *certiorari*. This is not a case in which it is, or could be, suggested that the particular bankruptcy is a matter not coming within the cognizance of the particular county court, the judge of the county court being, according to the principle of the decision in *In re New Par Consols*, a judge of co-ordinate jurisdiction with the judges of the High Court. The question whether this particular debtor has by his conduct rendered himself liable, under the Bankruptcy Acts, to be arrested is a question depending partly on law and partly on fact, which question, according to the meaning of the Bankruptcy Acts, the county court as a High Court is to decide, subject only to that appeal to the Divisional Court or with leave to higher courts which is given in the matter. If the first step is right—that is, if *In re New Par Consols* is rightly decided in principle—all the rest seems to follow of necessity.

Appeal dismissed.

Solicitors for the debtor, *Skinner, Son, & Church*, Sunderland.

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) — July 2, 1898.

WOOLF v. HAMILTON. (a.)

Gaming—Betting—Horse-racing—Cheque given in payment of bets—Holder for value with notice—Illegal consideration—9 Anne, c. 14, s. 1—6 & 7 Will. 4, c. 41, s. 1.

A cheque was drawn by the defendant in payment of bets lost by him to the payee upon horse-races, and was indorsed for value by the payee to the plaintiff, who had notice of the consideration for which it was drawn.

Held, that the cheque must be deemed to have been drawn upon an illegal consideration, and that the plaintiff, who had notice thereof, could not recover upon it.

Appeal from the judgment of Darling, J., in favour of the defendant at the trial of the action without a jury.

The action was brought to recover £84 3s. 9d. upon a dishonoured cheque which had been drawn by the defendant, payable to the order of Wilson, and indorsed by Wilson to the plaintiff for value. The cheque was given to Wilson in payment of bets lost by the defendant to him upon horse-races, and the plaintiff took the cheque with knowledge thereof. Darling, J., held that, as the plaintiff took the cheque

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

with notice of the consideration, he could not recover, and gave judgment for the defendant. The plaintiff appealed.

Ritter (*F. W. Sherwood* with him), for the plaintiff.—The cheque, being given for a bet on a horse-race, must be deemed to have been given for a void consideration—that is, without consideration, under 8 & 9 Vict. c. 109, s. 18. But a holder for value can recover on it. A horse-race is not a game within 9 Anne, c. 14, s. 1, which makes bills and other securities given for money won at gaming at cards, &c., or other game or games, or by betting on the games, void. Horse-races were expressly mentioned in 16 Car. 2, c. 7, and section 3 of that statute made bills and other securities for bets exceeding £100 void. That Act has, however, been repealed by section 15 of 8 & 9 Vict. c. 109. 5 & 6 Will. 4, c. 41, s. 1, repealed so much of the statute of Anne as enacted that any note, bill, or mortgage should be absolutely void, and enacted that every note, bill, or mortgage which would have been absolutely void under those statutes should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration. There are certain old cases—*Goodburn* v. *Marley*, 2 Stra. 1159; *Lynall* v. *Longbothom*, 2 Wils. 36; and *Blaxton* v. *Pye*, 2 Wils. 309—which decided that horse-racing was a game within 9 Anne, c. 14, but those cases were wrongly decided, and are not binding upon this court. *Applegarth* v. *Colley*, 10 M. & W. 723, merely followed the older authorities upon this point.

He also referred to *Lilley* v. *Rankin*, 56 L. J. Q. B. 248, 35 W. R. Dig. 169.

F. Shewell Cooper (*G. A. Cave-Orme* with him), for the defendant, was not called upon.

A. L. SMITH, L.J.—This is an action upon a cheque given in payment of bets lost on horse-races, the plaintiff being an indorsee for value who took the cheque with notice of the above fact. The learned judge held that the plaintiff could not recover. It has been decided in more than one case that horse-racing is a "game" within 9 Anne, c. 14. Horse-racing was expressly mentioned in 16 Car. 2, c. 7, a statute which has now been repealed, and the cases have decided that the games contemplated in the statute of Anne are the same as those referred to in the statute of Charles 2. Therefore horse-racing comes within the statute of Anne. We cannot overrule those authorities even if we did not agree with them, seeing that Parliament has been legislating about these matters upon several occasions, and has never touched those decisions. That being so, the case becomes clear. 5 & 6 Will. 4, c. 41, s. 1, has repealed so much of the statute of Anne as declared that any note, bill, or mortgage should be absolutely void, and enacted that every such bill, note, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration. The effect of that is that a person who gives value for a bill or note with notice that it was originally given for an illegal consideration cannot recover upon it. A cheque given in payment of a bet lost upon horse-racing is deemed to have been given for an illegal consideration, and the person who takes it with notice, though he gave value for it, cannot recover upon it.

RIGBY, L.J., concurred.

VAUGHAN WILLIAMS, L.J.—I agree. I will only add one passage from the judgment of Lord Campbell, C.J., in *Hay* v. *Ayling*, 16 Q. B. 423, at p. 431: "As the law now stands the illegality of the gaming consideration would be immaterial to a *bonâ fide* holder without notice of the consideration; but the plea goes on to allege (what was distinctly proved) that the plaintiff, before and at the several times when the bills were made and accepted, had notice of the premises aforesaid, and took the said bills from the defendant with the said notice." In that case the bills of exchange were given in payment of a bet lost upon a horse-race.

Appeal dismissed.

Solicitors for the plaintiff, *H. Dade & Co.*

Solicitor for the defendant, *W. H. Curtis.*

From Q. B. Div. (Mathew, J.) (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 16, 17, 1898.

SEA INSURANCE CO. v. BLOGG. (*a*.)

Insurance, marine — Steamers "sailing on or after the 1st of March"—"Sailing," what constitutes—Attachment of risk.

The plaintiff company were reinsured on flour in steamers "sailing on or after the 1st of March." A steamer completed her loading alongside a wharf in a river about 10 p.m. on the 29th of February. The steamer was then moved a short distance out into mid-stream, where she anchored till 8 a.m. on the 1st of March, when she proceeded down the river on her voyage. By leaving the wharf on the previous evening the steamer was placed in a more advantageous position for making a start, but the master's sole intention in moving the steamer was to prevent the crew from leaving the steamer during the night. The steamer and her cargo having become a total loss,

Held, that the steamer sailed on the 1st of March, and not on the 29th of February, and that the loss was covered by the policy.

Appeal of the defendant from the judgment of Mathew, J., at the trial of the action without a jury.

The action was brought to recover a total loss on cargo per steamship *Massasoit* under a policy of reinsurance subscribed by the defendant and other underwriters. By that policy the plaintiffs were reinsured "at and from ports in the United States to ports in Europe" on flour per "steamers as attached sailing on and after the 1st of March, 1896." Amongst the declarations attached to the policy was one on flour per *The Massasoit* on a voyage from Newport News, James River, Virginia, to London.

In February, 1896, *The Massasoit* was loading her cargo alongside a wharf at Newport News. The loading was finished between 9 and 10 p.m. on the 29th of February. By a rule of the pilotage authorities of the port foreign-going vessels are not allowed to go to sea after dark, owing to the difficulties of navigation and the absence of leading lights in the river. After the loading was finished the master moved *The Massasoit* about five hundred yards out from the wharf into mid-stream where the vessel remained at anchor until the following morning. This was done in order to prevent the crew from going on shore and getting drunk. *The Massasoit* had cleared at the custom house before she finished loading, but in accordance with the usual practice of the port a custom house officer was on board when she left the wharf and he remained on board until about 8 a.m. on the 1st of March, when he went ashore and the

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

vessel proceeded to sea. *The Massasoit* and her cargo eventually became a total loss.

By being anchored in the stream a vessel would gain an advantage of a few minutes in getting under way as against another vessel starting from alongside the wharf, but the master, when he moved the vessel on the 29th of February, was not influenced by that consideration.

Mathew, J., held that *The Massasoit* sailed on the 1st of March, 1896, and gave judgment for the plaintiffs.

The defendant appealed.

Pickford, Q.C., and *Scrutton*, for the defendant.—The question is, did the vessel sail on the 29th of February or on the 1st of March. When she left the wharf on the 29th of February she had finished loading, and was ready for sea, and she was placed in a more advantageous position for proceeding down the river on the following day. That is sufficient to constitute the leaving of the wharf an act of "sailing." It is immaterial that the master knew that he could only proceed a short distance that evening, or that one of his objects in leaving the wharf was to keep the crew on board during the night.

They cited *Pittegrew* v. *Pringle*, 3 B. & Ad. 514; *Cockrane* v. *Fisher*, 2 Cr. & M. 581, 1 Cr. M. & R. 809; *Moir* v. *Royal Exchange Assurance Co.*, 3 M. & Sel. 461; "*The City of Cambridge*," 22 W. R. 578, L. R. 5 P. C. 451; "*The Cachapool*," 7 P. D. 217, 30 W. R. Dig. 190; *Lang* v. *Anderdon*, 3 B. & C. 495.

Joseph Walton, Q.C., and *Carver, Q.C.*, for the plaintiffs.—The question whether any particular act constitutes a "sailing" or not depends on the intention with which that act was done. In this case the learned judge has rightly inferred from the evidence that when the master left the wharf on the 29th of February he had no intention of sailing.

A. L. SMITH, L.J.—The question in this case is whether the ship, the goods on which were reinsured by the defendant, sailed before the 1st of March. If she did the loss is not covered by the policy. *Cockrane* v. *Fisher* and the other cases cited show that the question to be considered is, What was the intention with which the particular act was done which is said to constitute the sailing? That is, I think, quite clear. We must see, therefore, whether there is any evidence on which it could be found that when the master moved the ship from the quay side on the 29th of February it was his intention that the ship should then sail. In my opinion the evidence shows conclusively that there was no such intention, but that the intention was to sail on the 1st of March. It has been suggested on behalf of the defendant that because the ship went 500 yards out into the stream on that evening, she must be regarded as having then commenced her voyage. I agree that a ship may move from alongside a wharf and go a short distance and then stop, and nevertheless be held to have begun her voyage, but I think that in this case there was no intention to sail before the 1st of March. In my opinion the judgment of Mathew, J., was right, and this appeal must be dismissed.

RIGBY, L.J.—I agree. The question is one of intention. It cannot be said that whenever a ship goes a short way from her moorings she has commenced her voyage. If that were so, I do not see how any question could have arisen in the case of *Cockrane* v. *Fisher*. I agree that if a ship goes out of port and anchors near the bar in order to get the utmost advantage from the tide, the voyage must be considered to have begun when the ship first started.

VAUGHAN WILLIAMS, L.J.—I agree. I think that in these cases the intention with which the act was done should be deduced as far as possible from the facts of the case and not from the evidence as to what was afterwards said to have been the intention. Further, I think that if a ship is ready to start on her voyage, with her loading completed and her crew all on board, and she moves from alongside the wharf where she has been loading, and goes a short distance on her voyage and is prevented by some physical reason from going further, then, in the absence of any further evidence, the inference to be drawn is that the ship has sailed within the meaning of that word in a policy of insurance. But I entirely agree that there must be a sailing which is intended to be a commencement of the voyage, and if a ship is not ready to start, that is evidence to show that the sailing is not a commencement of the voyage. It seems to me that although a *primâ facie* case of sailing has been established in this case by showing the condition of the ship at the time she started from the wharf; and by showing that her stay during the night in the river was caused by the regulations of the port, yet in my opinion the inference as to the voyage having commenced on the 29th of February is negatived when the whole of the evidence is looked at. The facts account for the moving of the ship into the middle of the river quite independently of any intention to commence the voyage at that time; under these circumstances I think that the inference drawn by Mathew, J., from the evidence was right.

Appeal dismissed.

Solicitors for the plaintiff company, *Rowcliffe Rawle, & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

Solicitors for the defendant, *Wallons, Johnson, Bubb & Whatton.*

High Court of Justice.

Chan. Div. Romer, J. } Oct. 25, 26; Nov. 8.

WAUTON v. COPPARD. (a.)

Vendor and purchaser—Restrictive covenant—Construction—Injurious or offensive or disagreeable noise or nuisance—Carrying on school—Action for rescission of contract.

W. entered into negotiations with the defendant's agent for the purchase of a house for the purpose of carrying on a boys' school, and was induced to enter into a contract to purchase the house by his representing that there was no covenant which would interfere with W's carrying on his school there. W. subsequently discovered that the house was subject to a covenant which, after specially restraining certain trades or businesses from being carried on, provided that there should not be carried on upon the premises any trade or business or occupation whatsoever whereby (inter alia) *any injurious or offensive or disagreeable noise or nuisance should or might be occasioned, caused, or made. He thereupon brought an action for rescission of the contract, and return of the deposit made by him, with interest.*

Held, that the covenant was not limited to trades or businesses ejusdem generis *as those specifically mentioned; that the carrying on of a boys' school would come within the prohibition of the covenant; that the agent's representation was as to a fact, and not a mere statement*

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

of law; and, therefore, that the plaintiff was entitled to succeed in his action.

Tod-Heatly v. Benham, 37 *W. R.* 38, 40 *Ch. D.* 80, *followed.*

Action.

Wauton, a schoolmaster, entered into negotiations with the defendant's agent for the purchase of a freehold house and grounds at Tunbridge Wells for the purpose of carrying on a boys' school there. He made particular inquiries of the defendant's agent as to whether there were any covenants affecting the premises which would prevent his using the place as a boys' school, and he was in substance informed by the agent that there was no covenant which would interfere with his so doing.

He had several interviews with the agent, in the course of which the existence of a deed of covenants of the 3rd of November, 1851, relating to the property of which the said premises formed part was disclosed, but the plaintiff was told that he could not inspect the deed, which was in London, and was assured that it imposed no restriction which would interfere with the plaintiff's carrying on a boys' school on the said premises. The plaintiff thereupon signed an offer written upon certain particulars and conditions of sale of the said premises, which contained a statement that the property was subject to the covenants contained in the said deed of the 3rd of November, 1851, and the purchase was to be completed on the terms of these conditions so far as they applied to a sale by private treaty. On the day after this offer was made, it was accepted by the defendant "subject to the conditions named."

After the plaintiff had contracted to purchase the premises and paid a deposit, the deed of covenants was produced, and was found to contain a covenant to the following effect—namely, that each of them the covenantor and the several other persons who might become parties thereto of the second part, his, her, or their heirs or assigns, or any of them (*inter alia*) should not and would not suffer to be exercised or carried on upon or in any part of the land therein referred to or any house or building thereon to be erected or built the trade or business of a melter or boiler of tallow or grease or resin or tar or any greasy substance or compound for any purpose whatsoever, gas maker or worker, blacksmith, tin worker, coppersmith, brickmaker, lime burner, slaughterman, catgut spinner, dog skinner, boiler of horseflesh, soap maker, beershop keeper, brewer, scavenger, cowkeeper, or any trade or business or occupation whatsoever whereby any unwholesome or offensive or disagreeable smell, or gas, or unwholesome or offensive or disagreeable matter deposit or fluid, or any injurious or offensive or disagreeable noise or nuisance should, or might be collected, occasioned, caused, or made.

The plaintiff thereupon gave the defendant notice to rescind the contract, and demanding a return of the deposit, which was refused. The writ in the above action was then issued claiming rescission of the contract and return of the deposit with interest at 4 per cent.

Neville, Q.C., and *Martelli*, for the plaintiff.—This covenant will be construed like the restrictive covenant in *Tod-Heatly* v. *Benham*, 37 W. R. 38, 40 Ch. D. 80, and the observations on the scope of that covenant show that it would not be safe to carry on a school on premises subject to such a covenant. The plaintiff had no fair opportunity of ascertaining that the property was subject to the restrictive covenant, and cannot be taken to have had notice of it: *Reeve* v. *Berridge*, 36 W. R. 517, 20 Q. B. D. 523. The defendant's agent stated that there was nothing to prevent the property being used for a school, but the covenant would be a substantial interference with such user, and the plaintiff, who relied on this representation, is entitled to rescission of the contract: *Mullens* v. *Miller*, 31 W. R. 559, 22 Ch. D. 194; see also Dart's Vendors and Purchasers, 6th ed., vol. 1, p. 106.

Warmington, Q.C., *Farwell, Q.C.*, and *Ribton*, for the defendant.—*Reeve* v. *Berridge* does not apply to a covenant in a conveyance. It was a case of purchase of a lease, and the usual covenants in a lease are well known: see Woodfall on Landlord and Tenant, 16th ed., p. 127. But the purchaser was held not to have constructive notice of unusual covenants where he had not a fair opportunity of seeing the lease. The plaintiff was not misled by the statements of the defendant's agent, and on the true construction of the covenant there is nothing to prevent the use of the property for a properly-conducted school. The alleged misrepresentation, moreover, was in point of law merely, not in point of fact, and nobody can be made liable for it: *Beattie* v. *Ebury* (*Lord*), 20 W. R. 994, L. R. 7 Ch. App. 777, at p. 802. In *Tod-Heatly* v. *Benham*, Lindley, L.J., doubted Bacon, V.C.'s, decision in *Harrison* v. *Good*, 19 W. R. 346, L. R. 11 Eq. 338, that "nuisance" in a covenant meant legal nuisance; but the doubt was *obiter*, and the decision stands. Bacon, V.C., there held that the carrying on of a national school was not a legal nuisance. But the covenant here is against the carrying on of certain trades only, and the true construction requires the general words to be restricted to noise and nuisance arising from the trades mentioned or similar trades.

They also referred to *Scott* v. *Alvarez*, 43 W. R. 694, [1895] 2 Ch. 603.

Neville replied.

Nov. 8.—ROMER, J., held, on the evidence, that the plaintiff was induced to enter into the contract by the representation made to him by the defendant's agent, and that what the agent in substance represented, and what the plaintiff understood the representation to be, was that the covenants in the deed of covenants would not interfere with the plaintiff in carrying on his school on the property. [His lordship then stated the covenants, and said as follows:] In my opinion, as a matter of construction, the deed means what it says, and the covenants cannot be held limited to trades or businesses *ejusdem generis* as those previously specially mentioned: see *Tod-Heatly* v. *Benham*. The next question is whether the covenants will interfere with the plaintiff in carrying on his school in an ordinary and reasonable way. Now, I am satisfied that if the plaintiff should be compelled to carry out the contract and proceed to carry on his school in the ordinary way, he will immediately have an action brought against him by the adjoining proprietors to restrain him from doing so on the ground that thereby a disagreeable, if not an injurious or offensive, noise or nuisance is caused or made, and I think that action would succeed. But putting aside the evidence before me as to what action or actions particular adjoining owners have threatened or are likely to bring, what I have to consider is, following in substance the words of Cotton, L.J., in *Tod-Heatly* v. *Benham*, 40 Ch. D., at p. 94, whether I am satisfied by argument and the evidence before me that reasonable people living near, having regard to the ordinary use of their houses for pleasurable enjoyment, could and would regard the carrying on of this school in the ordinary way on these premises as causing an injurious, offensive, or disagreeable noise or nuisance. And after hearing the argu-

ments and on the evidence before me I answer this question in the affirmative. But then it is said on the defendant's behalf that the agent's representation only amounted to a statement as to a point of law—namely, as to the true construction of the deed, and that though the plaintiff might successfully resist an action against him for specific performance, he is not entitled by reason of the agent's representation to have the contract rescinded. But, in my opinion, the agent's representation to the plaintiff, so far as the plaintiff is concerned, was a statement as to a fact. The agent was not asked by the plaintiff as to the construction of the deed, or on any question of law, but merely whether, as a fact, there were any covenants affecting the property having regard to the purpose for which the plaintiff wanted it. And the agent chose to take upon himself to answer this question in the negative. No doubt he did not intend to deceive the plaintiff, and believed his answer to be correct. But the plaintiff is not concerned with what induced the agent's belief, and even if that belief arose from the agent wrongly construing the deed or making a legal mistake, it would not concern the plaintiff, or enable the defendant to say that as between the agent and the plaintiff the misrepresentation was only one of law. I come to the conclusion, therefore, that in this case the contract has been induced by a misrepresentation of fact made by the defendant's agent, and this being so, it is clear that the plaintiff is entitled in equity to rescission of the contract, even though the misrepresentation was not made fraudulently. I therefore decree rescission of the contract, and order repayment of the deposit with interest at 4 per cent., and the defendant must pay the costs of the action.

Judgment for the plaintiff.

Solicitors, *C. F. Martelli*, for *R. Preston*, Tonbridge; *Lee, Ockerby, & Everington*, for *E. E. Robb*, Tunbridge Wells.

Chan. Div. } Byrne, J. } June 30, 1898.

MACLEOD v. POWER. (*a*.)

Practice—Parties—Action against two joint debtors—Judgment by consent against one defendant—Continuance of action against the other — Merger — Pleading—Costs.

If in an action brought against two joint debtors one of the two submits to judgment, the claim against the other is merged in the judgment, and the plaintiff cannot obtain a second judgment against the remaining defendant.

The rule in King *v.* Hoare, 13 *M. & W.* 494 (*as explained by* Bowen, L.J., *in* In re Hodgson, 34 *W. R.* 127, 31 *Ch. D.* 177), *applied.*

Trial of action.

This was an action in which the plaintiff claimed against the two defendants, Power and Perrins, the principal sum of £1,000 and the delivery of 24,500 shares in the South African Saltpetre Fields (Limited), or their nominal value in cash, with damages for their detention, or, in the alternative, specific performance of the agreements between the defendants and plaintiff.

The facts of the case, so far as they relate to the only point in the action calling for report, are as follow:

The plaintiff delivered his statement of claim on the 14th of November, 1896. The defendant Perrins delivered a statement of defence on the 13th of January, 1897, and Power on the 26th of January, 1897.

Perrins subsequently admitted his liability, and on a motion for judgment, on the 7th of August, 1897, judgment was given against him. The action was continued against Power, who did not amend his pleadings by stating that judgment in the action had been given against Perrins.

Eve, Q.C., and *H. Spensley, jun.*, for the plaintiff, opened the case.

Frank Dodd, for the defendant Power. — The plaintiff's cause of action is merged in the judgment which he has obtained against our co-defendant, and he cannot now proceed to obtain a further judgment: *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504. In that case the judgment had been given in another action; but the rule laid down is that if two persons are jointly liable, and judgment is obtained against one, the cause of action is merged in the judgment: *King* v. *Hoare*, 13 M. & W. 494. This rule still holds, although there are two exceptions now admitted in the rules. Under R. S. C., ord. 13, r. 4, when a writ of summons is indorsed for a liquidated demand and there are several defendants, of whom one or more appear to the writ, and another or others of whom fail to appear, the plaintiff may enter judgment against such of them as have not appeared, without prejudice to proceed with his action against such of them as have appeared. Under R. S. C., ord. 14, r. 5, when one defendant has a good defence and the other has not, and ought not to be permitted to defend, the plaintiff may issue judgment against the latter without prejudice to his right to proceed against the former. [He also referred to ord. 16, r. 5: *Odell* v. *Cormack*, 19 Q. B. D. 223, 35 W. R. Dig. 35.] The very fact that these special exceptions are made, proves that the old rule still exists. [BYRNE, J., referred to the judgment of Bowen, L.J., in *In re Hodgson, Beckett* v. *Ramsdale*, 34 W. R. 127, 31 Ch. D. 177.]

Eve, Q.C., and *H. Spensley, jun.*, for the plaintiff. —The rule on which the defendant relies is a highly technical one. The present case is distinguishable, however, from all the cases in which it has been applied. There is no recorded case in which this rule has been applied to a judgment obtained in the same action. They were all cases in which the judgment had been obtained in a former action. [They referred to *Weall* v. *James*, 68 L. T. 54.] As to *In re Hodgson*, the judgment of Bowen, L.J., deals with the liability of partners. The reason for the rule, and which, in fact, called it into existence, is that it was unfair to bring two separate actions against joint contractors. In the present case the defendant Power has in no way been prejudiced by the judgment against Perrins. [They also referred to *Wegg Prosser* v. *Evans*, 43 W. R. 66, [1895] 1 Q. B. 108; *Munster* v. *Cox*, 34 W. R. 461, 10 App. Cas. 680; and *Hammond* v. *Schofield*, [1891] 1 Q. B. 453, 39 W. R. Dig. 58.] In any case the defendant ought to have amended his defence under ord. 14, r. 5, and he is, in any event, not entitled to costs.

Dodd, in reply.—There cannot be two judgments for the same cause of action. Whether the action is brought against one or two debtors there can only be one judgment. As soon as a judgment is signed the cause of action is gone. The Rules of the Supreme Court have made certain exceptions; but these exceptions cannot apply to the present case, and therefore the old rule holds.

BYRNE, J.—The plaintiff sues in this action in

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

respect of a claim against two co-contractors. The joint contractors are both made defendants, and before the action comes on for hearing, judgment is signed against one of the two. I have here to decide whether the old rule laid down in *King* v. *Hoare*, and recognized in *Kendall* v. *Hamilton*, is applicable to the present case. The rule is stated by Bowen, L.J., in *In re Hodgson* in the following words (31 Ch. D., at p. 188): "It appears to me to be of considerable importance to bear in mind exactly what *Kendall* v. *Hamilton* did and what it did not decide. Now, in order to do that in a few words I should like to consider the rights in equity, as distinguished from the rights in law, of the creditors of a joint debtor. The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of *King* v. *Hoare*. There is in the cases of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, or continued against one debtor or all the debtors—there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that, whether or no the rule by the light of pure reason, and unassisted by authority, might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognized by the law. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is secured against one of the debtors not only as against him but against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued if he were left with future litigation still hanging over his head."

This is a clear statement of the rule, which is also confirmed by other cases. The rule is now so established that it would be impossible to argue against it if it were the case of separate actions brought against joint contractors. It is, however, urged that the action having been properly conceived and properly brought, and both joint contractors having been sued for the same cause of action, that the mere fact of the plaintiff taking judgment against one of them by consent, ought not to stop the taking of judgment also against the other in the ordinary course. The rules, however, make it clear that he cannot do this. If a plaintiff obtains judgment against one defendant by reason of default he may proceed with his action against the other under ord. 13, r. 4; or where one defendant is refused leave to defend and the other is not, he is not thereby prevented from continuing his action against such defendant. The rules clearly provide in these two cases for the non-observance of the ordinary rule. But there is no rule which applies to such a case as the present, and I do not see why, although the original action was rightly conceived, the remaining defendant is not entitled to say that the debt against him has been merged in the judgment. It may be that it is a *casus omissus* in the rule, and it may be that when attention is called to the matter it will be remedied. As things stand, however, I am bound to hold that the plaintiff is disentitled to the relief that he asks.

It was very fairly and properly admitted that but for the rule which has been applied the plaintiff would have been entitled to recover on the evidence; and it is clear that the present defendant ought to have raised the issue in his pleadings. I have not, however, felt at liberty to refuse to allow him to take advantage of it as if he had pleaded it; but I do not think that it would be right to order the plaintiff to pay costs, which, if notice of this had been given to him, he might have avoided. The present defendant will, therefore, pay the costs of the action up to the time that judgment was obtained against Perrins, and there will be no further costs for either party.

Action dismissed.

Solicitors, *Ashby, Lumby, & Michael; Wild & Wild.*

Chan. Div. } April 1; May 4;
Wright, J. } June 9; July 20, 1898.

In re AURIFEROUS PROPERTIES (LIMITED). (*a.*)

Company—Winding up—Creditor also contributory—Unpaid calls of company—Debt of company—Set-off—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 38, 101—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

A company in liquidation which owns shares on which unpaid calls are due in another company which is also in liquidation, and is also a creditor of that company for money lent, is not entitled to set off the debt against such calls, as the bankruptcy law as to set-off is not imported by section 10 *of the Judicature Act*, 1875, *into the law of companies so as to allow set off against calls.*

But the debtor company is entitled, when paying a dividend, to retain such part of that dividend as is payable to the creditor company until the calls made on the shares held by the creditor company are paid in full.

Gill's case, 27 *W. R.* 934, 12 *Ch. D.* 755, *and* Grissell's case, 14 *W. R.* 1015, *L. R.* 1 *Ch.* 528, *followed.*

The African Gold Properties (Limited) held 2,500 shares of the Auriferous Properties (Limited). In January and June, 1896, calls of 5*s.* a share were made on these shares (*inter alia*), but these calls were not paid by the Gold Co. In January, 1896, the Auriferous Co. became indebted to the Gold Co. to the amount of £2,775 for money lent.

On the 19th of December, 1896, the court ordered the Auriferous Co. to be wound up.

In January, 1898, the Gold Co. passed an extraordinary resolution for winding up, and on the 26th of June, 1898, the court made a supervision order.

The liquidator of the Gold Co. now took out a summons in the winding up of the Auriferous Co. claiming the right to set off the amount of the Gold Co.'s debt against the amount due on the unpaid calls.

George R. Northcote, for the liquidator of the Gold

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Co.—As the Gold Co. is insolvent, by section 10 of the Judicature Act, 1875, the same rules prevail as in bankruptcy. Section 38 of the Bankruptcy Act, 1883, enables mutual credit, debts, or dealings to be set off between the debtor and a person claiming against his estate. *In re Overend, Gurney, & Co. (Limited), Grissell's case*, 14 W. R. 1015, L. R. 1 Ch. App. 528, does not apply here, as the shareholder was not a bankrupt and the calls were not made before the liquidation of the company. If the contributory is a bankrupt, the liquidator must prove in the bankruptcy for any balance: *In re Duckworth, Ex parte Cooper*, 15 W. R. 858, L. R. 2 Ch. App. 578; *In re Universal Banking Corporation (Limited), Ex parte Strang*, L. R. 5 Ch. App. 492, 18 W. R. Ch. Dig. 48. These cases were before 1875, and section 10 of the Judicature Act applies the rule so laid down as to bankrupts to cases of insolvent companies in liquidation. *Gill's case*, 27 W. R. 934, 12 Ch. D. 755, though after 1875, does not apply here, as there the contributory was solvent. *In re Whitehouse*, 27 W. R. 181, 9 Ch. D. 595, was also a case of a solvent contributory, and was moreover commented on adversely by Cotton, L.J., in *In re Pyle Works*, 38 W. R. 282, 674, 44 Ch. D. 534. Different considerations prevail where the contributory is solvent and where he is insolvent.

Howard Wright, for the liquidator of the Auriferous Co.—*Grissell's case* shows that a shareholder cannot set off a debt which the company owes him against a call on his shares. Whether the calls were made before or after the winding up has commenced makes no difference: *In re Whitehouse & Co.* Both that case and *In re Pyle Works* were decided after 1875, and *Black & Co.'s case* 21 W. R. 68, L. R. 8 Ch. App. 254, is treated in them as a binding authority. Section 101 of the Companies Act, 1862, does away with any set off in a case like this.

Northcote replied.

Cur. adv. vult.

May 4.—WRIGHT, J. — Both the Auriferous Co. and the Gold Co. are now in liquidation. Before the liquidation of either of them the latter company owed the former for calls made and in arrear, and the former owed the latter for money lent. The question is whether against the claim for the amount of the calls the claim for the money lent can be set off. If the Gold Co. had not been in liquidation it could not have set off its claim for money lent against its liability for the amount of the call. That was decided before the Judicature Acts in *Grissell's case* and in *Black & Co.'s case* with reference to calls made by a liquidator in a winding up under an order of the court, or (per Lord Selborne) in a voluntary winding up. And since the Judicature Act, 1875, it has been held in the case of *In re Whitehouse & Co.* that the same rule holds good whether the call is made before or in the liquidation, and whether the liquidation is compulsory or voluntary. The ground of the rule is that all contributions from shareholders enforceable in the liquidation are by the Companies Acts made applicable for the payment of the company's creditors *pari passu* (sections 38, 101, 133 of the Companies Act, 1862), and a person who is a creditor and also a contributory cannot be allowed to do what might amount to paying his own claim in full out of a fund which ought to be distributed rateably (see *Black & Co.'s case* and *In re Pyle Works*, where the decision in *In re Whitehouse & Co.* is approved, though some of the reasons given by Sir George Jessel are questioned). Whether the same rule would apply if the liquidator sought to enforce the call by action seems not to have been the subject of express decision; but the call, though made and payable before the liquidation, and therefore at one time a debt to the company, is also enforceable by the liquidator by balance order as a contribution to be made in the winding up for *pari passu* distribution, and in this aspect is not a subject of set off in the case of a limited company. But in the present case it happens that the Gold Co. is also in liquidation and the question is what is the effect of this. If the Gold Co. had been a bankrupt individual instead of being a company in liquidation the liquidator of the Auriferous Co. must have enforced his claim in the bankruptcy and according to bankruptcy law, which even before and apart from the Judicature Act would have allowed the set-off; see *In re Duckworth*, where the question arose in the bankruptcy of the creditor-contributory; *Ex parte Strang*, where it arose in the liquidation of the company. Here the creditor-contributory is not a bankrupt individual, but is a company in liquidation, and therefore the particular ground on which *In re Duckworth* was decided is not applicable. The liquidator of the Auriferous Co. is not driven to proceed in the bankruptcy or to submit to the rules of the Bankruptcy Court, but proceeds in the Chancery Division and is entitled to the benefit of the Companies Acts as there administered. And the simple question is whether section 10 of the Judicature Act, 1875, has introduced into the law of the winding up of companies the bankruptcy rules as to set off, so as to allow a set-off against liability for the amount of unpaid calls in the case of a company constituted with limited liability. It seems to me that this question is decided in effect in the negative by *Gill's case*, which was cited with approval in the Court of Appeal in *In re Washington Diamond Co.*, 41 W. R. 681, [1893] 3 Ch. 95; and that the liquidator of the Auriferous Co. is entitled to prove in the winding up of the Gold Co. for the whole amount still due upon the shares, leaving the liquidator of the Gold Co. to his right of proof in the winding-up of the Auriferous Co. for the money lent. It is true that in *Gill's case* the creditor-contributory was not a company in liquidation, but that circumstance does not prevent it from being in point as a decision that the bankruptcy law of set-off is not imported by the Judicature Act into the law of companies so as to allow a set-off against calls; though for other purposes there may be the same right as in bankruptcy (see in *Ex parte Theys*, 32 W. R. 601, 25 Ch. D. 587) to a set-off of cross-claims as existing at the time of the bankruptcy. *In re Duckworth* has, therefore, no application. The view which I have taken seems to be consistent with all the decisions on section 101 of the Act of 1862 since the Judicature Act (see *e.g.*, *Ex parte Pelly*, 31 W. R. 177, 21 Ch. D. 492 at p. 509, and *In re Pyle Works*, 44 Ch. D., at p. 585, per Lord Justice Lindley). I therefore hold that the applicant is not entitled to the set-off which he claims, but has only a right to prove. I think there is some difficulty in reconciling *In re Duckworth* with what Lord Selborne said in *Black & Co.'s case* (at p. 262) with reference to a "statutory trustee," but I do not think the House of Lords would now overrule what was said in *In re Duckworth*.

When the order consequent on this decision came to be drawn up the liquidator of the Auriferous Co. wished to have inserted in it a declaration that, in the winding up of the Auriferous Co., the Gold Co. could not take any dividend on the debt owing to them until they had paid up all calls in the winding up of the Auriferous Co. This matter came before the court on the 9th of June.

Howard Wright, for the liquidator of the Auriferous Co.—Till the Gold Co. has paid all calls made by the Auriferous Co. on the shares held by the former the latter company may set off the calls against the dividend which the Auriferous Co. is going to pay: *Grissell's case*. This question arises in the winding up of the Auriferous Co. and the liquidator of that company is therefore entitled to hold the dividend. If it prove insufficient he can then prove in the winding up of the Gold Co. for so much of the debt as remains over.

Northcote, for the liquidator of the Gold Co.—Here there is no right of set-off, only mutual rights of proof. If the Auriferous Co. have this right to retain the dividend they will be paid in full, and not *pari passu* with the other creditors of the Gold Co. *Grissell's case* is distinguishable, as there the question was between a company in liquidation and a solvent individual, here it is between two liquidating companies.

Cur. adv. vult.

July 20.—WRIGHT, J.—I have already considered this case in one of its aspects, with the result that, in my judgment, the liquidator of the Gold Co. could not set off, against calls made by the liquidator of the Auriferous Co., the debt owed by the latter to the former company. A further question was not discussed on the first argument, and remains to be considered. The liquidator of the Auriferous Co. is paying a dividend to its creditors, and he asks for a declaration to the effect that he is entitled to hold the dividend due to the Gold Co. against the liability of the latter company for calls in arrear on its shares in the Auriferous Co. *Primâ facie* the Gold Co. is entitled to take its dividend. Its claim as a creditor has been duly ascertained in the appropriate proceeding, and it is *primâ facie* immaterial that the creditor happens to be also a debtor to the Auriferous Co. There is no contract for a set-off, nor do the articles of association of either company appear to contain any provision for it, nor do the general statutes of set-off apply. Nor, as it seems, is the doctrine of set-off in bankruptcy, which under section 10 of the Judicature Act, 1875, is extended to the liquidation of companies (*Mersey Steel and Iron Co.* v. *Naylor*, 32 W. R. 989, 9, App. Cas. 434), applicable to this case. That doctrine has been held to apply only to cross-rights existing at the commencement of the winding up (*In re Milan Tramways Co. Ex parte Theys*; but here the call has been made in the liquidation, and until it was made there was only a contingent liability which might never become enforceable and could not be set off, unless, perhaps, after some process of valuation. But in my opinion this case is governed by the principle established in *Grissell's case*, and is within the express terms of the Lord Chancellor's judgment in that case. If the creditor-contributory were allowed to take the dividend without paying the call he would be receiving payment of a part of the debt which the company owes to him without making his contribution to the fund out of which that debt, with the other debts of the company, was to be paid. "If," Lord Chelmsford says L. R. 1 Ch. App. at pp. 536-537, "the amount of an unpaid call cannot be satisfied by a set-off of an equivalent portion of a debt due to the member of a company upon whom it is made, it necessarily follows, in the last place, that the amount of such call must be paid before there can be any right to receive a dividend with the other creditors. The amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company. The dividend will be, of course, upon the whole debt, and the member of the company will from time to time, when dividends are declared, receive them in like manner when either no call has been made, or, having been made, when he has paid the amount of it." This passage is cited as authoritative by Fry, J., in *In re West of England Bank*, 27 W. R. 869, 12 Ch. D. 823. There must be an order as asked by the liquidator.

Solicitor for the Gold Co., *W. H. Hudson.*

Solicitors for the Auriferous Co., *Freshfields & Williams.*

C. C. R.
(Lord Russell of Killowen, C.J., and Hawkins, Wills, Wright, and Bruce, JJ.) — Nov. 5.

THE QUEEN v. GARDNER. (a.)

Criminal law—Procedure—Prisoner sole witness for defence—Right of prosecution to sum up—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *ss.* 1, 2, 3—*Criminal Procedure Act*, 1865 (28 & 29 *Vict. c.* 18), *s.* 2.

Where, on the trial of a person charged with a criminal offence, that person is the only witness for the defence, the right given by section 2 of the Criminal Procedure Act, 1865, to the counsel for the prosecution to sum up the evidence is not taken away by the Criminal Evidence Act, 1898, but is postponed until after the person charged has given his evidence, and in such summing up counsel is entitled to comment upon the evidence given by the person charged as well as upon that given for the prosecution.

Case stated by the chairman of the Oxfordshire Quarter Sessions.

The prisoner was tried at the Oxfordshire Quarter Sessions on the 18th of October, 1898, for breaking into a warehouse and stealing goods therefrom. The prisoner was defended by counsel. At the close of the case for the prosecution the counsel for the prisoner announced that the prisoner applied to be called as witness, but that no other evidence would be called for the defence.

The counsel for the prisoner submitted (1) that inasmuch as the prisoner was required by the Criminal Evidence Act, 1898, s. 2, to be called "immediately after the close of the evidence for the prosecution," the counsel for the prosecution could not sum up the evidence at that stage of the proceedings, as he would have been entitled to do under the Criminal Procedure Act, 1865, s. 2; and (2) that if his right to sum up the evidence was not altogether taken away by the first-mentioned Act, he was, at any rate, not entitled to comment on the evidence offered by the prisoner.

The chairman ruled, with the concurrence of the bench, (1) that inasmuch as it was enacted by section 3 that the calling of the prisoner as a witness should not confer upon the prosecution the right of reply, and as section 2 merely required the immediate calling of the prisoners on the close of the evidence for the prosecution, the Act did not, by implication, take away from the counsel for the prosecution the right to sum up the evidence conferred by the Act of 1865, but that he was entitled to sum up at the close of the prisoner's evidence; (2) that the counsel for the prosecution was entitled, in summing up the evidence against the prisoner, to deal with the

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

evidence which he had given, as well as with the evidence which the prosecution had adduced.

The counsel for the prosecution summed up after the prisoner had given evidence, and dealt with all the evidence before the court. The counsel for the defence replied. The prisoner was convicted. The questions for the consideration of the court were: (1) Has the Criminal Evidence Act, 1898, taken away the right of the prosecuting counsel to sum up in cases where a prisoner applies to give evidence but does not call witnesses? (2) If the prosecuting counsel is entitled to sum up at the close of the prisoner's evidence, is he entitled to comment on that evidence, or is he required to confine his summing-up to the evidence adduced by the prosecution?

The Criminal Evidence Act, 1898, enacts (section 2) that "Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution," and (section 3) "In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called shall not of itself confer on the prosecution the right of reply."

The Criminal Procedure Act, 1865, s. 2, enacts that where a prisoner is defended by counsel, and his counsel does not, in reply to the question of the presiding judge at the close of the case for the prosecution, announce his intention to adduce evidence, "the counsel for the prosecution shall be allowed to address the jury a second time for the purpose of summing-up the evidence against such prisoner."

Turrell, for the prisoner.—The effect of section 2 of the Act of 1898 is to sweep away the period which formerly intervened between the close of the evidence for the prosecution and the beginning of the evidence for the defence, so that the prosecuting counsel cannot sum up, and the counsel for the defence cannot open his case. Even if the right of the prosecuting counsel to sum up is not taken away, but is postponed until after the prisoner has given his evidence, that evidence cannot be made the subject of comment in the summing-up; for the right given by the Act of 1865 is to sum up the evidence "against" the prisoner, and the prisoner's own evidence is evidence for the defence, and not evidence against the prisoner. And if the prosecuting counsel has the right to comment on the prisoner's evidence, his speech is in effect a reply and not a mere summing-up, and a right to reply is expressly negatived by section 3 of the Act of 1898 where the prisoner is the only witness for the defence. A voluntary statement made by the prisoner before the magistrate is commented on by the prosecution because it is considered to be evidence "against" the prisoner. [He referred to *Reg.* v. *Holchester*, 10 Cox C. C. 226.]

Biron, for the prosecution, was not called upon to argue.

LORD RUSSELL OF KILLOWEN, C.J.—In my judgment the court of quarter sessions took the right view and acted in the right manner in reference to each of the two points raised in this case. [His lordship stated the facts, and continued:] The first question is, when is the prisoner's evidence to be given, before or after counsel for the prosecution sums up? for he has the right to sum up under the Criminal Procedure Act, 1865. The answer is to be found in the Criminal Evidence Act, 1898. Under section 1 of that Act the prisoner is a competent but not a compellable witness for the defence. [His lordship then read sections 2 and 3.] Then, the evidence for the prosecution having closed and the prisoner having applied to give evidence, what is the proper course of the proceedings? It is clear: the prisoner is to be called immediately after the close of the evidence for the prosecution. Therefore the magistrates were right in saying that the counsel for the prosecution should not at that moment sum up the evidence, but that the prisoner's evidence should be taken. What is the effect of that? Does it operate as an extinguishment of the right to sum up, or only as a postponement of the time at which that right is to be exercised? If it were intended to extinguish the right the statute would surely have said so. In my judgment, the effect is merely to postpone the exercise of that right to a later period. That is the answer to the first question reserved.

The second question is, Has the counsel who sums up the right to comment not only on the evidence given for the prosecution against the prisoner, but also on the evidence given by the prisoner for the defence? It is suggested that his right is limited to summing up the evidence which he has called himself. The argument is based upon the construction of section 2 of the Criminal Procedure Act, 1865. [His lordship read the section.] When that statute was passed prisoners were not competent to give evidence, but since the Act of 1898 came into operation that has become possible. A prisoner may have given evidence before the summing-up takes place. Is it to be said that the prosecuting counsel must shut his eyes to the evidence of the prisoner where that evidence is (as it generally would be) wholly inconsistent with the evidence of the other witnesses? where, for instance, he swears an *alibi*, and thus completely contradicts the witnesses for the prosecution. Is counsel not to comment on that by pointing out the want of corroboration of the prisoner's story and criticizing it in the light of the previous evidence? That cannot have been intended. When one recollects the course pursued under the state of things existing before this Act was passed, it would be most unreasonable to hold that the counsel for the prosecution cannot now comment on the prisoner's evidence. I allude to the practice of putting in the prisoner's statement before the magistrate as part of the case for the prosecution, and of the prosecuting counsel, if necessary, pointing out any inconsistencies between it and the other evidence. In my opinion the magistrates were right as to the postponement of the right of summing up, right as to the time when it is to be exercised, and right as to the power of the prosecuting counsel to make proper observations on the evidence given by the prisoner.

HAWKINS, J.—I am of the same opinion. On the second point it seems to me possible to say that the prosecuting counsel may comment on the prisoner's evidence and yet be strictly within the words of the statute as to summing up the evidence "against" the prisoner. Suppose the prisoner to have given evidence with the object of weakening the force of the evidence for the prosecution, the object of the comments in the summing-up would be to show that the evidence for the prosecution is not really disturbed by the prisoner's evidence, but is in fact supported by it.

WILLS, J.—I am of the same opinion. The second question is really answered by the reply to the first. If the right to sum up is not taken away the postponement in effect extends the meaning to be given to the expression "summing up," for it is impossible to think that the Act intends to confine the summing up to a portion only of the evidence which has been given.

WRIGHT, J.—I am of the same opinion.

BRUCE, J.—I agree.

Conviction affirmed.

Solicitor for the prisoner, *George Mallam*, Oxford.

Solicitor for the prosecution, *The Treasury Solicitor.*

C. C. R.
(Lord Russell of Killowen, C.J., and Hawkins, Mathew, Kennedy, and Bigham, JJ.) Aug. 6, 1898.

THE QUEEN *v.* HOBBS. (*a.*)

Criminal law—Illegal betting—Sweepstakes on a horse-race—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 1, 3.

The defendant received subscriptions from a number of persons on the understanding that the money so received, after payment of the actual expenses of management, was to be distributed in certain shares or prizes of different amounts among such of the subscribers as should draw (at a drawing in which all the subscribers were to take part) a ticket bearing a number corresponding with the number attached to the name of a horse in a list of horses entered for a race called "The Derby Sweepstakes," the drawer of the winning horse receiving the largest share or prize.

Held, that the defendant could not be convicted of an offence under section 1 *or section* 3 *of the Betting Act,* 1853.

Semble, *that the transaction was an illegal lottery.*

Case stated by Hawkins, J.

The defendant was tried at the Lewes Summer Assizes, 1898, upon an indictment containing three counts. Hawkins, J., directed a verdict of not guilty in the third count for reasons immaterial to the question reserved. On the second and third counts he directed a verdict of guilty, subject to the opinion of the court on the question stated below.

The two material counts were founded upon the second branch of section 1 of the Betting Act, 1853, and section 3 of the same statute. Of these, the first charged that the defendant, on the 18th of April and other days, in a certain parish in Hastings, "being then the occupier of a certain house known by the sign of the Yorkshire Grey, . . . unlawfully did use the said house for the purpose of money being received by and on behalf of him, the said L. I. Hobbs, the occupier, as and for the consideration for promises and agreements to pay thereafter money—to wit, a sum of £45" (and the other sums mentioned in the summing-up) "on certain events of and relating to a horse-race called the Derby Stakes to the great damage," &c.

The second count was in similar terms, except that the place alleged to be unlawfully used was "a certain place—to wit, the bar of certain licensed premises known," &c.

The defendant had been charged before a magistrate, and had claimed to be tried by a jury pursuant to section 17 of the Summary Jurisdiction Act, 1879.

The case, after stating the above counts, set out the learned judge's summing up to the jury, in which he stated all the material facts and the question of law which arose upon them. That summing up was as follows—"The question raised upon this indictment is whether the sale of and receipt of the purchase-money for tickets in an ordinary Derby Sweepstakes by a licensed victualler in the bar of the licensed house occupied by him amounts to an offence created by the statute 16 & 17 Vict. c. 119, the Betting Act, 1853."

The material facts are few and simple. The defendant Lewis Irvin Hobbs was from the 18th of April to the 11th of May, 1898, both days inclusive, the licensed occupier of "The Yorkshire Grey" at St. Leonards-on-Sea. He had been such occupier for some eight or nine years previously, and during each of those years a sweepstakes similar in all respects to that now in question had been promoted by him on the approach of the "Derby Day." It was a sweepstakes to consist of one thousand subscriptions of two shillings and sixpence each, which, assuming all the subscriptions were made, would raise a sum of £125, of which 10 per cent., amounting to £12 10s., was to be deducted for expenses, leaving a balance of £112 10s. for distribution among the subscribers in the following manner:

	£	s.	d.
To the drawer of the first horse (that is, the winner of the race)	45	0	0
Second prize—*i.e.*, the second horse . .	20	0	0
Third prize—*i.e.*, the third horse . .	10	0	0
To the drawers of 100 non-starters, 5s. each	25	0	0
Remainder to be divided amongst runners	12	10	0
	£112	10	0

A ticket was on payment of 2s. 6d. issued to each subscriber for each ticket subscribed for by him. These tickets were, before issue, bound up in books (similar in form to bank cheque-books) of twenty-five tickets each, with counterfoils attached, on which to write the name of the purchaser. As each ticket was paid for it was detached from its counterfoil and handed to the purchaser, whose name and address were written on the counterfoil. The tickets were distributed, some in the "Yorkshire Grey" by the defendant himself and by his wife and barmaid, who assisted him in the conduct of his house, and some by other persons, to whom books were entrusted away from the premises, one of such books for this year's sweepstake, from which six tickets had been sold, having been found on the person of one Talbot, as hereinafter mentioned. The names of other recipients of other books containing 475 tickets being found entered in a memorandum-book of the defendant.

A man named Mawle, a porter, formerly in the service of the defendant, on the 18th of April last (having been employed by the police so to do) went to the "Yorkshire Grey" and there purchased a ticket from defendant's wife. On the 23rd of April a similar ticket was sold in the house to a customer. On Sunday, the 24th of April, two tickets were sold by the barmaid in the presence of the defendant, who, in reply to some observation, said, "You can spot [or find] the winner on Sunday as well as any other day." On the 26th of April more tickets were sold to customers in the bar, and on the 29th of April defendant himself sold Mawle, who paid 2s. 6d. for it, another ticket. The whole of these sales were openly made.

There was no drawing for the prizes in this present year, because, before the time had arrived, the "Yorkshire Grey" was raided by the police, which, of course, stopped further proceeding with the sweepstakes. But the drawings for each of the years 1896 and 1897 were held at Saxon-chambers, a house adjoining, but forming no part of the "Yorkshire Grey." At such drawing about twenty persons were present. The witness Mawle was doorkeeper on those occasions, and for his services he was paid by the defendant, who in fact paid all the other expenses connected

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

with the sweepstake, including those of this year, and if the fact be important, I have no reason to think that the 10 per cent. deducted for expenses was an unreasonable amount for that purpose.

No other evidence was given or offered of any matter connected with the sweepstake than that I have mentioned. It was not even suggested that the defendant, who took no ticket, was either to receive any part of the money subscribed except his expenses as already mentioned, or to supply or make good any deficiency in the event of all the tickets not being sold, and he gave no guarantee or promise to pay anything to anybody, except to distribute the money actually subscribed among the subscribers according to the terms of the tickets.

On the 11th of May the inspector of police, under a search warrant issued under the Betting Act (16 & 17 Vict. c. 119), searched the "Yorkshire Grey," but in the house found nothing beyond some books of tickets, some of which had been issued and torn from the counterfoils, and a book with names and addresses obviously of persons to whom similar books had been entrusted.

A person named George Talbot was in the bar, where he was a daily visitor. It was said by the inspector that he was a betting man, and on search there were found upon him some papers and telegrams (one addressed to him at the "Yorkshire Grey"), which went strongly to prove that the inspector's description of him was correct. But there was nothing to indicate either that the defendant was concerned in betting, or that any bets were ever made in his house.

On this state of things Mr. Muir, for the defendant, objected that there was no evidence which could properly be submitted to the jury in support of this indictment. Mr. Horace Avory, for the prosecution, contending to the contrary.

For the purposes of this case it was conceded by Mr. Muir that the sweepstake in question was a lottery, and I am strongly inclined to the opinion that it was so, although, as this indictment was only preferred under the Betting Act, it is not necessary to pronounce any judgment upon that point. As to its being a lottery, therefore, I will only refer to the case of *Mearing* v. *Hillings*, 14 M. & W. 711. The mere fact, however, of its being a lottery would be no bar to proceedings under the Betting Act if the facts of the case would otherwise bring it within the operation of that statute.

So far as I am aware, the question whether such connection with an ordinary Derby Sweepstakes as is established against the defendant is sufficient to support the present indictment has now arisen for the first time. It must be taken there is no evidence to support any other offence against the second branch of that section.

That second branch forbids the use of a house or place for the purpose of any money being received by or on behalf of the owner, occupier, &c., as or for the consideration for any promise or agreement, &c., express or implied to pay or give thereafter any money or valuable thing "on any event or contingency of or relating to any horse-race, &c., or as and for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid."

I am strongly inclined to think that such a sweepstake as that described in this case constitutes either expressly or impliedly an agreement between each member or ticket-holder in it, that each member in respect of each ticket he holds shall be entitled to draw in his proper time a ticket bearing a number corresponding with the number attached to the name of some horse entered for the Derby, and appearing on a list of such horses prepared and recognized by all as the list of horses in respect of which the sweepstake is established. No member is entitled to claim anything until after the race has been run and the result declared, and then each holder of a ticket becomes entitled to receive the prize or other sum of money mentioned on his ticket, having regard to the position or place in the race of the horse indicated by the number drawn by him.

The destination of every sum of money paid into the sweepstake, after deduction of expenses, is dependent on the event or contingency of a horse-race, and every title to a share of the distribution is dependent on the like contingency. The consideration for this agreement is the money paid by each member on the purchase of his ticket or tickets; that which he is to receive in return clearly is dependent on the event or contingency of the race.

Now, as to the defendant's responsibility. In every such sweepstake as the present there must be somebody to receive and hold the price of the tickets till the event of the race is ascertained; there must also be someone to distribute the amount to which members are entitled; both these offices seem to have been undertaken by the defendant. Some, at least, of the moneys were received by him at his house, the "Yorkshire Grey." Can it be said that in undertaking these offices the defendant did not impliedly or expressly promise and undertake with and to each subscriber to pay the money found to be due to on the happening of the event or contingency upon which his title to it depended according to the agreement?

I think it unnecessary to discuss any other part of this section. My present impression (the evidence being unquestioned) is that the defendant has rendered himself liable to the penalty imposed by section 3 of the Act, and that the jury ought to find him guilty upon the first and second counts of this indictment.

The opinion I have expressed above is that which I have necessarily hastily formed, without having an opportunity of referring to any of the authorities cited. The point is a new one—it affects a wide circle, wider, perhaps, than at first sight may be apparent. I purpose, therefore, to reserve the question of law for the consideration of the Court for Crown Cases Reserved, and I respite judgment until the next assizes, or until the opinion of the Court for the Consideration of Crown Cases Reserved is known.

The defendant to be allowed bail until such time in the amounts he is now under.

If the court thought the learned judge was right in directing the jury as he did, the conviction was to stand; otherwise it was to be reversed.

R. D. Muir, for the defendant, contended that the sweepstakes out of which the charge arose was a mere lottery, and that the defendant was a stakeholder. There was no illegal betting transaction such as was aimed at by the Betting Act, 1853. The money was not to be paid upon the event or contingency of a horse-race, but in the event of the drawing of the horses.

Horace Avory (*Henry Sutton* with him), for the prosecution, contended that, although there was a lottery, the transaction was in effect a bet or wager; and, even if it were not a bet, the transaction was within the second branch of section 1 of the Act, for the defendant impliedly promised to pay money in the event of the race.

Allport v. *Nutt*, 1 C. B. 974; *Carlill* v. *Carbolic Smoke Ball Co.*, 41 W. R. 210, [1893] 1 Q. B. 256; *Sagar* v. *Stoddart*, 18 Cox C. C. 165; and *Caminada*;

v. *Hulton*, 39 W. R. 540, 60 L. J. M. C. 116, were cited.

Lord RUSSELL OF KILLOWEN, C.J.—The learned judge at the trial of this case expressed grave doubt as to whether there ought to be a conviction. I think that that doubt was well founded. In my opinion there was no evidence to go to the jury on either of the two counts in question. The general importance of the case makes it desirable that I should state the grounds for this opinion. Let me first say that the allegation that the defendant is a publican is wholly irrelevant, the case would have been precisely in the same position if the sweepstakes had been carried on at a club or at any other place. It seems to me that what took place was a lottery, or in any case was not a betting transaction. It was said that it was an offence under the second part of section 1 of the Betting Act, 1853. Now it is material to observe that when this Act was passed there were already statutes dealing with lotteries—betting was treated as a separate and distinct subject for legislation. This Act is entitled "An Act for the Suppression of Betting Houses." It recites that "a kind of gaming has of late sprung up . . . by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices or by other persons acting on their behalf on their promises to pay money on events of horse-races and the like contingencies"; it then proceeds to deal with the evil which it has so pointed out. The first part of section 1 enacts that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner" or the other persons there mentioned "betting with persons resorting thereto": that clause deals with a house being opened or used for the purpose of betting with persons resorting to the house: counsel for the prosecution was right in saying that these words would cover betting both in cases where no money passed and in cases where money was paid in advance. The second part of the section covers cases in which persons do not necessarily resort to the house—"or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, &c." that is the clause with which we have to deal. Was there any evidence in this case that this place was used for the purpose of any money being received by or on behalf of the defendant as the consideration for a promise to pay any money on an event or contingency of or relating to a horse-race? The section points to a contractual relation between the keeper of the house and the person who pays his money, a promise by the former that he will make a payment to the latter in certain contingencies. The facts of this case show no such relation; all that the defendant said was that he would manage the sweepstakes. If each subscriber paid half-a-crown, the defendant, after paying the reasonable expenses of management, was to distribute the prizes out of the contributions. He took no ticket himself, and he was to receive nothing out of the transaction except those reasonable expenses. He gave no guarantee or promise to pay anything, but he was only to distribute the money arising from the sale of the tickets. The persons who took the tickets created a common fund, which the defendant merely received as a stake-holder and undertook to distribute. The clause aims at transactions in which a promise to pay in a certain event is made by the person who receives the money, and here the defendant made no such promise.

Again, to bring a case within the section the promise must be to pay "on an event or contingency of or relating to a horse-race"; but that was not so here: the prizes depended on the event or contingency of the drawing, which would have been equally effective if it had taken place after the horse-race instead of before. I think that I have gone through all the provisions of section 1 which it is necessary to consider. Looking at the rest of the Act, it is clear that every section of it is conversant with the keeping of houses for the purpose of betting. Section 7 makes this clearer than any other section, for it contains a prohibition against exhibiting or publishing any handbill advertising that a house is used for the purpose of making bets or wagers.

In my judgment this case does not fall within the letter of the Act or within the category of evils with which it deals, and there was no evidence on which the jury could find a verdict for the Crown. I must not be understood as saying that the conduct of the defendant did not constitute a criminal offence. I think the transaction was a lottery; but that was not the case put forward by the prosecution, and we are not dealing with that question.

HAWKINS, MATHEW, KENNEDY, and BIGHAM, JJ., concurred.

Conviction quashed.

Solicitors for the defendant, *Davenport, Jones, & Glenister.*

Solicitor for the prosecution, *The Treasury Solicitor.*

Privy Council.

(*From the Supreme Court of New South Wales.*)

May 14, 1898.

ATTORNEY-GENERAL FOR NEW SOUTH WALES v. LOVE. (*a.*)

Nullum Tempus *Act* (9 *Geo.* 3, *c.* 16)—*New South Wales—Construction of statute.*

The English Nullum Tempus *Act is in force in the colony of New South Wales, and applies to land which has never been granted out or dealt with by the Crown.*

This was an appeal from the Supreme Court of New South Wales. The facts sufficiently appear in their lordships' judgment.

A. Cohen, Q.C., Vaughan Hawkins, and *Butterworth,* for the appellants.

The respondent did not appear.

The judgment of their lordships (the Earl of HALSBURY, L.C., Lord MACNAGHTEN, Lord MORRIS, and Mr. WAY) was delivered by the

Earl of HALSBURY, L.C.—This is an appeal by the Attorney-General for New South Wales against the judgment of the Supreme Court of the Colony pronounced on the 18th of February, 1896, overruling a demurrer to the defendant's plea to an information of intrusion to recover certain lands in the parish of Concord and county of Cumberland in the said colony. The question involved is whether the English *Nullum Tempus* Act (9 Geo. 3, c. 16) is in force in the colony and applies to land which has never been granted out or dealt with by the Crown.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

It does not appear to be denied that the lands in question (described by their abuttals and containing 13¼ acres) were and had ever since the original settlement of the territory of New South Wales been waste lands belonging to and vested in the Crown.

The defendant, by his plea dated the 10th of April, 1895, averred that one Edward J. Keith, more than sixty years before the filing of the information, entered on and thenceforward held possession of the lands as his own property, that he conveyed his interest therein to William Love, who settled the same in trust for himself and his wife Susannah Love and the survivor of them for life and after the decease of the survivor on the defendant, Emily Susannah Love, absolutely, that the foregoing persons had from the entry of Edward J. Keith to the present time held continuous possession of the lands adversely to Her Majesty and without payment of rent to her, and had themselves since the said entry taken and enjoyed the rents, revenues, issues, and profits of the land, and that Her Majesty's title to the land did not first accrue within sixty years next before the filing of the information. The plea did not aver that the lands had not been in charge of the Crown within the said sixty years.

On the 20th of May, 1895, the appellant replied, traversing the allegations of the plea, and also demurred thereto on the grounds (1) that the Act 9 Geo. 3, c. 16, is not in force in New South Wales, (2) that assuming it to be in force it does not apply to lands which have never been dealt with by the Crown, (3) that the period of sixty years was not alleged to have run out before the date of the Constitution Act, 1855; (4) that the plea showed no title in the defendant.

Joinder in demurrer having been delivered, the demurrer came on for hearing before the full court (consisting of Darley, C.J., and Windeyer and Simpson, JJ.), by whom judgment was pronounced on the 18th of February, 1896, in favour of the defendant overruling the demurrer, Simpson, J., stating that he felt very considerable doubt about the matter.

Their lordships have no doubt that the judgment accurately describes the importance of the question here raised to the colony. The learned judges say "the earlier grants issued by the Crown were vague in the extreme, and that it would be in the present day impossible to ascertain from the description in the grants to what lands they applied." And it is clear that the inference which the learned judges draw from that state of facts is accurate, "that the holders would not be able to show upon the face of the instrument a title, and have to rely upon possession."

Their lordships do not think that the learned judges at all exaggerate the mischief and confusion which would arise in the transfer of property if the holders could not depend upon the operation of the statute in question.

Two arguments appear to have been suggested against the application of the Act to the particular colony under 9 Geo. 4, c. 83, which *primâ facie* applied the *Nullum Tempus* Act to the colony in question as much as if it had in terms re-enacted it for that colony.

Section 24 of that Act provides "that all laws and statutes in force within the realm of England at the passing of this Act" (that is to say, in the year 1828) "shall be applied in the administration of justice in the courts of New South Wales," and it is sought by construction to limit the words "all laws and statutes" by introducing into the section the words "having relation to procedure" or some equivalent expression. At least, that is the only intelligible mode in which the argument can be supported, because the words which do occur in the section, "in the administration of justice," would certainly include a limitation of the time within which actions can be brought, and their lordships are of opinion that the language of the section cannot be limited so as to exclude the statute, which, for the reasons pointed out by the learned judges, were and are so important in the administration of justice in the colony.

The second argument is not very intelligible since the words upon which reliance is placed are words which in the statute thus applied (9 Geo. 3, c. 16) except from the operation of the statute, lands in respect of which the Crown has been answered by rents, revenues, issues, or profits thereof within the space of sixty years next before the issuing or commencing of such action, information, &c., as shall at any times have been duly in charge or stood *in super* of record within the space of sixty years.

The provision is intelligible enough, and what in substance it means is that if the Crown is not actually in possession, but that in the Crown's accounts some person is charged with the rent which they had not paid and still stand as a Crown debtor in the Crown books, and that condition of things has existed within the sixty years, the title by that condition of things, although the possession may have been for sixty years, was not adverse, because during that period something was payable to the Crown which had not been paid.

It is not suggested here that the person in possession filled that character, but the argument appears to be that because there is no such administration in the colony as involves the peculiar form of Crown accounting thus described, the remedial operation of the statute cannot apply.

Their lordships are unable to accept any such suggestion. There is no allegation here of any equivalent record against the person who held possession for sixty years, and if no modification or limitation such as section 24 of the Act authorizes has been made so as to apply such a mode of accounting to the Crown as might have an equivalent effect, the only result would be that there is nothing upon which the exception preserving the Crown's right could operate, but certainly would not cut down the enacting part of the statute or establish that it was inconsistent with the laws of England.

For these reasons their lordships are of opinion that the judgment of the Supreme Court was right, and they will humbly advise Her Majesty that this appeal should be dismissed accordingly.

Solicitors for the appellants, *Light & Galbraith* (*ex parte*.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 5.

Bennett v. Slater and Another. (a.)

Friendly society—Moneys payable on death of member—Nomination of person to receive—Revocation of nomination—Moneys payable exceeding £100—Friendly Societies Act, 1875 (38 & 39 *Vict.* c. 60), s. 15, *sub-section* 3.

A member of a friendly society can, under section 15,

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

sub-section 3, of the Friendly Societies Act, 1875, nominate a person to receive a sum not exceeding £100 payable by the society on his death, even though the total sum payable by the society on his death exceeds £100. Such a nomination can only be revoked in the manner prescribed in the section, and cannot be revoked by will.

Appeal from the judgment of Mathew, J., upon an interpleader issue, reported [1898] 1 Q. B. 469, 46 W. R. Dig. 61.

In 1864 William May effected a policy of insurance upon his life for £100 in the Royal Liver Friendly Society, a society registered or deemed to be registered under the Friendly Societies Acts. By the rules of the society the maximum sum for which a policy could be taken out was £200.

In 1889 William May made a nomination of this £100 in favour of the plaintiff, his daughter, under section 15 of the Friendly Societies Act, 1875, and this nomination was duly sent to the society. William May died on the 29th of October, 1896, leaving a will, dated the 7th of September, 1895, of which the defendants were the executors. By his will the testator directed all his estate and effects to be sold by his executors, and after paying his funeral and testamentary expenses and debts, that the residue should be equally divided between his two grandchildren. Neither the will nor a copy thereof was delivered or sent to the society during the lifetime of William May, but after his death probate of the will was sent for registration. The amount due under the policy was, at the death of the testator, with accretions, £104, which the defendants claimed. The plaintiff claimed £100 under the nomination, and brought an action against the society to recover it, when the society interpleaded. Mathew, J., held that the will operated as a revocation of the nomination, and gave judgment for the defendants.

The plaintiff appealed.*

38 & 39 Vict. c. 60, s. 15, sub-section 3: "A member of a society (other than a benevolent or working-men's club), not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, not being an officer or servant of the society (unless such officer or servant is the husband, wife, father, mother, child, brother, sister, nephew, or neice of the nominator), to whom any moneys payable by the society on the death of such member, not exceeding £50, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid."

By 46 & 47 Vict. c. 47, s. 3, the sum of £100 was substituted in the above section for £50.

The above enactments are now repealed and re-enacted in substance by section 56 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 52).

Sir R. B. Finlay, S.G. (*H. Sutton, R. Newton Crane*, and *H. Burrows* with him), for the plaintiff.—The true construction of section 15, sub-section 3, is that a nomination can only be revoked in the same way as it is made. The nomination cannot be revoked by will. The society must, upon receiving satisfactory proof of the nominator's death, pay to the nominee the amount due, not exceeding £100. That provision is not consistent with a revocation by will. Further, this £100 became, upon the nomination, the property of the nominee, subject to the power of the nominator to revoke it during his lifetime, and there being no such revocation, it could not pass under a residuary bequest as part of the testator's estate.

H. D. Bonsey, for the defendants.—First, no nomination can be made where the sum payable on death exceeds £100. In the present case £104 was payable on death. The words "not exceeding £100" refer to "any moneys payable by the society on the death of such member." The object was to relieve poor persons from the obligation of making a will, and their estates from paying probate duty. Secondly, section 15 contemplates the absence of a will, sub-section 4 clearly deals with an intestacy, and sub-section 3 upon its true construction also deals with an intestacy. There is no reason why a nomination should be on a better footing than a will which can be revoked by a subsequent will. The sub-section does not say that the only mode of revocation shall be as prescribed in the Act. It does not exclude a revocation by will. The society, if they have notice of a will, ought not to pay the money to the nominee.

He referred to *Ashby* v. *Costin*, 37 W. R. 140, 21 Q. B. D. 401.

A. L. SMITH, L.J.—The first contention before us is that as the sum payable on the death of the member exceeded £100, section 15 does not apply and the nomination is of no effect. I cannot agree with that contention. I agree that there cannot be a nomination of a sum exceeding £100. Here the nomination did not exceed £100. I have no doubt that the object of the Legislature was to save the expense of taking out representation to the member upon his death in the case of small estates. If the sum payable upon the death of a member does not exceed the £100 nominated, assuming that sum to be nominated, then that sum must be paid over to the nominee, and the expense of taking out representation will be avoided. If, however, the sum payable at death exceeds the £100 nominated, then the £100 will have to be paid to the nominee, and as regards the excess over that sum the general law applies and representation will have to be taken out as to that. The nomination here, being for a sum not exceeding £100, is therefore valid.

The second question is whether that nomination can be revoked by will. First of all, it seems to me that this money became and remained the property of the nominee so long as the nomination was not revoked, and therefore I do not see how this £100, which belonged to the nominee at the time of the testator's death, and not to the testator, can be included in the residuary bequest in his will. I pass that by, however, and I come to the question upon which Mathew, J., based his judgment, whether the nomination can be revoked by any mode other than that prescribed by the section. In my opinion it cannot. The section provides a special mode in which the nomination can be made, and it seems to me to prescribe a special mode in which it can be revoked, and in my opinion that is the only form of revocation recognized. Under the section all that the society has to do is to see that a due nomination has been made, that it has not been revoked in the mode prescribed in the section, that the member is dead, and thereupon "the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid." I find no obligation on the society to see whether there is a will or not. Therefore even if there were what purported to be a revocation by will, and even if the residuary clause covered

* On account of the importance of the question to friendly societies the appeal was taken up by the Board of Trade.

this money, the revocation would be inoperative under the statute, and the nomination would stand. Judgment must therefore be entered for the plaintiff for £100.

RIGBY, L.J.—I am of the same opinion. I think that we can gather the intention of the Legislature from the words of the Act itself. The enactment in question is a provision in favour of members of friendly societies. By the rules of this society a member can insure up to £200. Now, an insurer for £200 seems to me to be as meritorious an individual as an insurer for £100. If the defendants' contention as to the £100 limit were correct, the words of section 15, sub-section 3, "to whom any moneys payable by the society on the death of such member, not exceeding £50"—now £100—"shall be paid at his decease," ought to read to whom "all moneys," &c. The section seems to me to mean that the member may nominate £100, whether out of a larger sum or not, to be paid to the nominee at his death. That seems to me to be the plain meaning of the words. I am, therefore, of opinion that there is no substance in the argument that the Act applies only to those cases in which the total sum payable at death does not exceed £100. If that argument were correct, this strange result would follow, that a member might insure for £50 and nominate that sum, and yet, if he afterwards insured for a further sum, bringing the total to over £100, the previous nomination would be invalidated. I cannot come to such a conclusion. The Act gives a member the important privilege of making a gift, though not an irrevocable gift, of a sum not exceeding £100, and so far relieves his estate from the expenses of representation being taken out to him, and, in my opinion, the sum nominated, subject to revocation, ceases to be the property of the member and does not belong to his estate. The case of *Ashby* v. *Costin* seems to me to be an authority almost in point. I now come to the question whether there can be a revocation of the nomination otherwise than as prescribed in the Act. I find that the Act carefully points out the particular mode in which the nominator can revoke the nomination. Why should we imply something that is not in the Act? Why are we to imply a power to revoke by will? There is good reason why we should not. There is no mention of a will in sub-section 3. That sub-section provides that on proof of the death of a nominator the society shall pay to the nominee the amount. It is suggested that we must read in the words "without notice of a will." I cannot do so. The death of the nominator might well be proved before the society had time to see whether there was a will or not; or the death might be proved, and a will might be in existence which might not be proved for months or years afterwards, and yet, according to the argument, the society would be bound not to pay over the amount to the nominee if they had notice of the will. That would be in direct contradiction to the Act. I think that there can be no revocation by will. If I am right in my view of the Act, this £100 formed no part of the estate of the testator, and he could not dispose of it by his will, and in my view of the Act it would have been equally inefficacious if he had purported to expressly revoke the nomination by his will. Even supposing the testator were insolvent at the time of his death, no recourse could be had to the nominee to recover the sum paid to her. Of course, if at the time of his death the £100 was not an asset of the testator, it would not become an asset because he happened to be insolvent.

COLLINS, L.J.—I am of the same opinion. In my opinion the statute makes £100 the limit of the sum payable to the nominee, and is not the limit of the sum payable on the death of the member. As regards the other point, the clear intention of the Legislature is to benefit members of these friendly societies by giving them a simple and convenient method of disposing of their property on their death, without the formalities and expense incident to a will. The method of disposition thus conferred on members is to a certain extent a substitute for and resembles a will, but it has not all the incidents of a will. It cannot be revoked by a will made subsequently. That incident of a will is wanting. It can only be revoked in the way specified in the Act. It seems to me, therefore, that on two grounds the learned judge was wrong. First, the nomination having been properly made, death intervened before it was revoked. The will, therefore, which was competent to deal only with the testator's estate, did not embrace this £100 at all. I agree also that, even if there had been in this will what purported to be an express revocation of the nomination, inasmuch as it was not the statutory and only method of revocation, it would have been inoperative.

Appeal allowed.

Solicitors for the plaintiff, *Hyde, Tandy, Mahon, & Sayer.*

Solicitors for the defendants, *Letts Brothers.*

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) [and Chan. Div. Romer, J.] — July 6, 1898. June 10, 1898.

BIGGS v. HODDINOTT. (a.)

Mortgage—Redemption—Collateral advantage to mortgagee—Restrictive covenant—Injunction.

A mortgagor can always redeem on payment of principal, interest, and costs, and any bargain which is unconscionable will not be enforced; but a collateral agreement giving the mortgagee some collateral advantage, provided it is not unconscionable and does not clog the equity of redemption, is not invalid.

Jennings v. Ward, 2 *Vern.* 520, *and* In re Edwards' Estate, 11 *Ir. Ch. Rep.* 367, *discussed and explained.*

The defendant, being the owner of a public-house, mortgaged it to the plaintiff, with a proviso that the loan should continue for five years, and covenanted during the continuance of the security not to sell on the premises malt liquors other than those supplied by the plaintiff.

Held, that such a covenant was valid, and ought to be enforced by injunction.

Appeal of the defendants from Romer, J.

The plaintiff was a brewer at Cardiff, the defendants being the owners of the Witchell Hotel, Cadoxton, Glamorgan. The premises were mortgaged by the defendants to the plaintiff by deed dated the 18th of March, 1896. The mortgage deed contained a covenant by the mortgagors that they would during the continuance of the security deal with the plaintiff only, for all beers, stout, or any other malt liquor (except bottled beers) which should be vended to be consumed on or off the hotel and premises, and would not sell or permit the sale or consumption on the premises of any such liquors other than such as had been purchased or taken of the plaintiff. There was a proviso that the mortgage-money should not be called in for five years, and the plaintiff covenanted to

(a.) Reported by W. SHALLCROSS GODDARD and RALEGH B. PHILLPOTTS, Esqrs., Barristers-at-Law.

supply the defendants with malt liquors of a kind and quality similar to those which were being supplied for the time being for consumption on the hotel premises.

On the 1st of April, 1898, the defendants ceased to purchase their malt liquors from the plaintiff, and on the 4th of May 1898, tendered to him the amount of his principal and interest to date and a further six months' interest in lieu of notice.

The plaintiff declined to accept the money, and on the 10th of May, the defendants took out an originating summons for redemption.

On the 23rd of May the plaintiff instituted an action claiming an injunction to restrain the defendants, their servants or agents, from selling or permitting the sale or consumption on the hotel premises of any beer, stout, or other malt liquors (other than bottled beers) which should not have been purchased and taken from the plaintiff.

On the 10th of June the plaintiff moved before Romer, J., for an interim injunction in the terms of the claim. The defendants' summons for redemption and the plaintiff's motion for an injunction were heard together.

Romer, J., dismissed the summons for redemption on the ground that it was premature. The plaintiff's motion for an injunction was then argued.

Levett, Q.C., and *R. F. Norton*, for the motion.—The covenant is good and should be enforced. It is outside the mortgage in the sense that it has nothing to do with the right to redeem; it is only a collateral advantage which in a proper case should be allowed to the mortgagee.

They cited *White* v. *City of London Brewery Co.*, 36 W. R. 881, 39 Ch. D. 559; *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126; *Luker* v. *Dennis*, 26 W. R. 167, 7 Ch. D. 227.

Farwell, Q.C., and *Ingpen*, for the defendants.—This covenant is an attempt to clog the equity of redemption by giving the mortgagee a collateral advantage; this is not allowed: *Jennings* v. *Ward*, 2 Vern. 520. This is irrespective of the usury laws: *Broad* v. *Selfe*, 11 W. R. 1036; and depends on the general protection equity gives to borrowers against lenders which should the more be enforced now that the usury laws are abolished: *James* v. *Kerr*, 37 W. R. 279, 40 Ch. D. 449. A mortgagee cannot stipulate that he shall be a paid receiver of the rents of the property he holds as security, nor can a mortgagee auctioneer stipulate for and get commission: *Broad* v. *Selfe*; *Field* v. *Hopkins*, 44 Ch. D. 524, 38 W. R. Dig. 134; *Salt* v. *Marquess of Northampton*, 40 W. R. 529, [1892] A. C. 1. The covenant therefore is void, and this injunction should be refused.

ROMER, J.—There is a great principle which in my opinion ought always, so far as possible, to be adhered to—namely, that a man should abide by his contracts. There are, however, certain principles of equity which especially relate to mortgagors and mortgagees, and which to some extent interfere with this great principle. With these I will deal upon the understanding that unless some rule of equity forbids it, a man's contract should be enforced against him. In the present case the transaction was reasonable and proper, and the contract seems to me to be reasonable, entered into in good faith and fairly, and in no sense oppressive, so that unless some rule of equity interfere to prevent my so doing I ought to enforce it. I should be sorry if I thought there was any such rule, but I don't think in this case that there is.

There is a principle which I wholly accept, at any rate for the purposes of this judgment, that in a mortgage you cannot by contract between mortgagor and mortgagee clog the equity of redemption so as to prevent the mortgagor redeeming on payment of the principal interest, and costs. That principle does not, in my opinion, apply here to prevent the contract in question being enforced; there is nothing in it to clog the equity of redemption. The mortgagor's right to redeem stands the same whether this covenant to take the beer is in the deed or not. The mortgagee in respect of that, has no right to check redemption. There is no charge on the mortgaged premises in favour of the mortgagee, for any sums due to him by reason of any breach of that covenant. It therefore seems impossible to say that this covenant in any way infringes the principle against clogging the equity of redemption.

Then it is said on behalf of the mortgagor that a much wider principle applies which would prevent this covenant being binding, and the case of *Jennings* v. *Ward*, was referred to as an authority in support of this. The Master of the Rolls in that case is certainly reported to have said that a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. I have already dealt with clogging the equity; but it is said that the decision of the Master of the Rolls is to be taken to its fullest extent, and that in no case shall the mortgagee have his interest and a collateral advantage besides. I think it good in dealing with general observations to bear in mind the case in which such general observations were made, and in applying this to *Jennings* v. *Ward* it will be seen that there there was no attempt to clog the equity of redemption; but looking beyond that and considering what the collateral agreement there was, it was one which the Master of the Rolls held should be set aside as being unconscionable. Also, it is important to bear in mind that he was dealing with a case when the usury laws were in force and it was not allowed to a mortgagee to get anything equivalent to rate of interest beyond the legal rate under the guise of a collateral advantage. I am unable to find any subsequent case to show me that this decision of the Master of the Rolls is to be taken unlimitedly. Some of the cases to which I have been referred are cases where it was sought to clog the equity of redemption by saying that to redeem the mortgagor had to pay more than was due from him for principal, interest, and costs, and the question was what ought to be done when the mortgagor came to redeem; not, as here, the question whether, when there is a reasonable and proper agreement entered into between two persons, it should be void because it is between mortgagor and mortgagee. Also, you must put aside cases before the usury laws, and cases of unconscionableness. Lord Eldon in *Chambers* v. *Goldwin*, 9 Ves. 254, stated the law at that time on the subject in question, and this is referred to by Kay, J., in his judgment in *Mainland* v. *Upjohn*, 41 Ch. D., at p. 138, whose remarks at the top of that page I would wish to now adopt.

Putting aside, therefore, the question of what is wrong and what circumstances are oppressive, I can see no reason why a covenant between a mortgagor and mortgagee, entered into in good faith and really giving a reason why the mortgagee should advance the money, should be bad, and it appears to me that if there is no objection falling within the lines I have mentioned, a contract which is really equivalent to a term of the advance is binding on the mortgagor where it is part of the consideration for the advance and the mortgagor has got the benefit resulting from it. That the principle laid down by the Master of the Rolls in *Jennings* v. *Ward* is not to be taken in its widest

sense as urged on behalf of the defendants is clear from the cases of *Potter* v. *Edwards*, 5 W. R. 407, 26 L. J. Ch. 468, and *Mainland* v. *Upjohn*, as they show that, for instance, a mortgagee may contract with a mortgagor that in consideration of an advance of £700 he shall be repaid £1,000 with interest on the £1,000, and that such a bargain will stand. So here the mortgagor has obtained an advance no doubt at a reduced rate of interest by reason of this covenant, the advantage of which he now seeks to escape the consequences of. I can find no authority that such a covenant is to be held void. Certainly the cases which have been cited to me do not amount to such an authority. Thus, in *James* v. *Kerr*, 40 Ch. D. 449, the facts when looked at show that the agreement there relied upon by the mortgagee was oppressive and improper. *Broad* v. *Selfe* was a case of clogging the equity of redemption, and in *Field* v. *Hopkins* the question was as to the amount which the mortgagor had to pay before he could be allowed to redeem, and it was a case where the mortgagee was claiming to charge items that ought not to have been charged against the mortgagor, and the Court of Appeal dealt with it as a question of construction.

Lastly, there is the case of *Salt* v. *Marquis of Northampton*, where the question merely was whether a certain policy was mortgaged, and when it was held that it was, it followed that any bargain seeking to stop the redemption of it would not be allowed. That decision therefore has no application to the question I am now dealing with.

Finding, therefore, in this case an honest bargain entered into to the benefit of the mortgagors, and finding no principle to prevent me enforcing this covenant on the part of the mortgagors, I grant the injunction asked for on the present motion, limiting it to the period of the continuance of the security.

The defendants appealed from this order on the plaintiff's motion.

Farwell, Q.C., and *Ingpen*, for the appellants.

Levett, Q.C., and *R. F. Norton*, for the plaintiff, were not called upon.

LINDLEY, M.R.—We have heard an ingenious and learned argument put forward with the view of inducing us under pressure to lay down a proposition of law which, if true, would be unfortunate for business men. The proposition is this—that upon a mortgage transaction the mortgagor and mortgagee cannot at the same time enter into any other transaction with each other which can possibly benefit the mortgagee—that any such transaction must be entered into before the mortgage, so that it cannot be said that the mortgagee gets any collateral advantage out of the mortgage. That is not good sense, and it does not require very much intelligence to say it is not the law. Counsel for the appellants did not attempt to support it upon any rational principle, but they put it on authority. We are of course bound by the authorities, whether we like them or not, and counsel were right, there being no reasonable ground against it, to press us with authority.

The first case relied upon was *Jennings* v. *Ward*. That was a redemption suit, and there was an agreement, contemporaneous with the mortgage, which seriously interfered with the redemption of the property, on payment of principal, interest, and costs. The Master of the Rolls (Sir John Trevor) decreed redemption without regard to that stipulation, and said, "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye-agreement." That language has found its way into the books, and it has been understood as if he meant exactly what he said without regard to the circumstances of that case, and it has been said that no mortgagee can have his principal, interest, and costs, and also a collateral advantage. Now, what does the proposition mean? If it means what counsel for the appellants say, it would be monstrous; but when the authorities are looked at it will be seen that that general proposition has been departed from again and again, which shows that it does not mean what counsel say. Take, for instance, the case of West Indian mortgages, in which it has been held that a mortgagee who is not in possession could stipulate to act as consignee for the mortgagor. That is a collateral advantage. The proposition as stated in *Jennings* v. *Ward* is too wide. If properly guarded it is good law and good sense, and when one looks at the cases where it has been applied and those where it has not, one sees what it means. The principle is this: A mortgage is regarded in equity as a security for the money advanced, and a mortgagor can always redeem on payment of principal, interest, and costs, and no bargain which prevents that, will be enforced or regarded.

There is another principle which is not peculiar to mortgages, and that is that an unconscionable bargain will not be enforced; and there is no case of any bargain being set aside which does not come under one of those two heads. I think the decision of Romer, J., was right; and to say, as we are asked to do, that a clause like this one, stipulating that a publican is to get his beer from a brewer upon reasonable terms is a collateral advantage and must be disregarded as unconscionable, would shock any business man, and we are not going to say that. The only possible way of making that out would be this, which was the view taken by Hargreave, J., in *In re Edwards' Estate*, 11 Ir. Ch. Rep. 367, that any stipulation in a mortgage for the benefit of the mortgagee is, because it is in a mortgage, due to pressure upon the mortgagor by the mortgagee. The simple decision there was right, that the agreement in the mortgage which was relied on was invalid as preventing redemption; but what the judge said as to a stipulation being unreasonable because it was found in a mortgage is going too far. The appeal will be dismissed.

CHITTY, L.J.—It is said that the covenant by the mortgagor is void in equity. The first observation that I have to make upon that is, that it in no way affects the equity of redemption, as redemption can take place in just the same way as if that covenant were not in the deed. There is no stipulation that any damages for breach of the covenant should be covered by the security, so it is plain that it is not a case where the equity of redemption on payment of the principal, interest, and costs is in any way affected. In equity a mortgage has always been looked upon as a security for money, and here the principle that the mortgagor can redeem on payment of principal, interest, and costs is maintained. It was contended that generally a mortgagee cannot stipulate for any collateral advantage to himself, and that there are authorities which show that. That has not been made out. The true proposition is that a mortgagee shall not impose on the mortgagor an unconscionable and oppressive bargain. That there is anything of that kind in this case is out of the question. The arrangement is for the common benefit of both parties. Though the mortgagee does by the operation of the covenant get an opportunity for the sale of his beer, the mortgagors get presumably good beer supplied upon the usual terms. It would be contrary to sense to say that this trade contract, entered into by persons

with their eyes open, should be set aside on the ground of its being contrary to some fanciful doctrine of equity.

As regards the authorities, *Jennings* v. *Ward* was relied upon. That was a bill for redemption of a mortgage, and the Master of the Rolls decreed redemption without regard to a certain agreement which he considered unconscionable, and which he set aside as being unreasonable, as appears from the registrar's book, which we now have in court.

The statement by Hargreave, J., in *In re Edwards' Estate*, that the presumption is that a mortgagor is under pressure when he borrows money on the terms of a mortgage, is not a universal principle, and that that is so, is established by many authorities. The first great departure from it is to be found in the case of the West Indian mortgages, where a mortgagee was allowed to act as consignee for the mortgagor so long as he was not the mortgagee in possession. This supposed rule, which was gathered from *dicta*, not decisions of judges, was found not to work in those cases, as the West Indian planters could not get their money unless they consented to the mortgagee being consignee. That is a clear departure from the rule, and *Potter* v. *Edwards* was the same way. In that case £700 was advanced, and the mortgage was for £1,000. It has been attempted, I think, to explain what was a plain transaction there by a fiction which was untrue and unreasonable, and the theory was that the parties went through a supposed payment and repayment in the nature of a commission. The real bargain was an advance of £700 and an undertaking to give security for £1,000. In one sense there was an additional advantage to the mortgagee, as he was getting £300, and also getting interest on his security. *Mainland* v. *Upjohn* was a decision the same way. The decision of Hargreave, J., in *In re Edwards' Estate*, was right, as in that case there was not only a bargain which was unreasonable, but one which was a clog upon the equity of redemption. The mortgagee is that case could either purchase part of the property or remain mortgagee, so that there was a direct clog on the redemption, as if he became the purchaser the mortgagor had no right to redeem that part of the estate which came within the option.

It is unnecessary to add any more. In this case the transaction does not fall within any such supposed rule of equity as the appellants contend for.

COLLINS, L.J.—I am of the same opinion, and were it not for the course of the authorities I should not think that any rational person looking at this document would suppose that it was otherwise than a fair and reasonable arrangement—a contract between a brewer and a publican, by which the brewer becomes the transferee of a mortgage on the licensed house, and stipulates that the publican is to take his beer from him.

It is said, however, that mortgages have been the subject of a long series of decisions in equity. The equity judges have tried to find some principle which would satisfactorily explain the decisions of their predecessors, and those which they were about to give themselves, and it is no wonder that in searching for that, they fixed on some general principle which, when applied in other circumstances, was unfortunate. The difficulty came from the jurisdiction of the courts of equity to correct the hardness of the law. The decisions were given to remedy the hardness of particular cases, and then the judges tried to reduce them to a general rule which would meet all cases. In dealing with hard cases, the only safe thing is to do as Romer, J., did here, and see how far the decisions have gone in each particular case.

It is clear that when a person enters into a mortgage contract he is only a borrower upon security, and any stipulation in the deed which is inconsistent with that must be treated as if it were not there. It is not necessary now to go back to any such general proposition; but it may be that in earlier days, when people were driven to finding the principles, they were justified in going back to it, and so Hargreave, J., in *In re Edwards' Estate*, may have had in his mind the principle that, the contract being one of loan on security, any stipulation inconsistent with that must be regarded as unfair, and must be rejected. Whether that was what he had in mind or not I do not know, but the proposition which he laid down in such a general form was not necessary for the decision of that particular case, for in that case the stipulation interfered with the right of the mortgagor to redeem on payment of principal, interest, and costs.

Upon what principle can it be said that a stipulation which does not clog the equity of redemption is invalid as being contrary to the spirit of the mortgage? It seems that it can only be so on the general principles of the law of debtor and creditor—that is, only where there is something so oppressive as to make it wrong to give effect to it. In the case before us the provision is a reasonable one, and it does not make the mortgage anything but a security for a debt. The mere fact that a stipulation for the benefit of the mortgagee is contained in the mortgage-deed does not necessarily make it invalid. The only ground for saying that it does is what was said in *Jennings* v. *Ward*, that a man shall not have interest for his money and at the same time a collateral advantage to himself. This case is not covered by the decision in that. There was sufficient there to warrant the judge in treating the clause as in fact an agreement for purchase at a given sum, notwithstanding that there was in form a mortgage. Nothing more than that was necessary for the determination of that case, and there is nothing here which goes so far as that. The agreement is one which does not fetter the redemption, and there is nothing unreasonable in it.

Appeal dismissed.

Solicitors for the appellants, *Riddell, Vaizey, & Smith*, for *J. H. Jones*, Cardiff.

Solicitors for the plaintiff, *Bower, Cotton, & Bower*, for *Stephens, David, & Co.*, Cardiff.

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) — June 28, 1898.

GROVES *v.* LORD WIMBORNE. (*a.*)

Factory Acts—Fencing machinery—Breach of statutory duty—Liability—Common employment—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *ss.* 5, 82, 87.

Where the proprietor of a factory fails to perform the duty imposed upon him by section 5 of the Factory and Workshop Act, 1878, *to fence and maintain the fencing of dangerous machinery, an action to recover damages will lie at the suit of a person injured thereby, notwithstanding that the Act has imposed a penalty for the breach of the statutory duty.*

The defence of common employment is no answer to such an action.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Application by the plaintiff for judgment or a new trial in an action tried before Grantham, J., and a jury.

The action was brought by a boy of fourteen years of age in the employment of the defendant to recover damages for personal injuries caused by the defendant, in breach of his statutory duty, not fencing certain dangerous machinery at his ironworks, but allowing the same to be and remain in an unfenced condition.

It appeared that the plaintiff was employed at a steam winch which had revolving cog-wheels, and while so employed his arm was caught by the cog-wheels and was injured. The plaintiff had been employed at the works for about eighteen months before the accident, and for the last six months he had been employed at the steam winch, which, during that period, had remained unfenced, though a fence had been originally provided for it.

The jury found a verdict for the plaintiff for £150 damages, but the learned judge held that the penalty imposed by section 82 of the Factory and Workshop Act, 1878, for breach of the statutory duty to fence was the sole remedy, and entered judgment for the defendant.

Abel Thomas, Q.C., and *S. T. Evans*, for the plaintiff.—An action will lie for breach of the statutory duty to fence contained in section 5 of the Factory and Workshop Act, 1878, whereby personal injuries ensue: *Britton* v. *Great Western Cotton Co.*, 20 W. R. 525, L. R. 7 Ex. 130; *Holmes* v. *Clarke*, 10 W. R. 405, 7 H. & N. 937; *Kelly* v. *Glebe Sugar Refining Co.*, 20 Court Sess. Cas., 4th ser., 833: see also *Thompson* v. *Wright*, 22 Ontario Rep. 127; *Coe* v. *Platt*, 7 Ex. Ch. 923; *Caswell* v. *Worth*, 4 W. R. 231, 5 E. & B. 849; *Doel* v. *Sheppard*, 4 W. R. 232, 5 E. & B. 856. The cases—such as *Gorris* v. *Scott*, 22 W. R. 575, L. R. 9 Ex. 125; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 25 W. R. 794, 2 Ex. D. 441; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 41 W. R. Dig. 85; *Municipality of Picton* v. *Geldert*, 42 W. R. 114, [1893] A. C. 524; and *Saunders* v. *Holborn District Board*, 43 W. R. 26, [1895] 1 Q. B. 64—in which it was held that the penalty was the only remedy, do not apply to a statutory obligation to fence machinery, where the Legislature could not have contemplated that the penalty should be the only remedy available in case of personal injury: see *Couch* v. *Steel*, 2 W. R. 170, 3 E. & B. 402; *Shepherd* v. *Hills*, 11 Ex. Ch. 55, 4 W R. C. L. Dig. 182; and *Ross* v. *Rugge-Price*, 24 W. R. 786, 1 Ex. D. 269. The doctrine of common employment cannot apply where the action is for breach of a statutory duty, there being no question of the negligence of a fellow-servant raised.

They also referred to *Paterson* v. *Wallace*, 1 Macq. 748.

B. F. Williams, Q.C., and *Bailhache*, for the defendant.—The Legislature did not intend that there should be a remedy in damages in addition to the statutory penalty. The Factory Acts created the duty to fence, and provided a remedy for the breach of that duty, and that is the only remedy available. In *Britton* v. *Great Western Cotton Co.* the action was for breach of the statutory duty in not having originally provided a fence for the machinery. Here a guard for this machine was originally provided, but there was negligence in not maintaining the fencing. The doctrine of common employment is a defence to an action for the breach of duty in not maintaining the fencing, as the neglect to maintain it was that of the foreman, and he was a fellow-servant with the plaintiff: see *Senior* v. *Ward*, 7 W. R. 261, 28 L. J. Q. B. 139; *Howells* v. *Landore Siemens Steel Co.*, 23 W. R. 335, L. R. 10 Q. B. 62; *Wilson* v. *Merry*, L. R. 1 Sc. & Div. 326

They also referred to *Bartonshill Coal Co.* v. *Reid*, 6 W. R. 664, 3 Macq. 266.

A. L. SMITH, L.J.—This action is brought to recover damages for breach by the occupier of the factory of his statutory duty to maintain the fencing of certain machinery, injury being thereby caused to the plaintiff. Grantham, J., entered judgment for the defendant upon the ground that an action for damages would not lie for breach of the statutory duty. The Factory and Workshop Act, 1878, has followed similar Acts, and is a public Act enacted by the Legislature in favour of workmen, and imposing a liability on the master which is enforceable by a penalty. Section 5, sub-section 3, of the Act, as amended by section 6, sub-section 2, of the Factory and Workshop Act, 1891, provides that "all dangerous parts of the machinery and every part of the mill gearing shall either be securely fenced or be in such a position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced." By sub-section 4, "all fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process." In this case it was conceded that the machinery ought to have been fenced and that the plaintiff was in consequence injured. Taking section 5 alone, it seems clear that upon proof of the statutory duty, and upon proof of the failure to perform that duty, resulting in injury to the workman, a cause of action accrues. Unless, therefore, we can find upon the whole purview of the Act that the Legislature intended that the fine imposed by the Act should be the only remedy for the breach, it seems to me that a cause of action exists. Can such an intention be inferred from any other parts of the Act? That brings me to sections 81, 82, 86, and 87. In considering this question it is proper to consider, as Kelly, C.B., did in *Gorris v. Scott*, whether the object of the statute is to confer a benefit on individuals and to protect them. It seems to me that the Factory Acts were passed to compel employers to do certain things for the benefit and protection of their workmen. Can it be said that the statute has made the fine the only remedy, especially when it is remembered that not one penny of it may ever go into the pocket of the injured man? Can that be the intention of the Legislature? The fine is imposed by section 82, and the whole or any part thereof may be applied for the benefit of the injured person or his family or otherwise as a secretary of state may determine. When an information is laid to recover the fine, how are the justices to act? The character of the offence should be taken into consideration. If the omission to fence was of a venial character, but a workman was injured or killed in consequence, what fine ought the justices to impose? Ought they to impose the same fine as if the offence were of a flagrant character? It seems to me that the fine is imposed as a punishment to the master for his breach of duty, and if the breach is wilful the fine should be greater than if the breach were trivial. The above considerations seem to me conclusive to show that the imposition of a fine does not take away the right of a workman to be compensated for the injury caused by the breach of duty. Another observation makes it still more clear. It does not necessarily follow that the occupier of the factory is the person to be fined for the breach of duty, because by section 87 a workman, who may not have a penny with which to pay, may be fined; and yet it is said that the injured workman

must look to this payment of the fine as his only compensation. I cannot agree with that view. Section 5 gives a right of action upon the statute to a person injured by the breach of duty to fence, and he is not remitted to a fine as his sole remedy. Coming to the authorities, from the time when the Factory Act, 1844, was passed down to the present no case has laid down that the fine is the only remedy. There are two cases which show the contrary. *Britton* v. *Great Western Cotton Co.* seems to me to cover this case. There the breach of duty was in not providing a fence in the first instance, whereas here the breach consisted in the failure to maintain it. I do not think that any distinction can be founded upon that. There is also the Scotch case of *Kelly* v. *Glebe Sugar Refining Co.*, which, though not binding upon us, covers the present case. For these reasons both upon principle and upon authority I am of opinion that the plaintiff has a cause of action. There is one other point. It is said that the doctrine of common employment affords a defence to the action. A master is liable to a third person for the negligence of his servant when acting within the scope of his employment. A limitation was placed upon that principle in favour of the master by the decision in *Priestley* v. *Fowler*, 3 M. & W. 1, which decided that if a servant injures a fellow-servant by his negligent act, the master is not liable, the reason being that the servant, when contracting with the master, impliedly took the risk of being injured by the negligence of a fellow-servant. That is the doctrine of common employment. It is a defence to an action by a servant against his master for injuries caused by the negligence of a fellow-servant. In an action founded upon the statute there is no need to resort to the negligence of a fellow-servant. The plaintiff need only prove the breach of the statutory obligation, and what answer is it to say that a fellow-servant of the plaintiff was guilty of negligence causing the injury? An employer cannot delegate his statutory duty to another. It is said that *Wilson* v. *Merry* decided the contrary. In my opinion it did nothing of the kind. The decision in that case was that the law as to common employment was the same in Scotland as in England. No doubt Lord Chelmsford said that the doctrine of common employment might be a defence to an action for breach of the statutory duty. I cannot agree with him in that opinion, which was not necessary for the decision, and the other law lords refrained from expressing an opinion. For these reasons the appeal must be allowed, and judgment entered for the plaintiff for the amount awarded by the jury.

RIGBY, L.J.—I am of the same opinion. There seems to me to be only one question to be decided—whether, having regard to the purview of the Act, the penalty was intended to be the only remedy. Section 5 of the Workshop and Factory Act, 1878, imposes an absolute and unqualified obligation upon the occupier of a factory, and upon no one else, to fence dangerous machinery and to maintain that protection. When a duty is cast upon a person, he cannot be allowed to say that he delegated the performance of that duty to someone else, and that that other person neglected to perform it. A man cannot be heard to say, as a defence to an action for damages for personal injuries, that he employed a competent servant to do certain business for him, and that it was the servant's negligence, in the performance of it, which caused the injuries. If the servant is engaged upon his master's business, and in the performance of it injures another through his negligence, the master is liable. An exception was engrafted on that general rule by the decision in *Priestley* v. *Fowler*, which has not always commended itself to the conscience of mankind, but which is now undoubted law, that where a person enters into the employment of another the former is assumed to have entered into a bargain with the latter that he will not sue the master for injury to himself caused by the negligence of a fellow-servant. In Scotland the courts had taken a limited view of the doctrine of common employment—namely, that the doctrine did not apply where the fellow-servant, whose negligence caused the injury, was in a superior position, and only applied to a fellow-servant in the same class of employment as the injured man. In *Wilson* v. *Merry* the House of Lords held that the Scotch courts were wrong in that view. The majority of the lords refused to express any opinion whether the defendants were not liable for the breach of the statutory duty, but Lord Chelmsford did think it desirable to say something about it. He took the case of *Gray* v. *Pullen*, 13 W. R. 257, 5 B. & S. 970, a decision of very great authority, where it was held that if a person, who was bound to perform some duty, employed an independent contractor, who failed to perform the duty, the person employing the contractor could not, by doing so, get rid of his liability. The learned lord said that that decision was wrong. He seems to have said in effect that a person may get rid of a statutory duty by employing an independent contractor to do the work instead of employing his own servant. That is not the law of the land. In *Hardaker* v. *Idle District Council*, 44 W. R. 323, at p. 324, [1896] 1 Q. B. 335, at p. 341, Lindley, M.R., in referring to this opinion of Lord Chelmsford, said that he could not find that the decision in *Gray* v. *Pullen* had ever been overruled or considered unsatisfactory. In my opinion the decision in *Gray* v. *Pullen* was perfectly right, and Lord Chelmsford's criticism upon it was unsound. I have never had a doubt that where a statutory duty is imposed upon a person he must see to the performance of that duty, and he is liable if injury is caused by a breach of that duty, unless the case can be brought within some known exception to that rule. It is said that a new duty is imposed and a new remedy for breach of that duty given by the Act, and upon the whole purview of the Act that is the only remedy. Where it is necessary to prove negligence of a person in the employment of the master, then it may be that the plaintiff may be met by the doctrine of common employment. But there is no question of negligence raised here. The Dowlais Ironworks are very extensive, and Lord Wimborne does not and cannot be aware of all that is going on there. He could not be expected to attend to the original fencing or to the maintenance of the fencing. I cannot see any distinction between the duty to provide original fencing and the duty to maintain the fencing. There is here a statutory duty which absolves the plaintiff from the necessity of relying upon negligence, and the doctrine of common employment is not applicable. The question then is, looking at the whole purview of the Act, whether the breach of duty gives rise to a cause of action for damages. The plaintiff was clearly one of those persons for whose protection section 5 of the Act was passed. That being so, the only suggestion is, can we draw the conclusion from the imposition of a fine that the Legislature intended that to be the only and complete remedy. To my mind it is impossible to say so. The maximum fine, even in a serious case, is £100. Is it conceivable that that sum can have been intended to be the limit of compensation? The fine does not necessarily go into the pocket of the injured man. When bodily injury has been occasioned to a workman, the secretary of state may apply the whole or any part of the fine inflicted for the benefit of the

injured man or his family. In considering what fine to impose, how are the justices to act? If the injury, though slight, is caused by a deliberate and wilful breach of duty, the justices would probably impose the maximum fine. On the other hand, if the injury is serious and the offence is venial, are the justices to say that the occupier of the factory, who has been most anxious to perform his statutory obligations, should be fined £100? There may be many such cases in which the justices would impose only a small fine. Another consideration is this: by section 87, if the occupier of the factory can show that he used due diligence and that some other person was the offender, he may exempt himself, and the actual offender, who is probably a workman in the occupier's employment, may be convicted. Such a person may not be able to pay the fine, and yet it is said that the fine is the only remedy available. Considering all these reasons I cannot think that the penalty is intended to be the only remedy.

VAUGHAN WILLIAMS, L.J.—I agree in the conclusion arrived at by my learned brothers. I entertain no doubt that upon a proper construction of the Act it would not be right to hold that the Legislature intended the penalty to be the only remedy to the person injured. Nor have I any doubt that the doctrine of common employment affords no defence to this action.

As regards the first point, I do not think it has ever been doubted that where a statute provides for the performance of a duty, and a person is injured by the failure to perform that duty, if there is nothing more, an action will lie at the suit of the injured person, such person being one of those for whose benefit and protection the statute was passed. I have equally no doubt that where in a statute of this sort a remedy is provided in case of non-performance of the statutory duty, that is a matter to be taken into account when considering whether the Legislature intended that to be the only remedy. But it is by no means conclusive, nor is it the only matter to be taken into consideration. Further, if the remedy given by the statute is a remedy which the statute provides is to enure for the benefit of the person injured, that is an additional matter to be taken into consideration, a cogent though not a conclusive matter for consideration. It is necessary to look, according to Lord Cairns in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, at the general scheme of the Act, and the nature of the statutory duty. In addition to that, one must look at the nature of the injuries likely to be caused by the breach of the statutory duty, the amount of the penalty imposed, and the person upon whom it is imposed. I can add nothing to the observations of A. L. Smith, L.J., as to the provisions of section 87, nor can I add anything to the observations of Rigby, L.J., as to the intention of the Legislature that the £100 should be the only remedy for a breach of the statutory duty which might lead to the death or serious injury of a person of the class sought to be protected. For these reasons I entirely agree that the statute does not intend the penalty provided by section 82 to be the only remedy for breach of the statutory duty created by the Act. But although I agree with this conclusion, I cannot think that the point is one entirely free from difficulty, because I know of no authority in which it has been held that where a statute in terms provides that the penalty shall go to the person injured by the breach of the statutory duty a civil action is open also. However, we have not to decide that question, because section 82 does not give the penalty to the person injured. It only gives the secretary of state power to apply the whole or any part thereof for his benefit. In making this observation I do not wish to go back from the general proposition, that there is no hard-and-fast line to be drawn. One must look at the whole statute and gather from its provisions whether the Legislature intended the statutory remedy to be the only remedy. This is laid down in *Vallance* v. *Falle*, 32 W. R. 770, 13 Q. B. D. 109.

I wish now to add a few remarks upon the defence of common employment. The defence of common employment does not in any sense negative negligence for which the master is responsible. It is a defence because it is an answer to the claim of the particular plaintiff. Whether it is founded upon the doctrine of *Volenti non fit injuria*, as seems to have been thought in *Priestley* v. *Fowler*, or, as seems to be the later view, upon an implied undertaking by the servant to take the risk of injury by the negligence of a fellow-servant, in either case it is an answer to the claim for damages by the particular plaintiff. The question is, can the defence be set up by the defendant in this case? In my opinion it cannot be set up. The duty is imposed upon the master by section 5, and it is no answer for him to say that he employed a most skilful servant who failed to perform the statutory duty. I wish, however, to guard against being supposed to affirm that in no case can the defence of common employment be set up in answer to a claim arising out of a breach of a statutory duty. I agree that it cannot be set up in the present case, because the cause of action is not based on the negligence of any servant, but solely on the failure of the master to perform his statutory duty. But suppose a case where the master had put the most perfect fencing to the machinery, and suppose someone deliberately left off or removed the fencing, an obvious answer would be that the cause of damage to the plaintiff was not the failure of the master to perform his statutory duty, but the particular act of the servant. I am not sure that, if it could be shown that some fellow-servant of the plaintiff so dealt with the fencing and caused the injury to the plaintiff, the doctrine of common employment would not apply. Subject to that observation I entirely agree in the conclusion arrived at on this appeal. I will add this so as to make my position clear. No one could contend that if the plaintiff had been guilty of contributory negligence, that would not have been a complete answer to the claim founded upon the breach by the master of his statutory duty. In such a case the injury would have not been caused by the neglect of the master to perform his statutory duty, inasmuch as the injury would not have happened but for the contributory negligence of the plaintiff. In the same way, though I do not mean to decide it, it may be that, if it could be shown that, although the master failed to perform his statutory duty, the injury would not have happened but for the negligence of a fellow-servant, that would not be a defence to the action. I very much doubt whether Lord Chelmsford, in *Wilson* v. *Merry*, meant to go further than that. I agree with the criticism of Rigby, L.J., upon Lord Chelmsford's observations on *Gray* v. *Pullen*, but the observations he made as to setting up the defence of common employment in the case of a breach of statutory duty can stand by themselves apart from his observations on *Gray* v. *Pullen*.

Appeal allowed.

Solicitors for plaintiff, *Riddell, Vaizey, & Smith*, for *J. H. Jones*, Cardiff.

Solicitors for defendant, *W. Hurd & Son*, for *G. C. James*, Merthyr Tydvil.

High Court of Justice.

Chan. Div. } Stirling, J. } Aug. 5; Oct. 27.

GOLDSTONE v. WILLIAMS, DEACON, & CO. (a.)

Practice — Discovery — Privilege — Use of privileged document in former action—Production—R.S.C., Ord. 31, *r.* 1.

Documents in their original nature privileged are liable to production if such use has been made of them that they have become publici juris, *but not otherwise.*

Accounts which had been prepared by a witness's solicitors for purposes of litigation were, in the course of cross-examination of the witness before an examiner, handed to the witness and admitted to be correct, but were not read out in court. The same accounts were subsequently made an exhibit to an affidavit read on a summons before a judge in chambers to compromise the action. On an application in a subsequent action to produce the accounts and copies of the witness's depositions,

Held, that the accounts had never been effectually made public, and that the use made of them did not amount to a waiver of privilege, but that the witness's depositions had become public property and must be produced accordingly.

This was a motion to discharge an order made in chambers and involved a question as to how far documents originally privileged remained so after they had been used in a previous action even though they had not been read in open court. The facts were as follow. The order which it was now moved to discharge was made in chambers on the 18th of July, 1898, and it was thereby ordered that the plaintiffs should produce to the defendants the evidence in their possession upon which the order for compromise of an action of *In re Goldstone, Goldstone* v. *Goldstone*, [1897] G. 893, and dated the 13th of November, 1897, was made, including the office copy depositions of the defendant Jane Goldstone and the exhibits relating thereto.

The plaintiffs were the infant children of Sampson Goldstone, who died, in 1884, intestate, and his widow, Jane Goldstone became his legal personal representative. Mrs. Goldstone deposited certain securities, part of the testator's estate, with the defendant bank at first for safe custody, but subsequently by way of security for advances made to her by the bank. It was now alleged that the obtaining of these advances constituted a breach of trust on her part. This security was realised by the bank and the proceeds applied in satisfaction of the widow's debt. It was alleged that the bank had notice that the securities formed part of the testator's estate and had notice of the breach of trust committed by Mrs. Goldstone, and was liable accordingly. By their defence the bank denied the case made by the plaintiffs.

The usual order for discovery was made, in pursuance of which the plaintiffs filed an affidavit which was held insufficient. On the 7th of June, 1898, an order was made for a further and better affidavit. Accordingly the plaintiffs' solicitor made an affidavit on the 23rd of June, and the second schedule set out certain documents, including

"Accounts prepared by accountant relating to transactions between defendant Jane Goldstone and defendant Bank, and relating to the estate of Sampson Goldstone, deceased, and office copy depositions of Jane Goldstone."

The plaintiffs objected to produce these accounts on the grounds stated in the affidavit in question, namely, that they were privileged. The evidences as to the nature of these documents consisted of affidavits of plaintiffs' solicitor, filed the 12th of November, 1897, and the affidavit of plaintiffs' solicitor filed the 12th of November, 1897, and two other affidavits, namely, those of Mr. Crossman, an accountant, filed same date, and of Mr. Locke, the managing clerk of plaintiffs' solicitor, filed the 7th of May, 1898. From these it appeared that the action of *In re Goldstone, Goldstone* v. *Goldstone*, referred to in the order of the 18th of July, 1898, was brought against Mrs. Goldstone and the trustee in her bankruptcy for administration of the intestate's estate and to recover from the trustees', property alleged to form part of the same.

Mrs. Goldstone was unable to furnish proper accounts of her husband's estate, but made an affidavit stating what the estate consisted of at the time of his death.

Mr. Crossman was employed by the plaintiffs' solicitor to trace the estate, and he embodied the results of his inquiries in the accounts mentioned in the affidavit of the 23rd of June, 1898.

Mrs. Goldstone was subsequently examined before an examiner, and those accounts were produced to her and stated by her to be correct and made an exhibit to her depositions. After this admission had been made the trustee in the bankruptcy proposed a compromise, and the plaintiffs obtained the sanction of the court to the compromise on an *ex parte* application on which an order of the 13th of November, 1897, was made in the present action.

The depositions of Mrs. Goldstone and the exhibits thereto were entered as read on this order.

On the 16th of November, 1897, leave was given to bring the present action.

It appeared from the evidence that Mr. Crossman's investigations had been made with a view to the present action as well as the former action.

Jenkins, Q.C., and *J. Rutherford*, for the motion.—These accounts were prepared for the plaintiffs' solicitor and are privileged documents. Their use at the former trial does not waive the privilege: *Reg.* v. *Hawkins*, 2 Car. & Kir. 823; *Learoyd* v. *Halifax Joint-Stock Banking Co.*, 41 W. R. 344, [1893] 1 Ch. 686; nor is it necessary that they should have been prepared exclusively for this action; *Nordon* v. *Defries*, 30 W. R. 612, 8 Q. B. D. 508; In *In re Worswick, Robson* v. *Worswick*, 36 W. R. 685, 38 Ch. D. 370, the proceedings, of which notes had to be produced, were in open court, and in *Rawstone* v. *Corporation of Preston*, 33 W. R. 795, 30 Ch. D. 116, they were before an arbitrator. In the present case there was no publicity.

They also referred to Bray on Discovery, pp. 360, 432, 440.

Upjohn, Q.C., and *Kirby, contra.*—The documents have been published to the world, and the case falls within the rule established by *Nicholl* v. *Jones*, 13 W. R. 451, 2 Hem. & M. 588.

Jenkins, Q.C., in reply, cited *Lyell* v. *Kennedy*, 30 W. R. 493, 20 Ch. D. 484, and *The Palermo*, 32 W. R. 403, 9 P. D. 6.

Cur. adv. vult.

Oct. 27.—STIRLING, J., after stating the facts continued: The question is whether the plaintiffs are entitled to object to produce (1) the accounts prepared by Mr. Crossman, and (2) the copies in their possession of the depositions of Mrs. Goldstone.

The first of these questions is by far the more important, as it is said that the accounts prepared by Mr. Crossman contain the whole case of the plaintiffs.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

and the question is one of some nicety. The ground on which production is resisted on behalf of the plaintiffs is that the documents are privileged. It must be taken that the accounts were in the first instance privileged, for they were prepared at the instance of the plaintiffs' professional adviser with a view to a former litigation after that litigation had commenced. That alone would be sufficient to confer privilege even if they had not been prepared also with a view to the present litigation. On this *Walsham* v. *Stainton*, 12 W. R. 199, 2 Hem. & M. 1, is a direct authority. It has also been held that, as a general rule, a document once privileged is always privileged. The leading cases in this are *Bullock* v. *Corry*, 26 W. R. 330, 3 Q. B. D. 356; *Pearce* v. *Foster*, 33 W. R. 919, 15 Q. B. D. 114, and the very recent case of *Calcraft* v. *Guest*, 46 W. R. 420, [1898] 1 Q. B. 759, at p. 761, where the Master of the Rolls makes these remarks: "I take it that as a general rule one may say once privileged always privileged. I do not mean that the privilege cannot be waived, but that the mere fact that documents used in a previous litigation are held and have not been destroyed, does not amount to a waiver of the privilege."

These decisions rest on the necessity of allowing full and free communication for the purposes of litigation not only between a solicitor and his client, but between the solicitor and persons whose assistance he requires or with whom he communicates in order to enable him properly to conduct the litigation; as to this see *Bullock* v. *Corry* and *Pearce* v. *Foster*. On the other hand, it has been decided that notes of proceedings in open court—*Nicholl* v. *Jones*, *In re Worswick*, *Robson* v. *Worswick* — or before an arbitrator — *Rawstone* v. *Preston Corporation*, — are as a rule not privileged but liable to be produced. These decisions proceed on the ground, as I understand them, that the administration of justice in this country is a matter of public interest and to be conducted (again as a general rule) in public, and consequently that there can be nothing privileged or confidential which passes in open court. If, then, the proceedings in the former action had taken place in open court, and if the plaintiffs had in their possession a shorthand writer's note of them, it would seem to me that such a note must be produced. That, however, does not completely answer the question with which I have to deal. Such a note would only show that a particular document had been placed in the witness's hands and had been admitted to be correct, but the contents of the document would not appear. In the present case the document was only made an exhibit and is not on the file. The contents did not appear on the examiner's notes. Beyond what I have stated, no use was ever made of the document in the former action except that it was read in the order of the 13th of November, 1897. Now it appears to me that this order was made in circumstances which constitute it an exception to the rule established by *Nicholl* v. *Jones*. It was an *ex parte* order made in chambers; and the document was obviously brought before the judge to enable him to determine whether the compromise was proper to be approved on behalf of the infants. Such use was not a proper disclosure, but was in its nature confidential, and cannot affect the question I have to decide. It seems to me that the case stands very near in the same position as if on a trial in open court, after a document had been put in a witness's hands and its contents had been admitted to be true, but before it had been read, a compromise had been arranged between counsel. It appears to me that the document in question was never effectually made public, and that the use made of it does not amount to a waiver of the privilege. The particular point does not appear to be covered by authority, but the case which comes nearest to it is *North Australian Territory Co.* v. *Goldsborough, Mort, & Co.*, 41 W. R. 501, [1893] 2 Ch. 381. There an action was brought by a company in liquidation. In the course of the winding up and after the commencement of the action some of the directors and officers of the company were examined under section 115 of the Companies Act, 1862, and their depositions duly taken. These depositions had not been filed. In the action upon the cross-examination, under commission, on behalf of the plaintiffs of one of the persons examined under section 115, he was questioned as to certain answers given by himself and other persons who had been examined under section 115, and those answers were read to him from the depositions and admitted to be correct. Of course so much as was read of these depositions got on the notes, and the application there was for the production of the rest of the documents. The present Master of the Rolls says: "The argument of the defendants practically comes to this: that because use was made of these depositions by the plaintiff's counsel in Melbourne, the defendants are entitled to see them. On what principle are they so entitled? It is said that they are entitled because these depositions ought to have been scheduled in the plaintiff's affidavit of documents as documents in their possession relating to matters in dispute in the action; but, if they had been scheduled, privilege would as a matter of course have been claimed for them, and the defendants would never have seen them; and it would not be fair to the plaintiffs if we were to treat these depositions as documents in their possession unprotected by a claim of privilege."

There remains the question as to the copy of the depositions, a much smaller question, and one which but for the existence of the other would not have been brought before me. These copies of depositions simply constitute a note of what took place before the officer of the court in the course of hostile litigation. The depositions are on the file of the court, and may be inspected by any person who shows that he has proper grounds for so doing: see Central Office Practice Rules (Annual Practice, 1897, p. 1229). On such an occasion I take it that no question as to privilege could be raised any more than in the analogous case of documents filed in lunacy, as to which see *In re H. W. Strachan*, 43 W. R. 369, [1895] 1 Ch. 439.

The depositions have been filed in the usual way. They seem to me to have become *publici juris* within the meaning of the decisions in *Nicholl* v. *Jones* and the cases which have followed it, and to be liable to production accordingly.

Some reliance was placed on *The Palermo*, but there the depositions of which copies were sought were not *publici juris*. I think, therefore, that the order ought to be discharged only so far as it directs the production of the accounts. In this case effect is given to both lines of decision; what has become public is to be produced, while that which has not and is in its original nature privileged is to be treated as remaining privileged. The costs of the present application will be costs in the action.

Solicitors, *F. Venn & Co.*, for *J. C. Parkinson*, Liverpool; *Rooke & Sons*, for *Orford & Sons*, Manchester.

Chan. Div. } Romer, J. } Oct. 25; Nov. 4.

FRIARY, HOLROYD, & CO. v. SINGLETON. (a.)

Landlord and tenant — Lease—Option to purchase the freehold—If lessee or his assigns should be desirous of purchasing—Equitable assignee.

An equitable assignee of the legal owner of a lease is not an assign within the meaning of a covenant therein giving a right of pre-emption of the freehold to the lessee, his executors, administrators, or assigns, and therefore is not entitled in equity, as against the lessor or his assigns, to enforce such right of pre-emption.

Cox *v.* Bishop, 5 *W. R.* 437, 8 *De G. M. & G.* 815, *followed.*

Walsh *v.* Lonsdale, 31 *W. R.* 109, 21 *Ch. D.* 9, *distinguished.*

Action.

By an indenture of lease dated the 24th of June, 1880, and made between one Stone, of the one part, and one Master, of the other part, the White Lion beerhouse at Aldershot was demised to Master for twenty-one years from the 25th of December, 1876, at the yearly rent and subject to the lessee's covenants and conditions therein mentioned, together with an option to purchase the freehold, the terms of which were as follows: And Stone thereby covenanted with Master that if Master, his executors, administrators, or assigns, should at any time during the said term be desirous of purchasing the freehold of the said premises at the price of £450, and of such intention should give six months' notice in writing to Stone, his heirs or assigns, he or they would convey such freehold to Master, his heirs and assigns upon payment of such sum.

Later, in the same year the freehold of the above premises was conveyed to the defendant, a widow, and now of advanced age, subject to the said lease.

The plaintiffs were the successors of a company (here called the old company), to which the Friary Brewery and the freehold and leasehold properties used in connection therewith (including the said leasehold premises), and any right of pre-emption of any of the leasehold hereditaments, were conveyed and assigned by Master by indenture dated in 1889. The old company continued business down to a date in the year 1895, but was not finally dissolved until after the above action was commenced.

By an agreement dated the 25th of June, 1895, and made between the old company by its liquidator, of the one part, and the plaintiffs, of the other part, the old company agreed to sell and the plaintiffs agreed to purchase all the undertakings and the assets of the old company, including the benefit of all business and other rights held by or on behalf of the old company, and all rights of action and property of every description belonging to or held on behalf of the old company. There never was, however, either then or subsequently, a legal assignment to the plaintiffs of the lease with the benefit of the covenant containing the option.

On the 14th of December, 1896, the secretary of the plaintiffs wrote to the defendant's son on her behalf: "*Re* White Lion, Aldershot. Will you kindly inform me if you are willing that my company should complete this purchase at once, instead of waiting till next year?" and the plaintiffs relied on this letter as being a sufficient notice of their intention to exercise the option given by the said lease.

At this time, and during much of the correspondence which followed, the defendant's son, who acted for her, was, it appeared, under the impression that the defendant was bound to sell to the plaintiffs, but as soon as the defendant's solicitors were informed that no notice (except the above letter) had been given by the plaintiffs they contended that the defendant was not bound by what had passed. It appeared, moreover, that down to the trial of the above action the defendant and her son were not aware of the dissolution of the old company and the equitable assignment of the premises to the plaintiffs.

The present action was for specific performance of the contract alleged to be constituted by service of notice under the option.

Farwell, Q.C., and *Fletcher* for the plaintiffs.—The plaintiffs, as equitable assignees under the agreement of the 25th of June, 1895, of the lease, were entitled to exercise the option. Their rights were the same since the Judicature Act as if there had been a legal assignment of the lease with the benefit of the covenant: *Walsh* v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9. The plaintiffs have exercised the option, and on the facts the defendant is estopped in equity from denying such exercise: *Hughes* v. *Metropolitan Railway Co.*, 25 W. R. 680, 2 App. Cas. 439.

Neville, Q.C., and *Bristowe*, for the defendant.—The plaintiffs have to bring themselves within the legal terms of the legal covenant in order to maintain this action. *Cox* v. *Bishop*, 5 W. R. 437, 8 De G. M. & G 815, shows that an equitable assignee is in quite a different position from a legal assignee of a lease, and that case is still law: see Woodfall, Landlord and Tenant, 16th ed., ch. 7, s. 5, sub-section (*a*), p. 269. The plaintiffs being in possession does not help them. Possession can make no difference *quoad* legal rights. The word "assigns" in the covenant means legal assigns. Otherwise there would be no privity of contract between the lessor and the assigns. *Hughes* v. *Metropolitan Railway Co.* was a case of forfeiture, and the principle on which the notice to repair was held to be suspended under the circumstances of that case does not apply here. The exercise of a legal option has never been dealt with differently in equity to what it is at law. The possession of the plaintiffs not being referable to the alleged contract is not part performance—*Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467—and nothing else is.

Farwell replied.

Nov. 4.—ROMER, J.—The plaintiffs contend that the letter of the 14th of December, 1896, was a good notice under the lease to purchase the freehold at the end of the term. But, apart from any question arising on the wording of that letter, it appeared on the evidence when the plaintiffs came to prove their title that at the time the letter was written, and up to the commencement of this action, they were not the legal assignees of the lease, but only the equitable assignees of the legal owners. They were not, therefore, in my opinion, the persons entitled under the lease as against the lessor to give the notice, and the lessor did not become bound under the lease on receipt of that letter to sell or assure the freehold to the plaintiffs. The word "assigns" in the option to purchase in the lease given to the lessee, his executors, administrators, and assigns, had, in my opinion, the same meaning as the word "assigns" added to the lessee's name in the covenants entered into by and with him in the lease. In other words, it meant the persons entitled to the term as between them and the lessor, and bound by and entitled to the benefit of the covenants entered

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

into by the lessee and lessor respectively which ran with the land demised. The plaintiffs, though in possession, could not have been sued at law by the lessor on the lessee's covenants, nor could the plaintiffs have sued the lessor's assigns on his covenants in the lease. Nor would the lessor or his assigns have any right in equity to sue the plaintiffs on the lessee's covenants by reason of the plaintiffs being equitable assignees of the lessee's term and in possession: see *Cox* v. *Bishop*, and *Moore* v. *Greg*, 2 De G. & Sm. 304, decided by Knight-Bruce, V.C., and affirmed by Lord Cottenham, 2 Ph. 717, who at the same time pointed out that the case of *Lucas* v. *Comerford*, 1 Ves. jun. 235, 3 Bro. C. C. 166, was not a binding authority. The case of *Walsh* v. *Lonsdale* has no bearing on the case now before me. That was a case concerning the rights of two persons under one agreement, whereby one agreed to grant a lease to the other, and possession had been taken on the footing of the agreement, and it was held that the tenant in possession must be held as between him and the landlord to hold on the terms of the agreement as if the lease had been granted. In my judgment, therefore, in the case before me, no valid notice under the lease was given, and the fact that the company which contracted to sell the term to the plaintiffs has been dissolved and cannot now assign need not be considered, for that dissolution only took place after this action was commenced.

Nor can I find that the defendant is in any way estopped or prevented from taking the point that the plaintiffs were not entitled to give the notice to exercise the option under the lease. As a matter of fact, it appears that when the letter of the 14th of December, 1896, was sent, and down to the trial of this action, the defendant and her son and agent were wholly unaware that the plaintiffs were not the same company as that now dissolved, or that the dissolved company, the then legal owner of the term, had equitably assigned to the plaintiffs or was not still in possession of the premises. And, further, it appears that when the letter of the 14th of December, 1896, was received, and during great part of the subsequent correspondence that ensued, the defendant's son, who acted for her, was under the impression that she was bound to sell to the plaintiffs, and immediately her solicitors were informed that no notice under the lease had been given they at once took up the position that the defendant was in no wise bound by what had passed. It follows that the plaintiffs cannot assert as against the defendant that any due or sufficient notice under the lease was given. This being so, it is not disputed that the plaintiffs' case must fail, for apart from a contract made by service of notice under the option, no contract—certainly no contract sufficiently set forth in writing—can be established as against the defendant. It follows that the action fails, and I can see no sufficient reason for depriving the defendant of costs, as I think the wording of the letter of the 14th of December would tend to lead the defendant's son to think that the plaintiffs were already in the position of lessees who had given a valid notice under the lease, and that the only question was whether the purchase should be completed at an earlier date than that fixed by the notice.

Judgment for the defendant.

Solicitors, *Peacock & Goddard*, for *Capron & Sparkes*, Guildford; *Ingoldby & Adkin*.

Q. B. Div. (Lord Russell of Killowen, C.J., and Wills, J.) — Nov. 1, 2, 3.

WILLIAMSON *v.* NORRIS. (*a.*)

Licensing law — Sale of intoxicating liquor without licence—Sale by innocent servant of unlicensed person —House of Commons—Exemption—Licensing Act, 1872 (35 *&* 36 *Vict. c.* 94), *ss.* 3, 72.

An attendant at a refreshment bar situate within the precincts of the House of Commons, acting under the orders of the Kitchen Committee of that House, whose servant he was, supplied a person (not a member of the House) with intoxicating liquor, and received the price on behalf of the Kitchen Committee.

Held, that he had not committed the offence under section 3 *of the Licensing Act,* 1872, *of selling intoxicating liquor without being duly licensed.*

Semble, *the Houses of Parliament are not exempt from the provisions of the Licensing Act,* 1872, *so as to enable liquor legally to be sold there without a license.*

Case stated by a metropolitan police magistrate.

An information was laid by the appellant charging the respondent with selling by retail intoxicating liquor without being duly licensed to sell the same contrary to section 3 of the Licensing Act, 1872. The facts were as follows: On the 2nd of May, about 8 p.m., the appellant, entering Westminster Palace in the usual way, and passing through St. Stephen's Hall, proceeded to the bar at the foot of the committee-room staircase, and called for a glass of brandy and soda. This was supplied to him by the respondent, who accepted half-a-crown in payment therefor, returning eighteen pence to the appellant in change. At the same time two other persons were supplied with two glasses of whisky and Apollinaris water by the respondent, who accepted money from them in payment. The respondent, in so acting, was acting as the servant of the House of Commons and in obedience to orders which he had received on their behalf through the Kitchen Committee of the said house, by whom he was paid. The liquor which he delivered was the property of the House of Commons and paid for by the said Kitchen Committee, there being an annual vote of the House in aid of the refreshment department. The money which he received he received for and on behalf of the Kitchen Committee, above the bar being a tariff showing the prices of various intoxicating liquors. The appellant was not, when the liquor was delivered to him, a member of either House of Parliament. The Palace of Westminster is not a place licensed for the sale of intoxicating liquor.

It was contended before the magistrate on behalf of the respondent that the sale of liquor in this case was a sale by the House of Commons and not by the respondent, and also that the provisions of the Licensing Act, 1872, did not apply to sales of intoxicating liquor in the Palace of Westminster. The magistrate held that the fact that the respondent was a servant would be no defence to the charge of selling liquor made against him, if the sale was illegal under the said Act; but that section 3 of the Act and the other provisions of the Act did not apply within the Palace of Westminster to sales of liquor by the House of Commons. The questions of law for the court were—(1) whether there was a sale of intoxicating liquor by the respondent within the meaning of section 3 of the Licensing Act, 1872; (2) whether section 3 and the other provisions of that Act apply within the Palace of Westminster; (3) whether,

(*a.*) Reported by F. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

under the circumstances, the respondent was guilty of the offence charged.

Section 3 of the Licensing Act, 1872, enacts that "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same or at any place where he is not authorised by his license to sell the same" and goes on to impose penalties for breaches of that enactment.

Asquith, Q.C. (*H. L. Stephen* with him), for the appellant.—The case falls *primâ facie* within the words of section 3 of the Licensing Act, 1872. Section 72 of the same Act contains a list of exemptions from the Act which is intended to be an exhaustive list; it does not include an exemption in favour of the Houses of Parliament, and there is no reason why the Houses of Parliament should be exempt, at least in respect of sales of liquor to persons not members of those Houses. The argument that the sale of liquor in the Palace of Westminster could not be carried on in accordance with the provisions of the Licensing Acts leads not to the conclusion that the Acts do not apply within those precincts but to the conclusion that the sale of liquor there to the general public cannot be carried on without special legislation. The fact that the respondent was a servant only is no defence. The words "without being duly licensed" in section 3 mean "without being duly protected by a license." The offence is one in which *mens rea* is not a necessary element.

Sir R. A. Webster, A.G. (*Henry Sutton* and *Horace Avory* with him), for the respondent.—The whole scheme of the Licensing Act is wholly inapplicable to the Houses of Parliament and they are outside the scope of the Acts. It would be impossible to obtain a license for the Houses of Parliament, and if such a license were obtained a number of provisions would be brought into operation with most absurd consequences. [He then referred to the following, amongst other sections of the Licensing Act, 1872, s. 11 (names of licensed persons to be affixed to premises), s. 18 (power to exclude drunkards from licensed premises), s. 23 (power of justices to close licensed premises in case of riot), s. 25 (penalty on persons found on premises during closing hours), ss. 45 to 47 (qualification, structure, and annual value of premises), and to the Licensing Act, 1874, s. 3 (as to closing hours), and ss. 16, 17 (as to powers of entry on premises by constables and search warrants)]. The sale of liquor in the precincts of the Houses of Westminster was carried on at the time of the passing of these Acts as it is now, and it is impossible to suppose that the Legislature intended by these Acts to render illegal, transactions which were well known to be carried on daily in those precincts. The express savings in section 72 are not conclusive as to what bodies and places were intended to be exempted from the Acts: *London Joint-Stock Bank v. Mayor of London*, 1 C. P. D. 1, at p. 17, 24 W. R. Dig. 144, and the list of exemptions contained in that section is not exhaustive, for it does not include the well-established exemption as to the supply of liquor in a club to the members: *Graff v. Evans*, 30 W. R. 380; 8 Q. B. D. 373.

If the Acts apply and the Houses of Parliament were licensed under them, the general public would be entitled to enter the Houses and be served with liquor in certain hours, and the powers of the Houses to regulate their own proceedings would be interfered with. This cannot be done: *Bradlaugh v. Gossett*, 32 W. R. 552, 12 Q. B. D. 181.

The Palace of Westminster is the property of the Crown and is exempt from these Acts on that ground: *Reg. v. Justices of Kent*, 38 W. R. 253, 24 Q. B. D. 181.

If the Houses of Parliament are outside the scope of the Acts there is nothing to prohibit the sale of intoxicating liquor there.

Even if the Acts apply, the respondent was a mere servant of the House of Commons, and was acting under their orders. His act is the act of his masters and he cannot be held liable for a breach of the Licensing Acts. The person who is responsible under the Acts is the licensed person or the person who ought to be and is not licensed (Act of 1872, ss. 3, 62), and it cannot be suggested that a mere waiter or barman ought to be licensed. If the waiter sold liquor knowing that his master was not licensed and ought to be licensed he could be made amenable as an aider and abettor under section 5 of the Summary Jurisdiction Act, 1848.

Asquith, Q.C., in reply.—The inapplicability of the Licensing Acts to the Houses of Parliament shows that intoxicating liquor cannot be sold there at all, not that it can be sold there free from the restrictions imposed by the Acts. A servant who provides the liquor and receives the price, is the person who "sells" within the meaning of the Act, and he does so at his own risk, and if his master is not licensed he commits an offence. Servants have been held liable in similar circumstances under the penal provisions of other Acts.*

Lord RUSSELL OF KILLOWEN, C.J.—This matter comes before us on a case stated by a metropolitan police magistrate. The respondent is charged with the commission of an offence against section 3 of the Licensing Act, 1872—"for that he sold by retail intoxicating liquor without being duly licensed to sell the same." Two questions are involved—first whether any offence against the Act was committed, and, if so, secondly whether the respondent is the person who committed the offence. The case states that on the 2nd of May last the appellant (who was the complainant before the magistrate) went to the lobby of the House of Commons and there was given, on payment to the respondent of the price, a glass of brandy and soda water; and that in selling this liquor the respondent was acting as the servant of the House of Commons under the orders of their kitchen committee. On the question whether an offence was committed at all, it was argued that the Houses of Parliament are entirely outside the law which forbids the sale of intoxicating liquors without a license. In the view which we take of the other question raised it is not necessary to decide this point, but I think it right to say that I am very far from satisfied that no offence was committed by the sale of this liquor under the circumstances stated. I am not impressed by the argument that many of the provisions of the Licensing Acts are inapplicable and cannot be carried out with respect to the House of Commons or the House of Lords. It by no means follows that liquor can be sold without a license in those Houses. The Act of 1872 begins with a sweeping prohibition, and it contains a lengthy list of exceptions, which does not include the Houses of Parliament. I am far from satisfied that an offence was not committed by the person responsible for the sale; and even if there were less doubt than I feel, it is obviously convenient that an appeal should be made to Parliament to regularise by legislation what is taking place, if it is necessary to have these places for the sale of liquor in the House of Commons for general convenience.

But did this respondent commit any offence? If the provisions of the Act be carefully examined—"no person shall sell or expose for sale by retail any intoxi-

* See *Hotchin v. Hindmarsh*, 39 W. R. 607, [1891] 2 Q. B. 181.

cating liquor without being duly licensed to sell the same"—it is impossible not to see that to bring the act of an innocent waiter or barman within them it is necessary to put a rather strong gloss on the words. The Act contemplates a sale by a person who ought to be licensed and is not licensed; of course, neither a waiter nor a barman ever is licensed, and what is struck at is the sale by the person who is in the position of master to the waiter or barman, and who receives the profits of the sale. It is said that the words "without being duly licensed" ought to be read "without being protected by a license," but it may well be that proof of the act of sale by an unlicensed person will be a *primâ facie* case of the commission of an offence by him, and it is probable that it would lie on him to show that he was a mere servant. But when once it appears that he was a mere servant, and not knowingly accessory to the commission of the offence, he is not guilty of an offence against the Act. If he were accessory, he could, of course, be convicted and punished under 11 & 12 Vict. c. 43, s. 5. There are cases in which the Legislature, thinking that the law would not have full efficacy without such provisions, has provided that a man without guilty knowledge, and without carelessness on his part, shall be guilty of an offence; but these are exceptions to the rule that *mens rea* is a necessary ingredient in crime. In the present case the facts show that this man was appointed by responsible members of the House of Commons, and was under the *ægis* of that responsible body. The law could not contemplate it as just, that by obeying their orders he should make himself guilty of an offence. If there was an offence here, it was committed by those who, as masters or principals, authorized the commission of the offence. I therefore arrive at the same conclusion as the learned magistrate, though upon different grounds.

WILLS, J.—I am of the same opinion. I will only add that the argument of the Attorney-General involves the fallacy which often arises when, upon a question of the construction of an agreement, it is said that such and such a result could not have been contemplated by the parties. Such an argument cannot have effect except within very narrow limits, for what is to be looked at is what the parties have said in their agreement. So here the Act of Parliament is clear, and it is no argument to say that it has results so strange that if the framers of it had foreseen them they would not be likely to have adopted the Act. I share to the full my lord's doubts as to whether an offence was not committed in this case; but I agree with him that the words "without being duly licensed" cannot be extended so as to mean "without being duly authorised by a person having a license."

Appeal dismissed.

Solicitors for the appellant, *Todd, Dennes, & Lamb.*

Solicitor for the respondent, *The Treasury Solicitor.*

Q. B. Div.
(Wills and Channell, JJ.) Oct. 29.

MORRIS (*Appellant*) v. DUNCAN (*Respondent*). (*a*.)

Justices—Summary proceedings—Commencement of proceedings—Limitation of time—Salmon Fisheries Act, 1873 (36 & 37 *Vict.* c. 71), *s.* 62—*Summary Jurisdiction Act,* 1848 (*Jervis' Act*) (11 & 12 *Vict.* c. 43), *s.* 11.

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Section 62 *of the Salmon Fisheries Act,* 1873, *enacts that all penalties imposed by the Salmon Fisheries Acts "may be recovered within six months after the commission of the offence before two justices" in manner directed by the Summary Jurisdiction Act,* 1848.

Section 11 *of the latter Act provides that, where no time is specially limited for making a complaint or laying an information on the Act relating to each particular case, the complaint shall be made and the information laid within six months from when the matter arose.*

Held, that section 11 *of Jervis' Act applied to proceedings for the recovery of a penalty under section* 62 *of the Salmon Fisheries Act,* 1873.

Special case stated by two justices for the county of Durham in petty sessions.

On the 29th of April, 1898, an information was preferred against the respondent by the appellant, an officer of the Fishmongers' Company, charging the respondent with unlawfully having in his possession on the 9th of November, 1897, an unseasonable salmon contrary to section 14 of the provisions of the Salmon Fisheries Act, 1861. The summons was issued on the 29th of April, 1898, and was served on the respondent on the 3rd of May. At the hearing on the 11th of May it was proved to the satisfaction of the justices that the offence had been committed, but the respondent's solicitor took the objection that notwithstanding that the information had been laid by the appellant within six months from the date of the offence the justices could not convict, inasmuch as it was provided by section 62 of the Salmon Fisheries Act, 1873, that "all penalties imposed by the Salmon Fisheries Acts, 1861 to 1873, or by any law made in pursuance of this Act, and all sums of money, costs, and expenses by the said Acts, or either of them, directed to be recovered in a summary manner, may be recovered within six months after the commission of the offence before two justices in manner directed" by the Summary Jurisdiction Act, 1848. The appellant's solicitor contended that it was sufficient that the information had been laid and the summons issued and served within the six months, and that it was not necessary for the conviction to take place within the six months. The justices upheld the respondent's contention and dismissed the information subject to this case.

The Summary Jurisdiction Act, 1848 (Jervis' Act), s. 11, provides "that in all cases where no time is already or shall be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

Lawson Walton, Q.C. (*Travers Humphreys* with him), for the appellant.—The use of the word "recovered" in section 62 of the Salmon Fishery Act, 1873, is ambiguous, for it may mean either that the proceedings must be commenced within six months of the commission of the offence or that the judgment of the court must be obtained within that period. The former is the correct meaning of the word, otherwise the enforcement of the Act might be defeated if an adjournment of the hearing were rendered necessary by the illness of a magistrate or some other cause. But if this is not so, then section 62 contains no special limit of time for making a complaint, and therefore the section must be read with section 11 of Jervis's Act, and it is sufficient if the complaint be made within six months of the commission of the offence. A similar question was raised in *Reg.* v.

Mainwaring, 6 W. R. 594, 27 L. J. M. C. 278, but was not decided.

No counsel appeared for the respondent.

WILLS, J.—I regret that we must decide this case without having had the benefit of an argument for the respondent, but the question, though an important one, lies within a narrow compass, and the contentions which would have been put forward by counsel for the respondent, if he had been represented by one, are sufficiently obvious to enable us to deal with the matter. I do not agree with the argument of the appellant's counsel that the term "recovery" taken by itself is ambiguous. I think that the term "recovery" when applied to a sum of money, a penalty, or a debt means the obtaining of the judgment of the court, upon which the sum of money, penalty, or debt, becomes payable. That being so, the limitation provided by the Salmon Fishery Act, 1873, applies to the period of recovery, and not to the commencement of the proceedings. Apart from Jervis' Act, a summons might be issued on the last day of the six months, and if it were possible to have it heard on the same day it would still be in time. On the other hand, in order to get a recovery within the period of six months, it might be necessary to commence proceedings at some time, varying according to the practice of the particular petty sessions which had to deal with the case, before the expiration of the six months. That seems to show that the period of limitation given in the Salmon Fishery Act, 1873, is not a definite one, and is not what is meant in Jervis' Act by a "time specially limited for making a complaint or laying an information." I think that section 11 of Jervis's Act means that in all cases where there is no Act of Parliament which definitely says that the time for making the complaint or laying the information must be within a specified and defined period, the time within which the proceedings may be commenced shall be six months. There does not seem to me to be any possible injustice in such a construction of section 11, and such a construction is really necessary in order to give full and proper effect to the language of that section. One important object of Jervis' Act was to secure uniformity of procedure in all matters not specially provided for in the particular Act of Parliament. I am of opinion, therefore, that our judgment should be for the appellant, and that the case should be remitted to the magistrate to be heard upon the merits.

CHANNELL, J.—I am of the same opinion. I do not think that there is any indication in section 62 of the Salmon Fishery Act, 1873, of an intention to impose a different limit of time from that imposed by section 11 of Jervis' Act. The main object of section 62 was no doubt to authorize proceedings before justices. It is a repetition of the first part of section 35 of the Salmon Fishery Act, 1861, which provided the tribunal before whom penalties should be recovered. The first words of section 62 are identical with those of section 35 of the earlier Act, the main object of section 62 being also, no doubt, to provide a tribunal. In my opinion, section 62 means that the penalty may be recovered before two justices in the manner provided by Jervis' Act—that is to say, within six months after the commission of the offence, and that consequently the complaint may be made within that period.

Appeal allowed.

Solicitor for appellant, *C. O. Humphreys.*

House of Lords.

From C. A. (England). July 12, 1898.

LORD WOLVERTON v. ATTORNEY-GENERAL. (a.)

Inland revenue — Succession duty — Alienation—New succession—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 18.

Under the provisions of the will of the second Baron Wolverton, who died in 1887, *the whole of his residuary estate, subject to the widow's life interest, was held in trust for the person who might, at the time of the widow's death, answer the description of the testator's right heir at common law. At the testator's death his nieces became his co-heiresses, and the appellant, a nephew, succeeded to the title.*

Under a deed of arrangement, dated the 31*st of December*, 1888, *the co-heiresses under this will and the appellant assigned their contingent interests, and the widow her life interest, in the testator's residuary estate to trustees upon trust to pay thereout, upon Lady Wolverton's decease, an annuity of* £15,000 *to the appellant, and certain accumulations and payments were also provided for.*

The testator's widow died on the 4*th of January*, 1894, *the co-heiresses surviving her, when the Commissioners of Inland Revenue received legacy duty at the rate of* 3 *per cent. on the whole of the testator's residuary estate. In addition the commissioners claimed succession duty upon the annuity of* £15,000 *at* 6½ *per cent. from the appellant as upon a succession coming to the appellant from the testator's widow or from the co-heiresses, or from both.*

Held, that no new succession was created in the annuity of £15,000 *to which the appellant became entitled, and that he was not liable to duty.*

Decision of the Court of Appeal (45 *W. R.* 236, [1897] 1 *Q. B.* 231) *reversed.*

Under a deed of arrangement dated the 31st of December, 1888, Lady Wolverton gave up her life interest in certain bank shares and the co-heiresses of the second Baron Wolverton and the appellant gave up their rights to the whole residue of his estate in return for the certain benefits, immediate and future, provided for by the indenture. The arrangement and effect of the deed and the whole circumstances are dealt with in their lordships' judgments.

The commissioners claimed succession duty on the annuity of £15,000 given to the present appellant and provided for by the above indenture as upon a succession coming to the appellant from Lady Wolverton and the co-heiresses, or both, and filed an information claiming the duty.

The Divisional Court and the Court of Appeal held that succession duty became payable upon the death of Lady Wolverton in respect of the value of the annuity of £15,000 (45 W. R. 236).

The appellant appealed.

Cozens-Hardy, Q.C., and *Eady, Q.C.* (*Danckwerts* with them).—Having regard to the Succession Duty Act, 1853, ss. 2, 15, 18, the appellant is not liable to pay any succession duty. But for the deed he would not take. It was not possible to say who would take under the residuary clause. Legacy duty at 3 per cent. was paid in respect of the whole of the residuary estate. There was no new succession; the assignee is only liable to the same extent as the assignor. The effect of these deeds was that the co-heiresses

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

assigned the residuary estate, &c., and therefore the appellant takes this property as assignee.

They referred to Hanson, pp. 538, 641.

The cases are dealt with in the judgment of Lord Herschell.

Sir R. Webster, A.G., and *Sir R. Finlay, S.G.* (*Vaughan Hawkins* with them), for the respondent.—The deed created a new succession, and therefore the appellant is liable. This interest is created out of the interests of the co-heiresses. The payment of legacy duty by the co-heiresses does not relieve the appellant, and section 15 does not apply.

They referred to *Attorney-General* v. *Mitchell*, 29 W. R 683, 6 Q. B. D. 548; *In re Jenkinson*, 5 W. R. 301, 24 Beav. 64; *Braybrooke* v. *Attorney-General*, 9 W. R. 601, 9 H. L. Cas. 150; *Attorney-General* v. *Floyer*, 10 W. R. 762, 9 H. L. Cas. 477; *Attorney-General* v. *Yelverton*, 7 H. & N. 306, 10 W. R. C. L. Dig. 85; *Floyer* v. *Bankes*, 12 W. R. 28, 3 De G. J. & S. 306; and *Fryer* v. *Morland*, 25 W. R. 21, 3 Ch. D. 675.

The House took time for consideration.

July 12.—Earl of HALSBURY, L.C.—George Grenfell, second Baron Wolverton, died on the 6th of November, 1887. Under the provisions of his will, and in the events which happened, five nieces, described as the co-heiresses, became entitled to his residuary estate upon the death of Lady Wolverton. That lady died on the 4th of January, 1894, and upon her death legacy duty at the rate of 3 per cent. per annum was paid upon the whole residue of the testator's estate.

On the 31st of December, 1888, a deed had been executed by, among others, the five nieces, the late Lady Wolverton, and the present Lord Wolverton. By that deed the present Lord Wolverton, the appellant here, became entitled to an annuity of £15,000, and the question here is whether he is liable to pay succession duty upon this annuity.

The claim of the Crown is based upon the annuity being liable to duty as upon a succession coming to the appellant from the late Lady Wolverton, or the five nieces, or from both, and the sum of money in question is said to come within the express language of section 2 of the Succession Duty Act, 1853. The words of the section are as follows: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession"; "and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Before dealing with the particular question now before your lordships it will not be inappropriate to say a word or two upon the apparent scope and object of the section which I have quoted. What it points to is the disposition of property by reason whereof a person becomes beneficially entitled upon the death of any person. The disposition may be past or future: it may take effect immediately or after an interval; it may be either certainly or contingently; it may be either originally or by way of substitutive limitation, but with all these safeguards against evasion it must be a disposition by reason whereof a person has become beneficially entitled upon the death of some person. If a person were to confer by a deed of gift *inter vivos* his own existing property it would seem impossible to contend that this is a new succession. It is simply a transfer *inter vivos* of one person's property to another, and is not within the scope of the Act at all. Whether the succession be operated by disposition or devolution it must be a succession upon death.

Now, I am unable to understand how the annuity created under the deed to which I have referred is a succession at all. If it is a gift *inter vivos*, deriving no force from the death of anyone, I do not find any word in the section which make it chargeable with duty. If chargeable, a voluntary gift of it by him, or any part of it during his own life, would equally make such gift chargeable with duty, and the whole nature of the legislation aimed at, succession upon death, would be altered into taxation upon transfer of any property by gifts *inter vivos*, and this to any extent of remoteness, so that each donee, though *inter vivos*, would become in turn the predecessor, within the meaning of the section, to each subsequent donee of the same property, although no new death had intervened at all, but simply a change of proprietorship.

It is obvious to ask in this case whence it is that Lord Wolverton's interest in the annuity is derived. The Crown contends that it is derived from the nieces, or from Lady Wolverton, or from both. Let us take them separately. Suppose these ladies had waited to make the deed in question till the death of Lady Wolverton, and had thus become entitled in possession to the whole of the late Lord Wolverton's residuary estate, would they then have been entitled to hand over all or a part of what had become absolutely their own? The element of succession upon death would be entirely wanting, and though the word "succession" has a technical definition in the Act, the whole scope and meaning of the Act points to a distinction between alienation between living persons and a succession which death has opened to a successor.

It seems to me that if this case can be maintained, then if A. inherits and pays his succession duty, every donee from A. down to Z. must pay it also. Such a tax would be both unreasonable in itself and impossible of collection. The succession to property upon a death is one thing, the free gift *inter vivos* is a totally different thing.

I am aware that the Crown repudiated this view, but it is not permissible to repudiate the logical conclusion of a contention by saying that the Crown would not insist upon such a right. It will not do to throw over consequences which may reduce the argument to an absurdity. The question here is the true construction of the Act. I am unable to deal with it because I am afraid that I do not understand the suggestion, of one succession being substituted for another or how in this case it would arise.

The present Lord Wolverton got nothing upon the death either of the second Lord Wolverton or by the death of Lady Wolverton. The utmost that can be said is that upon the occurrence of the death of Lady Wolverton the present Lord Wolverton's donors obtained the power to render effectual a gift which they had *inter vivos* agreed to give him before the death took place. "Succession" in the Act means not the act of succeeding; but property chargeable with duty under the Act, and, as Baron Bramwell pointed out in *In re Peyton*, 9 W. R. 838, 7 H. & N. 296, property may escape the tax for all time by always passing *inter vivos*.

I am of opinion that the annuity given by the deed of the 31st of December, 1888, is not within section 2 of the Act at all. Lord Wolverton certainly obtained nothing by Lady Wolverton's death. She dealt with her own life interest in the property during her life.

I am not, of course, suggesting that the transfer *inter vivos* of property, the right to which arises upon the death, can escape the duty by its being transferred to a person other than the original successor. The succession once created, the duty must be paid for it, but I can find no warrant in the statute for a new succession duty being leviable upon the same property or money where no new death has created the right to such succession.

I have hitherto dealt, and only dealt with the second section itself. It is that section which imposes the tax. But the fifteenth section, which is supplementary to it, to my mind, places the matter beyond all possibility of doubt. The framers of the Act contemplated the case of the original person intended to succeed under the disposition or devolution spoken of in section 2 transferring the interest to some other person, and I think the effect of that part of section 15 with which we are dealing, is that the person to whom such an interest has been transferred shall stand in the shoes of the person originally entitled, and shall be chargeable with duty at the same time and at the same rate as the person originally entitled would have been chargeable if the interest had not been so transferred.

The succession to the sum of money which created the annuity of £15,000 was a succession rendering the successor liable to the tax, but the five nieces were the "successor," and undoubtedly they would be liable to the tax if they had not already paid it in a different form. But they had paid it in the form of legacy duty, and the Succession Duty Act enacts that anyone who is charged with the duties on legacies shall not also be charged in respect of the same acquisition of property under the Succession Duty Act.

I do not think that it would be proper to rely upon the fact that the legacy duty was charged, if it were charged, erroneously—that could not estop the Crown in arguing what was the true construction of the Act. But I think that it was charged, properly—rightly.

Looking at the scheme of the Act and the application of the second, fifteenth, and eighteenth sections as applied to the facts in the present case I confess that I am unable to appreciate the difficulties which have been supposed to surround it.

It is not very intelligible to me what is intended by the argument relied on apparently so much in the court below, as to whether the annuity granted to Lord Wolverton was one annuity or two annuities. If (and it is the only intelligible meaning that I can attribute to these phrases) it is meant that the sources from which the annuity given to Lord Wolverton are two different sources, that is quite true, but what relevancy has it to the question under debate? Lady Wolverton could, and did, only affect her own life estate. On her death nothing was left to succeed to. The co-heiresses, by the annuity to Lord Wolverton, gave nothing to which a title accrued by anyone's death, and I am unable to see, therefore, what the other source from which the annuity is derived has to do with this question. Nor do I see what relation the mode in which people dispose, *inter vivos*, of what they have got already can affect the question of what is only payable upon a succession which, by the hypothesis, is not a new succession, but a disposition of property obtained under an old succession upon which duty has been paid already.

It seems to be assumed without explanation, at least so far as I can understand, that there is a new succession, and if there were a new succession, no doubt the consequence would follow. But the only point being whether there is a new succession, or not, that appears in the argument to be assumed, and then an elaborate explanation is given of the consequences that must follow from that succession. For the reasons, however, which I have given, I think that there is no new succession, and, if there is not, it is, to my mind, perfectly immaterial what, in fact, is done with the property to which a donee had already succeeded.

As to the point upon the seventeenth section, I quite concur with the Court of Appeal that the argument founded upon that section is untenable.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed, with the usual result as to costs, and I move your lordships accordingly.

Lord HERSCHELL.—The Attorney-General, by the information upon which this appeal arises, sought to have it declared that upon the death of the late Lady Wolverton succession duty at the rate of 6½ per cent. became payable in respect of the value of an annuity of £15,000 per annum, to which the defendant became entitled under a deed to which I will call attention immediately. The Divisional Court by its order made the declaration prayed, and this order was affirmed by the Court of Appeal.

The second Lord Wolverton by his will vested his property in trustees upon trust to pay, assign, and make over the whole residue of his estate to Henry Richard Glyn if he should be living at the time of the decease of the testator's wife, and if he should be then dead to stand possessed thereof upon trust for the person who should be the testator's right heir at common law for his absolute use and benefit.

Henry Richard Glyn died in the lifetime of Lady Wolverton, and at her death the five daughters of a brother of the testator, being his right heirs, became entitled to his residuary estate. These ladies were called in the argument his co-heiresses, and it will be convenient to adopt this designation.

After the death of the testator and H. R. Glyn a deed of arrangement was entered into, to which Lady Wolverton, the co-heiresses, and the present Lord Wolverton were parties. The arrangement was founded, as the deed expressed, on the circumstance that it was contrary to the supposed intention of the testator that no part of his residuary estate should devolve on the person for the time being holding the title of Baron Wolverton. It is not necessary to refer to the provisions of the deed so far as they relate to what was to be done during the lifetime of Lady Wolverton, inasmuch as in my opinion they have no bearing whatever upon the point which has to be determined. Their introduction into the argument in the courts below tended, I think, to obscure the real point, and thus perhaps assisted to bring about what I think was an erroneous conclusion. The whole residuary estate of the testator expectant on the death of Lady Wolverton became by the arrangement vested in trustees, who were, as soon as Lady Wolverton died, to pay out of the annual income thereof an annuity of £15,000 a year to Lord Wolverton, the appellant. This is the annuity in question. It may be well to add that there was a further trust in case of the death of the then Lord Wolverton to pay a like annuity to the person for the time being holding that title. I pause here to call attention to the legal position of the parties. But for the deed of arrangement the co-heiresses would, on the death of Lady Wolverton, have become entitled in possession to the whole of the residuary property left by the

testator. The only title which the appellant had to any part of it was derived from the assignment contained in the deed under which they had vested the property in trustees in part for his benefit. It is only by virtue of this assignment that he is entitled to the annuity. Legacy duty at the rate of 3 per cent. (the rate applicable to the case of nieces taking a benefit from an uncle) has been paid to the Crown in respect of the whole of the residuary estate.

There can be no doubt, as was admitted by the Crown, that the disposition by the testator by reason whereof the co-heiresses became entitled to his residuary estate upon the death of Lady Wolverton conferred a succession, and that they became "successors" and the testator their "predecessor" within the meaning of the second section of the Succession Duty Act. I take it to be equally clear that the succession came into existence as soon as the testator died, and that its creation was not postponed until the death of the tenant for life. Indeed this was admitted by the Solicitor-General as soon as his attention was called to the terms of the section making it applicable to past dispositions.

It was contended for the Crown that the disposition contained in the deed of arrangement also created a succession to a part of the same property—viz., the annuity on the death of Lady Wolverton; that the successor under this disposition was the appellant, the predecessors being his cousins, the co-heiresses. The disposition contained in the deed of arrangement came, it was said, within the very terms of section 2, and not the less so even if it were the mere transfer from one person to another of a part of the succession already created.

It was not, however, argued that in such a case there were two successors who came into possession at the death of the tenant for life, but that the disposition by way of assignment by the original successor created a new succession which was substituted for that conferred by the prior disposition. I do not wonder that the contention was thus limited, for it would otherwise inevitably have followed that if property, to which a person was entitled expectant on a death, had passed by deed *inter vivos* a dozen times by way of gratuitous assignment during the lifetime of the tenant for life, a dozen duties would have been payable, although the last assignee only, would have acquired the property in possession.

I will assume for the purpose of argument that the disposition contained in the deed of arrangement was such as to satisfy the terms of section 2. In my opinion it was because the Legislature thought that an alienation by a successor of his succession might be thought to be within those terms that the fifteenth section was framed as it is. But before referring to the provisions of that section I will deal with the argument presented on behalf of the Crown.

I am unable to find in the Act any warrant for the view that a succession once created can by the act of the successor cease to exist and another succession be substituted for it. The words of section 10 are precise: "There shall be levied and paid to Her Majesty in respect of every such succession as aforesaid" the following duties: and these are made dependent on the relationship of the predecessor and successor. This provision operates, in my opinion, as soon as the disposition is made by which a "succession" is conferred. Moreover, "succession" denotes by clause 1 any property chargeable with duty under the Act. No doubt the time of payment is fixed by section 20, but this is quite a different thing from the obligation to pay. The time of payment is to be when the successor "or any person in his right or on his behalf" shall become entitled in possession to his succession. This contemplates that at the time the succession falls in, some person in right of the successor, and not the successor himself, may be entitled to the possession. The original successor is none the less called the successor.

I have not forgotten the argument of the Solicitor-General that an alienee for value does not become a new successor although a gratuitous alienee does, and that the language I have referred to is thus sufficiently satisfied. I shall deal with this argument when I come to consider the 15th section of the Act. It does not touch the point I am now concerned with—that section 20, to say the least, affords no support to the argument that one on whom a succession has been conferred can destroy it and the obligation to pay the duty which was attached to it by alienating it.

And when we come to section 44, which provides who are to be "personally accountable" to Her Majesty "besides the successor," amongst those named are "every person in whom" any property su ject to such duty "shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession." Here again there is nothing to suggest that a person who has once been a successor has ceased to be so if prior to the time of the succession becoming an interest in possession he has alienated it.

It was argued that the provisions of section 21, relating to the mode of assessment of the duty, in the case of real estate, would hardly be workable if in those provisions the word "successor" were held to refer to the original successor and not to his alienee. I think the application of this section may give rise to difficulty in certain cases. But it is to be observed that it does not determine either who is to be charged with the duty, when it attaches or becomes payable, or what is to be its rate. It is merely a rule for ascertaining the amount. And the difficulty is not got rid of by adopting the argument of the Crown, for it is just as great in the case of an alienation for a money consideration, which, it is admitted, does not make the alienee a new successor as in the case of a gratuitous alienation. It is not necessary to express any opinion on the operation of that section (which was discussed in *The Solicitor-General* v. *The Law Reversionary Society*, 21 W. R. 854, L. R. 8 Ex. 233), it is enough to say that it affords no sufficient reason for departing from what appears to me to the unambiguous meaning of the leading provisions of the Act to which I have called attention, and which, it must be remembered, apply to realty and personalty alike.

I am not surprised that the notion that the gratuitous alienation of a succession before the time for payment of the duty arrives, creates a new succession ousting the original one and becoming substituted for it, finds no countenance in the provisions of the Act. In the present case the contention of the Crown operates in favour of the revenue and increases the amount of the tax, but in many, and perhaps the majority of cases, it would have precisely the contrary effect. It would be strange if a person in whom a succession had been created by a stranger in blood, and in respect of which therefore a duty of 10 per cent. would be payable, should be able by a gratuitous alienation to his son before the death occurred to reduce the duty payable to 1 per cent. It seems to me inconsistent with the entire scheme of the Act that when once a succession has been created and the liability to duty has attached, a mere voluntary assignment of the right vested in the successor, by the disposition of it, or any part of it, should alter the succession duty and make another, and it may be a lower, duty payable at the time when the succession falls into possession.

Before proceeding to consider the 15th section, I may refer to the only authorities I am aware of bearing upon the question whether the alienation of a succession, or the creation of a new succession by alienation, can so extinguish the original succession as to get rid of the duty which has become leviable and chargeable in respect of it.

In *Solicitor-General* v. *The Law Reversionary Society* the Court of Exchequer laid down certain conclusions as established on a consideration of the various sections of the Act. They held that, though the duty is not payable until the time of actual enjoyment of the property, "the title to the succession dates from the disposition, and there is never any title to the property free from the duty," and that a person who has had a succession conferred upon him cannot by parting with it prevent it from being a succession. The only case which affords any support to the idea that a new succession can take the place of an old one is *In re Cooper and Allen*, 25 W. R. 301, 4 Ch. D. 802, at p. 824, decided by Jessel, M.R. In that case, A. and B., tenant for life and remainderman, conveyed their estates for money to C. in fee. C. died, having devised to D. in fee; D. paid duty on his succession from C. It was held that no more duty would be payable on the death of A., the tenant for life. It must be borne in mind that the case related to real estate, and that it was a special one, inasmuch as C., having taken a conveyance from the tenant for life, came at once in possession of the land and the income and profits thereof, in respect of which a succession had been created. Jessel, M.R., was of opinion that the conveyance to C. did not create a new succession, and that if he had remained owner until the death of the tenant for life the duty payable on the death of the tenant for life by the remainderman would have been payable by C., but that inasmuch as a new succession was created by the devise to D. and the death of C., the only duty payable was on that new succession. That new succession arose from a new disposition making the succession to property dependent on a new death, and it related to real estate; the case is therefore quite distinguishable from the present. But there are observations of Sir George Jessel which have a bearing on the present case. I confess that I find a difficulty in following some of the reasoning of the learned judge. He considered that because D. succeeded on the death of C., and that was a new succession, duty could only be payable on that succession, and the duty which attached by reason of the original disposition was no longer payable. Why, he asks, should a successor who is in possession of property pay two duties? The Crown has, he says, by the merger got the benefit of reducing the estate once more to the fee simple on which there is a succession and a successor coming in pays the duty. Further on, there occurs the following passage: "I think it is very difficult to give any meaning to the exception from the 15th section of alienations conferring new successions, unless it has the meaning which I attribute to it, because if the alienation does not confer a new succession, duty is to be paid at the same rate and time as on the original succession—that is, you are to wait for the payment. If it confers a new succession, then of course you will get payment on whichever succession comes first." Again, in discussing the effect of the 14th section, which applies only to personalty, the learned judge says that it would be singular if in the case of realty more than one duty was payable in case of devolution on death during the lifetime of the tenant for life "because the Act was intended to assimilate the duty upon personalty and realty." And he adds further on: "In the case of succession to real estate, the object of the Act is to let the last succession prevail; but as regards personal estate it is enacted that the highest duty shall be paid." I cannot see how the reasoning of the learned judge establishes that in the case before him there could be only one succession duty payable, and that in respect of the new succession. The merger of which the learned judge speaks did not arise by virtue of C.'s disposition, for the fee simple was vested in C. during his lifetime just as much as in D. after his death. It arose from the fact of his taking a conveyance from the tenant for life as well as from the person entitled to the succession. He was thereupon entitled to the estate in immediate possession. But the possession to which he then became entitled, and his right to the income and profits of the land, was not derived from the conveyance to him of B.'s succession, but solely from the fact that he was the owner of A.'s life estate. If he had purchased this only he would have been equally entitled to possession of the land and to the income and profits thereof. If he had only purchased the succession he would at that time and down to his death have been entitled to neither. The devise by C. to D. created a succession in respect of property which was not at that time the subject of any succession—namely, the estate during the life of A. I think, with all respect, that Jessel, M.R., overlooked these facts. When D. came into possession of the land by reason of C.'s devise, he undoubtedly became entitled in possession to a succession, and duty became then payable in respect of it, though the original succession had not then become, in the language of section 44, "an interest in possession." Duty would equally have been payable if C. had never acquired any title to the remainder in respect of which a succession had previously been conferred, and no title thereto had passed to D.

It is not necessary to determine what duty or duties became payable by D. Nor is it necessary to decide whether in the case of real estate the object of the Act is to let the last succession prevail. Such a conclusion cannot, however, in my opinion, be deduced from section 15, which only prescribes what duty is to be paid where a new succession has not been conferred. The argument derived by the learned judge from a consideration of the provisions of section 14 in connection with section 15 is, in my opinion, not a sound one. It is not correct to say that the Succession Duty Act was intended to assimilate the duty upon personalty and realty. Even in the view adopted by the learned judge the assimilation was not complete, for whilst in the case of personal estate if there were several successors by death to the interest of the original successor before it fell into possession the highest rate of duty is imposed which, if every successor had been subject to duty, would have been payable by any one of them. In the case of realty the rate was said to be determined by the last succession, and might therefore be the lowest instead of the highest.

But in truth, so far from assimilating realty and personalty for purposes of the duty, the Act created a fundamental distinction between them, and that to the advantage of realty. For whereas in the case of personalty the duty was charged at the prescribed rate upon the capital value of the property succeeded to, in the case of realty the charge was to be assessed only on the basis of succession to a life interest. The provision for assessment contained in section 21 affords a reason for the restriction of section 14 to successions to personalty.

I proceed now to examine somewhat more closely the language of section 15. The latter part of that section provides that where any succession shall, before the successor shall have become entitled thereto (*i.e.*, to the succession already conferred) in

possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created.

As I have already stated, a part of the succession to which the co-heiresses were entitled became vested by alienation in the appellant. The case therefore seems to come within the very words of section 15. For I can see no ground for a distinction between the transfer by alienation of the right to receive the whole of the personalty which is the subject of the succession or a part of it. It was argued on behalf of the Crown that the word "alienation" must be confined to alienation for valuable consideration; that the words "not conferring a new succession" qualified the word "alienation" as well as the words which immediately follow it, and that every gratuitous alienation must create a new succession substituted for the one from which it was derived.

I have already given reasons for thinking the last of these propositions ill-founded.

If the word "alienation" was only intended to apply to cases in which it was in respect of a money consideration, why were no words to that effect inserted? I think that there is no warrant for putting any limitation upon the word which is not found in the terms of the section.

As in my opinion no new succession was created in the money to which the appellant has become entitled, it is immaterial whether the words "not conferring a new succession" do or do not qualify the the word "alienation." But I think it right to state that, in my opinion, they do not, and the fact that they do not strengthens the arguments which I have adduced as to the scheme of the Legislation.

It is certainly not construing the words "by alienation or by any title not conferring a new succession" according to their grammatical meaning to refer the words "not conferring a new succession" to "alienation" as well as to "by any title." And if I am right in thinking that mere alienation of an existing succession does not of itself create a new succession, then the section may be construed according to its grammar, and is drawn in the manner one would have expected.

It is true that Sir George Jessel, in the case already referred to, expressed the opinion that the words, "not conferring a new succession" apply to the word "alienation" as well as to the words "any title," though he confessed that in that view the grammar was not perfect or beyond criticism. The reason he gave was that it would be very difficult to say what title there could be conferring a new succession, if not an alienation. I do not think the reason a sound one. A succession might, for example, before it fell into possession, have devolved by death upon another person or persons, so as to create a new succession. Such person or persons are termed in section 14 "other successor or successors." It was necessary to insert after the words "by any title" the words "not conferring a new succession," otherwise there would have been a conflict as regards personalty between the 14th and 15th sections. On the other hand, a succession might by operation of law become vested in some other person, as, for example, an assignee in bankruptcy, which would be a title not creating a new succession. But I can see nothing either in the terms of the section or in the reason of the thing to suggest that an alienation by instrument *inter vivos*, which merely transferred the interest of the successor or some part of it to some other person, would create a new succession. In such a case the same property passes into possession on the same death; and though by a transaction *inter vivos* another person is substituted for the original successor, I do not think it can reasonably be said that "a new succession" was thereby conferred.

For the reasons I have given I am of opinion that the 15th section applies, and that the duty payable in respect of the property into the possession of which the appellant came is to be paid at the same rate and time as the same would have been payable if no alienation had been made by the co-heiresses and they had themselves become entitled in possession.

I have so far mainly dealt with the case on a consideration of the terms of the statute as if the matter were *res integra* unaffected by previous decisions. It was, however, argued for the Crown that the case of the *Attorney-General* v. *Cecil*, 18 W. R. 949, L. R. 5 Ex. 263, was an authority in favour of their contention that the 15th section was inapplicable. I do not think so. In that case a father and son being tenant for life and tenant in tail under a settlement, the entail was barred and the estates settled to their joint appointment, and subject thereto to the uses of the earlier settlement. They afterwards appointed a term to a trustee, on trust to raise £20,000 for a younger son. On the money becoming payable to him upon the death of the original tenant for life, the question arose whether duty was payable at 3 per cent. as upon a succession derived from his brother, or at 1 per cent. only. The court held the former duty payable. It was contended that section 15 applied, and that the same duty only was payable as the tenant in tail would have paid on succession to the entailed estates. That case seems to me far removed from the present one. It was impossible to say with any reason that Lord Eustace Cecil succeeded to the £20,000 by reason of the vesting in him by alienation of a portion of the succession to which his brother was entitled under the original settlement. If the entire interest of the tenant in tail under that settlement had been conveyed to Lord Eustace Cecil he would have taken nothing at all, in the event which happened, inasmuch as the tenant in tail died without issue in the lifetime of the tenant for life. By the disentailing deed the estate of the tenant in tail became enlarged to an estate in fee. If he had survived his father he would have taken within the meaning of the 12th section under a disposition made by himself, and not under the original settlement. How, therefore, could it be said that the charge created in favour of Lord Eustace Cecil vested in him by alienation the succession to which the tenant in tail was entitled under the original settlement or any part thereof. The decision in no way conflicts with the conclusion at which I have arrived. There may have been some divergence in the reasons given by the learned judges in the case which I have been considering for the conclusion at which they arrived, but there is nothing really inconsistent with the construction which I have put upon the 15th section. On the contrary, according to the report of the case in the *Law Journal* (139 L. J. Ex. 201), which is fuller than that in the Law Reports, Kelly, C.B., said: "If the charge had been made or the term had been created out of the original succession, it would have come strictly within the words of this section of the Act (*i.e.*, the 15th) and would have created no new succession at all."

In *Braybrooke* v. *The Attorney-General* Lord Wensleydale said that the 15th section was meant to meet the simple case of a person having a right to a succession within the meaning of the Act totally alienating that right to another person before the succession opens, or carving out a derivative interest

from it, in which case the section provides that the assignee or the person having the derivative title shall stand on the same footing as the assignor. But if there is something different from a mere transfer of the interest or a part of it, if there is a title conferring a new succession in any other person, then the 15th section does not apply.

In *The Attorney-General* v. *Yelverton*, Martin, B., in delivering the judgment of the majority of the court, said of the 15th section: "It seems to us to refer to a species of property different from that on which the duty is claimed in the present case—that is to say, a reversionary property in respect of which the assignee would have been liable to duty but which he has assigned."

There is thus a considerable weight of judicial opinion in support of the views which I have expressed. The scheme of the Act, as I have presented it to your lordships, appears to me to be clear, consistent, and equitable, and it is arrived at by giving to the provisions which impose the duty and which determine its rate and time of payment, and the persons who are to be accountable for it, their natural grammatical meaning.

Having arrived, then, at the conclusion that duty was payable at the same rate and time as if the co-heiresses had made no alienation, the only question which remains in whether the payment of legacy duty at 3 per cent. on the entire residuary estate of the testator renders the duty of 3 per cent., which would otherwise have been payable on the succession in question, no longer payable. This depends on the concluding provision of section 18. It enacts that "no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property." It is clear that the co-heiresses could not have been called on to pay any further duty on the property which they assigned to the appellant. Having paid the legacy duty, no succession duty would have been payable by them at the time of Lady Wolverton's death or any other time. If I am right in the view which I have expressed, that the alienation did not create a new succession, it seems to me to follow that the Crown cannot be entitled both to legacy and succession duty in respect of the acquisition of the same property, on the same death, whether by the successor or his assignee. I think any other conclusion would be unreasonable, and contrary to the manifest intention of the enactment.

For the reasons I have given, I think the judgment ought to be reversed, and judgment entered for the defendants, with costs.

Lord MACNAGHTEN.—"The Act," it has been observed, "is a difficult Act" (4 Ch. D. 823), "and the *dicta* are not less difficult to consider than the Act itself." So said a distinguished judge speaking of the Succession Duty Act, 1853. I cannot help thinking that there is a good deal of truth in that saying, and just a touch of warning which the author of the observation himself might sometimes perhaps (if I may venture to say so) have kept in view without impropriety. Happily the provisions of the Act bearing upon the question now before the House do not present any very great difficulty, and even the *dicta* are less embarrassing than usual.

The disposition which your lordships have to consider in connection with the Act relates to the residuary estate bequeathed by the will of the second Lord Wolverton, who died in November, 1887. He left a widow, but no issue. He was succeeded in the title by his nephew. The third baron died unmarried in July, 1888. His successor was his brother, the present appellant.

Under the limitations contained in the testator's will the third baron would have become entitled to the testator's residuary estate, which was of very great value, if he had survived the testator's widow. But by reason of his death in her lifetime the whole residuary estate, subject to the widow's life interest, came to be held in trust for the person who might at the time of the widow's death answer the description of the testator's right heir at common law."

Now, the co-heiresses of the testator at the time of his death, and at the time of the death of the third baron, were the five daughters of the testator's next brother, who had died in the testator's lifetime without male issue. If they had never existed, the third baron, and after him, the appellant, would have been the testator's heir-at-law.

In this state of things, in order to carry out what was supposed to have been the testator's intention, and to prevent the property passing away from the title, and in order at the same time to make suitable provision for the co-heiresses, a family arrangement was come to between the co-heiresses, the appellant, and the testator's widow. The co-heiresses and the appellant brought in their contingent interests, and the widow gave up her life interest in certain bank shares producing an income of over £50,000 which had fallen into the residue on the death of the third baron. The scheme of the arrangement was this: The income of the bank shares was to be used to pay an annuity of £15,000 to the appellant, and annuities to the co-heiresses during the widow's life, the surplus income during her lifetime was to be accumulated. On the death of the widow certain capital sums were to be paid to the co-heiresses out of the accumulated fund, supplemented, if necessary, by the accumulation of the surplus income of the entire estate after payment thereout of an annuity of £15,000 to the holder of the title for the time being during the period of accumulation; subject to these provisions the property was to be settled so as to go along with the title. The arrangement was embodied in a deed dated the 31st of December, 1888, by which the widow assigned to trustees her interest in the bank shares, and the co-heiresses and the appellant assigned to the same trustees all their interest in the testator's residuary estate.

The testator's widow died on the 4th of January, 1894. The five co-heiresses survived her. The accumulated fund was then insufficient to answer the claims of the co-heiresses, and so a further period of accumulation commenced, during which the apellant, as the holder of the barony, became entitled under the trusts of the deed of arrangement to the annuity of £15,000 payable out of the testator's residuary estate.

On the death of the widow the Commissioners of Inland Revenue claimed and received legacy duty at the rate of 3 per centum on the whole of the testator's residuary estate. In addition to the legacy duty so claimed and paid the commissioners claimed succession duty upon the annuity of £15,000 as upon a succession coming to the appellant from the testator's widow or from the co-heiresses, or from both the widow and the co-heiresses. The claim was held good in the Queen's Bench Division and in the Court of Appeal. The matter now remains for your lordship's determination.

The question depends simply on the effect of two sections of the Succession Duty Act, the 15th and the 18th.

Section 15 enacts that "where . . . any succession shall, before the successor shall have become entitled thereto, or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would

have been payable if no such alienation had been made or derivative title created."

I may observe in passing, with all deference to Sir George Jessel, M.R., that I cannot see any reason why the expression "not conferring a new succession" should be read as qualifying the word "alienation" as well as the words "any title." Not that that construction would make any practical difference. But it is not wanted: it rather confuses the meaning, and it is forbidden by the structure of the sentence according to the ordinary rules of grammar. A mere alienation—a mere transfer of a subsisting succession—cannot confer a new succession. But a new succession may of course be conferred by a title in which alienation is followed by a transmission of interest before the succession vests in possession.

It seems to me that the case which your lordships have before you is precisely the case contemplated in the 15th section of the Act. I do not think that the transaction in respect of which the commissioners are now claiming succession duty could be described more accurately than in the very words of that section. The succession of the co-heiressess—that is to say, the residuary estate of the testator to which, at the date of the deed of arrangement, the co-heiresses were contingently entitled, and which was chargeable with duty on the death of the widow, became to the extent of £15,000 per annum vested by alienation in the appellant as the holder of the barony before the co-heiresses became entitled thereto in possession, and therefore if the 15th section had stood alone the duty payable in respect thereof to the extent of the annuity would have had to be paid at the same rate and time as the same would have been payable if the deed of arrangement had not been executed and no such alienation had been made. But then the provision at the end of the 18th section comes in, which enacts that no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts in respect of any property subject to such duties shall be charged also with the duty granted by the Succession Duty Act in respect of the same acquisition of the same property. Now, if the alienation in question had not been made, and if the whole of the testator's residuary estate had come to the co-heiresses, they could not have been charged with succession duty on any part of their succession. The charge for succession duty would have been cleared by the payment of legacy duty. It follows, therefore, from the combined operation of the 15th and 18th sections that no succession duty can now be claimed in respect of the annuity of £15,000 payable to the appellant as from the widow's death out of the income of the testator's residuary estate.

Speaking for myself I hardly think it necessary to say anything more. And, indeed, I should not have supposed the question open to argument if it had not been argued so strenuously on the part of the Crown. However, as the claim for duty has been made, and made with success in both the courts below, it would scarcely be respectful to omit all reference to the judgments under review.

In the Queen's Bench the ground of decision which I believe commends itself to your lordships, though argued, was not even noticed in the judgment of the court. It was supposed by the court—I do not know why—that the defence rested on two grounds, and two grounds only. One was that the annuity which became payable after the widow's death out of the succession of the co-heiresses was the same annuity which was payable during her lifetime out of the income of the bank shares, and that in fact there was only one annuity. The other was that the annuity payable after the widow's death was payable under a contract for valuable consideration in money or money's worth within the meaning of section 17. Both those grounds were plainly untenable, and both were properly rejected by the Court of Queen's Bench.

In the Court of Appeal the same arguments were repeated. They met with much the same fate. And the real ground of defence fared little better there than it did in the Queen's Bench. It suffered, I think, from being found in bad company. All the learned judges of the Court of Appeal say that Lord Wolverton's annuity was "a new succession" because it was not a continuation of the old annuity, but came into existence for the first time at the widow's death. That, however, was not the point. The point was, that the annuity to which Lord Wolverton became entitled after the widow's death was carved out of the succession of the co-heiresses, and was merely an alienation of part of their succession.

Besides holding that the annuity was a "new succession," both Lord Esher, M.R., and Rigby, L.J., relied on a proposition—a "larger proposition," Lord Esher calls it, which they attribute erroneously, I think, to Martin, B. They both seem to think that Martin, B., differed from Lord Wensleydale as to the true meaning of section 15. Now, Lord Wensleydale's opinion is to be found in his judgment in *Braybrooke* v. *Attorney-General*. In that case he dissented from the majority of the House, but the decision did not turn on the 15th section at all. What he said about section 15 was *obiter dictum*, but it was not at variance with anything said by the other noble and learned lords who took part in the case. The opinion of Martin, B., in the view of Lord Esher and Rigby, L.J., is to be extracted from one sentence in the report of the case of the *Attorney-General* v. *Cecil* as given in the Law Reports. From that sentence, divorced from the context, they conclude that Martin, B.'s, opinion was that an alienation in a family settlement was not an alienation within the meaning of section 15. With all deference to the Court of Appeal I must say that I can find no foundation for such a singular notion either in the Act itself or in anything that fell from Martin, B.

There was, no doubt, one point which came under discussion in connection with the Succession Duty Act on which Martin, B., did differ from Lord Wensleydale, but that point had no reference to section 15. The point of difference, as explained very fully by Lord Selborne in *Charlton* v. *Attorney-General*, 27 W. R. 921, 4 App. Cas. 427, was a point upon the general principles of law applicable to the execution of powers. On that Lord Wensleydale differed not only from Martin, B., but also from Lord Cranworth and the House of Lords.

The report of *Attorney-General* v. *Cecil* in the *Law Journal* (39 L. J. Exch. 201) seems to be more accurate than that in the *Law Reports*. The expression attributed to Martin, B., in the *Law Reports*, in which Lord Esher and Rigby, L.J., discover a difference of opinion between that learned judge and Lord Wensleydale, and on which to some extent their judgment is based, is not to be found in the report in the *Law Journal*. In the corresponding passage in the *Law Journal* Martin, B., actually expresses his concurrence with Lord Wensleydale, referring obviously to the passage in *Braybrooke* v. *Attorney-General*, where the noble and learned lord deals with section 15. That section, he says, was meant to meet the simple case of a person having a right to a succession within the meaning of the Act totally alienating that right to another person before the succession falls into possession or carving out a derivative interest from it, in which case, his lordship observes, "the section provides that the assignees or

the person having the derivative title shall stand on the same footing as the assignor; but if there is something different from a mere transfer of the interest or a part of it, if there is a title conferring a new succession on any other person, then the 15th section does not apply."

I think the appeal should be allowed, with costs both here and below.

Lord Morris.—I am of the same opinion.

Lord Shand.—I am also of the same opinion.

Judgment appealed from reversed; the respondent to pay to the appellant the costs both here and below.

Solicitors for the appellant, *Bompas, Bischoff, & Co.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 19.

Billings v. Holloway. (a)

Master and servant—Employment—"Building which exceeds thirty feet in height"—Building being constructed to exceed thirty feet in height—Building at time of accident not exceeding that height—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1; *s.* 7, *sub-section* 1.

By section 7, *sub-section* 1, *of the Workmen's Compensation Act,* 1897, "*This Act shall apply only to employment . . . on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished.*"

Held, that the Act does not apply to employment on a building in course of erection which, at the time of the accident, does not exceed thirty feet in height, but which, when completed, will exceed that height.

Appeal from the judgment of the judge of the Clerkenwell County Court upon a claim by the appellant for compensation under the Workmen's Compensation Act, 1897.

The appellant was a labourer in the employment of the respondent, a builder. In July, 1898, the respondent was erecting, by means of a scaffolding, a building in accordance with certain plans which showed that the building when completed would exceed thirty feet in height. The appellant, who was employed by the respondent on the building, was injured by a brick falling upon his head. At the time of the accident no part of the building exceeded thirty feet in height, the highest point being twenty-six feet above the basement.

The county court judge held that, as at the time of the accident the building did not exceed thirty feet in height, the Act did not apply, and gave judgment for the respondent.

By section 7, sub-section 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment . . . on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . ."

Bassett Hopkins, for the appellant.—The test whether the Act applies is, will the building exceed thirty feet in height when completed. The actual height at the time of the accident is not material. Suppose a building exceeding thirty feet in height were being demolished, it is inconceivable that the Act would cease to apply the moment the building ceased to be more than thirty feet in height. The county court judge was therefore wrong.

Ruegy, Q.C., and *A. W. Groser*, for the respondent, were not called upon.

A. L. Smith, L.J.—The question we have to decide is whether a building in course of erection which at the time of the accident does not exceed thirty feet in height, but which when completed will exceed that height, comes within the words of section 7, sub-section 1, of the Act. I do not stop to speculate why the limit of height is put at thirty feet. It seems clear, however, that the same words occur in section 23, sub-section 2, of the Factory and Workshop Act, 1895. Section 1, sub-section 1, of the Workmen's Compensation Act, 1897, provides that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman," his employer shall pay compensation. In order to find out what are the employments to which the Act applies, I turn to section 7, sub section 1, which provides that the Act shall apply only to employment (*inter alia*) "on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished." Can any words be plainer? This was clearly a building which did not exceed thirty feet in height. It is said that we ought to read in the words "or which is intended to exceed thirty feet in height." I cannot do so. The judgment must therefore be affirmed.

Rigby and Collins, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Edward Clarke.*

Solicitors for the defendant, *W. Hurd & Son.*

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 19.

Woodham v. Atlantic Transport Co. (Limited). (a)

Master and servant—Employment—"Factory"—Unloading ship by means of crane on quay—Injury to workman on ship—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7—*Factory and Workshop Act,* 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1.

A workman was employed by shipowners on board a ship to assist in unloading cases of cartridges by means of a crane on to a quay. The crane, which was standing on the quay, was worked by means of a chain, at the end of which was attached a basket. The workman placed the cases in the basket, and the basket and its contents were hoisted on to the quay. When one of the cases was being placed in the basket, it exploded and killed the workman. Upon a claim by his widow for compensation under the Workmen's Compensation Act, 1897,

Held, that the workman was killed by an accident arising out of, and in the course of, his employment in or about machinery used in the process of unloading on to a quay within the meaning of the Act; and that, therefore, the Act applied.

Appeal from the decision of the judge of the Bow County Court upon a question of law submitted to

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

him by an arbitrator appointed under the Workmen's Compensation Act, 1897.

The appellants, the Atlantic Transport Co. (Limited), were the owners of the steamship *Manitoba*, and the respondent was the widow of William Woodham, and she claimed compensation under the Workmen's Compensation Act, 1897, on behalf of herself and her five children for the death of her husband.

The following facts were admitted: On the 6th of July, 1898, the late William Woodham was employed with other men by the appellants in unloading the steamship *Manitoba*, and was on that date killed while working on the *Manitoba* at the Royal Albert Docks, the cause of death being injuries received through an explosion of two cases of primers. *The Manitoba* was at the time of the accident lying at the quay of the Royal Albert Docks, No. 22 shed, moored thereto. The deceased, together with a number of other men, was sent by the foreman stevedore, Henry Webb (who was in charge on behalf of the appellants of the work of unloading), with instructions to unload and discharge the cases of cartridges that were stowed in the said vessel. The cases of cartridges were unloaded in the following manner: The vessel was lying by the side of the quay. The cases were brought from the hold by means of an hydraulic crane which was standing on the quay. The crane was worked by a chain, on the end of which chain was attached a wicker basket. The basket was at all times attached to the crane. The cases in question were brought out of the baggage-room of *The Manitoba*. The men, among whom was the deceased William Woodham, placed the cases into this basket, whereupon the crane was set in motion and the basket and its contents were hoisted from the vessel and placed on the quay. The crane was worked by a man named Woods, who was in the employment of the appellants. About seventeen cases were safely landed by the crane, and the crane returned for the last set of cases, and the basket was being loaded by the said William Woodham and another man named William Connor. Four of the remaining five cases had been placed in the basket, and the fifth—the last case of all—being a case of primers, or percussion caps, was put into the basket by the deceased William Woodham, when it immediately exploded, and the deceased William Woodham was struck, with others, by the exploded primers or percussion caps and killed. *The Manitoba* was unloaded on to the quay. The crane was hired by the appellants from the dock company.

The county court judge held that, as the word "factory" in section 7 of the Workmen's Compensation Act, 1897, included a "dock," the deceased man, who was employed in a ship in the dock, was employed in a "dock," and therefore the Act applied. He accordingly gave judgment for the respondent for an agreed amount of £270. The Atlantic Transport Co. appealed.

By section 1, sub-section 1, of the Workmen's Compensation Act, 1897, "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." By section 7, sub-section 1, "This Act shall apply only to employment . . . on, or in, or about a railway, factory . . ." By sub-section 2, "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical 'power.'" By sub-section 3, "A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard." By section 23, sub-section 1, of the Factory and Workshop Act, 1895, certain provisions of the Factory Acts were to have effect "as if (*a*) every dock, wharf, quay, and warehouse and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . were included in the word 'factory' . . . and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises. . . ."

Joseph Walton, Q.C. (*B. D. Kilburn* with him), for the appellants.—By section 1, sub-section 1, of the Workmen's Compensation Act, 1897, the accident must arise out of and in the course of the employment to which the Act applies. Section 7, sub-section 1, enumerates the employments to which the Act applies, one of them being employment in a "factory." Factory is defined in sub-section 2, and that definition refers back to the Factory and Workshop Act of 1895, which, by section 23, sub-section 1 (*a*), includes in the word factory "every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto all machinery and plant used in that process." Those sections, when read together, mean that the accident must arise out of and in the course of the workman's employment on or in or about a dock, wharf, quay, or warehouse, or on or in or about machinery and plant used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse. The deceased man here was killed while employed on a ship in a dock, and the first question is whether he was killed while employed in a "dock." The county court judge held that he was none the less employed in a dock because he was employed on a ship in a dock. This involves that "dock" includes everything in the dock. This is too wide a construction of the Act. "Dock" includes only the land part of the dock. Otherwise every person employed in any capacity within the area of the dock would be included. The deceased man was employed in a ship, not in a dock. Sub-section 3 of section 7 tends to show that a ship in a dock is not part of the dock, otherwise that sub-section would be unnecessary. Further, the inclusion of machinery for loading and unloading, which is commonly on board the ship, would be unnecessary so far as the word "dock" is concerned if a ship in a dock were part of the dock. The county court judge was therefore wrong. Secondly, did the accident arise while the deceased man was employed on or in or about machinery or plant used in the process of loading or unloading from or to the quay? No doubt the basket was attached to the crane, and so far was part of the crane, and the deceased man was injured while putting a case of cartridges into the basket. But "on or in or about" the crane means in connection with the working of the crane. "About" the crane does not mean physical vicinity. The accident must have some connection with the working of the crane. Here there was no such connection.

G. H. Mallinson, for the respondent, was not called upon.

A. L. SMITH, L.J.—It seems to me that we can decide this case upon a very clear point. I do not

intend to express any opinion upon the first point which the appellants argued, and upon which the county court judge based his judgment. The appellants were using a quay on to which they unloaded their ship, and on the quay they used a crane for the purposes of the unloading. They employed the deceased man in the ship, together with others, to unload by means of the crane certain cases of cartridges. While he was so employed a case of cartridges, which was being put into the basket, exploded and killed him. The question is whether the Act applies. In my opinion it does. We must read section 1, sub-section 1, and section 7, sub-sections 1 and 2, of the Workmen's Compensation Act, 1897, with section 23, sub-section 1 (*a*), of the Factory and Workshop Act, 1895, and when that is done the words, so far as material to this case, read as follows: If personal injury is caused to a workman by accident arising out of and in the course of his employment on or in or about machinery or plant used in the process of loading or unloading to or from a dock, wharf, quay, or warehouse, then the injured man is to be entitled to compensation under the Act. It is impossible to say that the deceased man was not employed "in or about" the crane, and he having been killed by an accident arising out of and in the course of that employment, his widow is entitled to compensation. The case therefore came within the Act, and the judgment must be affirmed.

RIGBY and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Holman, Birdwood, & Co.*

Solicitor for the respondent, *W. Mitchell.*

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — July 27, 28; Aug. 8, 1898.

SOUTHWARK AND VAUXHALL WATER CO. *v.* WANDSWORTH DISTRICT BOARD OF WORKS. (*a*.)

Metropolis—Management—Highway—Lowering surface of road—Water company—Water pipes left insufficiently covered—Duty of local authority—Injunction—Damages—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 98.

A local authority which, in exercise of the powers conferred by section 98 *of the Metropolis Management Act,* 1855, *lowers the surface of a road so as to leave pipes belonging to a water company insufficiently covered, is not bound to alter the position of the pipes so as to secure to them adequate protection.*

Appeal from Kekewich, J.

An iron water-main belonging to the plaintiffs ran in the soil under a road in the district of the defendant board. The pipe had been laid under statutory powers thirty years before this action, and was at a depth varying from 1ft. 4in. to 1ft. 10in. The road had been used as a highway for many years, but the footway (under which was the pipe in question) had never been paved, and was simply a gravel path. The defendants had recently levelled the road and the footway, and in so doing had lowered the surface of the footway at several points. The plaintiffs' pipe was, in consequence, at one point only four inches below the surface; a depth which, it was shown, was insufficient to protect the pipe against injury from heavy traffic, frost, and other causes.

(*a*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

The plaintiffs, as soon as they understood how injuriously their pipe would be affected, commenced an action claiming an injunction to restrain the defendants from lowering the surface so as to leave the plaintiffs' pipes and mains without a sufficient covering, unless the defendants should first alter the position of the pipes and mains (as section 98 of the Metropolis Management Act, 1855, empowered them to do) by placing the same as far below the proposed new surface as they now were below the present surface; and claiming secondly, damages for the wrongful lowering of the surface of the said footway.

On motion by the plaintiffs for an interlocutory injunction, Kekewich, J., made an order restraining the defendants, as asked, until after judgment.

The defendants appealed.

On the hearing of the appeal it was agreed to treat it as an appeal from a final judgment in the action.

Renshaw, Q.C., and *Lyttelton Chubb*, for the appeal.—Similar cases are *Boulton* v. *Crowther*, 2 B. & C. 703, under the General Turnpike Act (3 Geo. 4, c. 126); and *Bold* v. *Williams*, 21 J. P. 84, under 11 & 12 Vict. c. 63. Sections 150, 151 of the Metropolis Management Act, 1855, exclude the operation of the compensation clauses of the Lands Clauses Act, 1845; and the cases show that the plaintiffs can have no remedy other than compensation.

They also referred to sections 98, 110, 111, 112, 113 of the Act of 1855; *Reg.* v. *Vestry of St. Luke's, Chelsea*, 19 W. R. 1086, L. R. 6 Q. B. 572 (on appeal, 20 W. R. 209, L. R. 7 Q. B. 148); *Geddis* v. *Proprietors of the Baun Reservoir*, 3 App. Cas. 430, 26 W. R. Dig. 259; *Thompson* v. *Mayor, &c., of Brighton*, 42 W. R. 161, [1894] 1 Q. B. 332; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 352, 41 W. R. Dig. 85; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 25 W. R. 794, 2 Ex. D. 441; and the Waterworks Clauses Act, 1847 (10 Vict. c. 17), s. 28.

Gore Browne (*Warrington, Q.C.*, with him), for the plaintiffs.—The defendants, if they exercise their statutory power of lowering the road, come under a common law duty not to injure anyone: *Geddis* v. *Proprietors of the Bann Reservoir; Metropolitan Asylums District Managers* v. *Hill*, 29 W. R. 617, 6 App. Cas. 193, at p. 203.

He also referred to sections 30, 31 of the Waterworks Clauses Act, 1847; and *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbott*, 33 W. R. 892, 15 Q. B. D. 1.

Renshaw, Q.C., in reply.—If this was a dispute between private individuals it would be clear that a landowner who had granted a licence to lay pipes could dig a ditch so as to expose part of them.

He relied upon sections 109, 112 of the Act of 1855. [LINDLEY, M.R., referred to Michael and Will on Gas, Water, and Electric Lighting, notes to section 31 of the Waterworks Clauses Act, 1847 (4th ed., p. 241), and the cases there cited.]

Cur. adv. vult.

Aug. 8.—LINDLEY, M.R., read a judgment in which, after stating the facts and reading section 98 of the Metropolis Management Act, 1855, he proceeded: This section in terms simply confers a power; its language imposes no duty. The words are, "It shall be lawful," &c. These words may, no doubt, under certain circumstances, impose a duty as well as confer a power; but it is for those who contend that they do both, to make good their contention. Nothing can be clearer on this point than the judgment of Lord Cairns in *Julius* v. *The Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214, at pp. 223-4. The defendants

have not touched or disturbed the plaintiffs' pipes. They have in no way injured them, and this circumstance distinguishes the case from *Gas, Light and Coke Co.* v. *St. Mary Abbott's Vestry*, in which the steam-roller used by the defendants broke the plaintiffs' gaspipes. The same circumstance—namely, the non-interference with the plaintiff's property—distinguishes this case from *Geddis* v. *Proprietors of the Baun Reservoir*, where the defendants flooded the plaintiff's land, and said, in effect, that they could not help it. The answer was that they could help it if they kept a stream into which they poured water free from obstruction by mud, which they could do if they chose. Lord Blackburn's remarks, on which the plaintiffs mainly relied, had reference to that state of things, and do not show what the plaintiffs must show—namely, that section 98 imposes a duty on the defendants to lower the plaintiffs' pipes, although the defendants do not want to do so for their own purposes.

Underlying the plaintiffs' contention is the assumption that they are entitled to have a certain amount of soil over their pipes. I can find no warrant for this assumption; and as the defendants are clearly empowered by section 98 to remove the soil above the pipes, I see no ground for saying that the additional power conferred upon them of lowering the plaintiffs' pipes imposes the duty of lowering them in order to protect them from injury. The plaintiffs pay nothing for the privilege of laying their pipes down in a public path or road, and they run the risk of having it made higher or lower by the road authorities under their statutory powers.

This conclusion is strengthened by section 61 of the Towns Improvements Clauses Act, 1847 (10 & 11 Vict. c. 34), which is *in pari materiâ*, and which empowers the improvement commissioners to raise or lower pipes "if they deem it necessary" so to do. No duty to do so is cast upon them. Section 98 of the Metropolis Management Act, 1855, although not quite so clearly worded, has, in my opinion, the same meaning.

The appeal motion having by consent been treated as an appeal from a final judgment in the action, the order appealed from must be discharged and judgment entered for the defendants, with costs here and below, and the costs below must be taxed as between solicitor and client pursuant to the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1: see *Fielden* v. *Morley Corporation*, 67 L. J. Ch. 611.

CHITTY, L.J.—I am of the same opinion. The case is of importance, for the decision will affect not only water companies, but gas and other like companies, who have the like statutory privilege of laying pipes under the public streets in the metropolis. For these privileges they make no payment. The case turns on the 98th section of the Metropolis Management Act, 1855. [His lordship read the section, and proceeded:] In this case the road authority has not altered the position of the pipes, nor have they in any way disturbed or interfered with them. The effect of their works, which have been lawfully executed under their principal power, is to bring the surface of the street nearer to the pipes, which remain *in situ*. The consequence is that the water in the pipes, being but a few inches from the surface, is more exposed to frost. In exercising the power the road authority have not been guilty of any negligence. I am unable to find in the section any express or implied duty cast upon the road authority, when they exercise their power of altering the level of the road, whether by raising or lowering it, to exercise at their own expense their power of altering the position of the pipes for the benefit of the company owning the pipes, much less any duty to place the pipes at a depth below the new surface corresponding with the depth at which they stood below the old surface. I think that no duty is imposed upon the appellants. The real question is on whom the expense of altering the position of the pipes is to fall. It appears to me that it falls on the company. They are under no statutory obligation as to the particular depth at which their pipes are to be placed from the surface of the road; it is for them to place them at such a depth as will protect the water from freezing. As between the road authority and the company, I think that the road authority is paramount. They are entrusted with the powers over the street, not for their own profit as a statutory body, but for the benefit of the public using the street as a highway. The statutory undertaking of the water company is vested in them with a view to their own profit as a company, and for the purpose of affording a supply of water to the consumers of water within their district. Where the road authority alters the level of the street, the 98th section does not afford any means of ascertaining the point at which the supposed duty of the road authority begins in reference to the distance from the surface at which the pipes are to be left, subject only to this qualification—that where the position of the pipes themselves is altered the approval of the company's engineer is required in relation to the position where the pipes are to be relaid. In regard to the authorities cited, I think they are distinguishable, as stated by the Master of the Rolls. I agree with Collins, L.J. (whose judgment I have had an opportunity of reading), in his statement of the general principles of law derived from the authorities in reference to the exercise of statutory powers.

COLLINS, L.J.—I am of the same opinion, but I will add a few words on the point based on the *dictum* of Lord Blackburn in *Geddis* v. *Proprietors of the Baun Reservoir*. The point urged is that the plaintiffs have suffered damage by the exercise by the defendants of their statutory powers, that the defendants were armed by the same statute with other powers, which, if used, would have mitigated the damage, and that, therefore, they were bound to use them. I think it is quite clear, as pointed out by the Master of the Rolls, that the power to move the pipes is quite ancillary to the powers of levelling the highway, and that there is no statutory duty on the defendants to exercise it, unless they require it for the performance of their primary obligation. But it is not on the assertion of such a statutory duty that the argument for the defendant's liability is or must be based, but on the broader proposition that, being possessed of a power of mitigating damage arising from their proceedings under the statute they are bound to exercise it. So stated it is merely an assertion of the proposition, so frequently affirmed, that where statutory rights infringe upon what, but for the statute, would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers. The railway spark cases are instances of this principle: *Vaughan* v. *Taff Vale Railway Co.*, 8 W. R. 549, 5 H. & N. 679; *Directors of the Hammersmith and City Railway Co.* v. *Brand*, 18 W. R. 12, L. R. 4 H. L. 171; and *Coats* v. *Clarence Railway Co.*, 1 Russ. & M. 181. Lord Blackburn was dealing with a case in which the rights of adjoining owners had been in fact invaded, the statute under which the defendants acted not enabling them to flood the plaintiff's lands when such flooding might have been avoided by dredging, as the defendants had power to do, the

channel by which they sought to pass their compensation water back to the river. They were under a duty to pass the water down to the river, and they were given powers to make and maintain channels for this purpose, and where they had not exercised these powers they could not say that that damage to the adjoining proprietors was a necessary incident of the exercise of this statutory right. The statutory power which Lord Blackburn thought them bound to exercise was one without which this duty of passing the water on could not be properly carried out. Here the levelling of the road could be, and was, effectively carried out without in any way disturbing the plaintiff's pipes, or infringing any of their rights. I think the *dictum* of Lord Blackburn must be read with reference to the case he was dealing with, and cannot be pressed to cover this one. But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons. I think when it is once clear that the main purpose of the defendants could be completely carried out without recourse to the power of removing the pipes, the obligation of the statutory body must be tried by the same standard of duty as is applicable to private persons. Of course, being merely a creature of statute, they cannot exercise powers if the statute has not conferred them; but it does not follow that they are bound to use them because they possess them, any more than a private person would be. They merely fall under the general principle, *Sic utere tuo ut alienum non laedas*. Here the plaintiffs have no right to any particular thickness of soil above their pipes. They are subordinate in this respect to the duties of the road authority: see *Gas Light and Coke Co.* v. *St. Mary Abbotts Vestry*. But they are not trespassers. Their pipes are lawfully in the road, and the defendants' acts have undoubtedly damaged if they have not injured them. I think they can have no higher claim to consideration at the hands of the defendants than the owner of a house for which no right of support from the adjoining house had been acquired, would be entitled to claim against the adjoining owner who, in pulling his own house down, withdraws support to which his neighbour is not entitled. I think it is clear in such a case that, though the pulling-down owner must be careful to interfere as little as possible with the adjoining house, he is certainly not called upon to take active steps for its protection, as, for instance, by shoring it up. There is a broad distinction between exercising a right with reasonable care so as not to do avoidable damage, and taking active measures to insure the continuance of something that is not a right in the adjoining owner. *Chadwick* v. *Trower*, 3 Bing. N. C. 334, 6 *ibid.* 1, which goes, perhaps, further than any other case in the plaintiffs' favour, merely decides that, supposing there is a duty upon a person pulling down his own house to take care not to injure his neighbour's vault in so doing, where he knows of its existence, though it has acquired no right to support, there can be no such duty where he does not know of it. And it cannot be the law that the pulling-down owner is bound to find a substitute or equivalent for the support which he has a right to remove. That he has such a right is clear: see *Dalton* v. *Angus*, 30 W. R. 191, 6 App. Cas. 740.

I think the result is that, though the person pulling down is bound to do no unnecessary damage, he is not fixed with any obligation to take active steps to mitigate a mischief which follows inevitably upon the reasonable exercise of his own rights. I think, therefore, the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs, and I think the existence of the power to move the pipes, and the fact that it was unused, would afford no evidence of want of such reasonable care, and that therefore the judgment ought to be for the defendants.

Appeal allowed.

Solicitors: *W. W. Young & Son; Lanfear, Tanner, & Lanfear.*

High Court of Justice.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills and Lawrance, JJ.) — Nov. 10.

JONES v. MUNRO. (*a*.)

Election law—Registration—Parliament—Borough vote—Duplicate entry—Notice of selection—Appeal—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 14—*Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 42.

Section 28, *sub-section* 14, *of the Parliamentary and Municipal Registration Act*, 1878, *enacts that*, "*Where the name of any person appears to be entered more than once as a parliamentary voter on the lists of voters . . . any such person may, by notice in writing delivered to the revising barrister at the opening of his first revision court, select the entry to be retained for voting. . . .*"

Held, that this power of selection did not exist where one of two entries was an entry appearing in the overseers' list of voters, and the other was only an entry appearing in the list of claims—even although the claim was, in the course of revision, allowed—because the duplicate entries must exist in the list of voters at the time when the notice of selection is required to be given—viz., at the opening of the first revision court.

Held, also, that no appeal lies from a decision of a revising barrister as to the validity or invalidity of a notice of selection of entry given by a voter.

Reg. *v.* The Revising Barrister of Liverpool, 43 W. R. 220, [1895] 1 *Q. B.* 155, *followed.*

Case stated by the revising barrister for the city and county of Exeter.

The appellant's name duly appeared as a voter in the occupation list of the parish of St. Sidwell in St. David's Ward in the city of Exeter in respect of No. 5, Clifton-hill, which was his place of abode.

He made a claim to the overseers of the parish of St. Martin in St. Petrock's Ward to have his name inserted in the lists for that parish as a parliamentary elector and burgess in respect of a warehouse in High-street, in the same parliamentary borough.

On the 16th of September he delivered to the revising barrister at the opening of the first revision court, a notice in writing that he selected the entry in the claim as the entry to be retained for voting.

The appellant's claim to be on the lists of the parish of St. Martin was, in the course of the revision, allowed. He then applied to have the entry in respect of his place of abode in the parish of St. Sidwell marked under section 28 subsection (14) of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), with a note to the effect that he was not entitled to vote in respect of that qualification, he being then on the list of voters in respect of another qualification, *i.e.*, the warehouse in High-street in the parish of St. Martin.

The revising barrister held that he had no power

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

to mark the entry in respect of the appellant's place of abode, on the ground that at the time of the opening of his first registration court there was no duplicate entry in the list of electors to which Form P of the Registration Order, 1895, Schedule 3, could apply, and that the appellant's notice of selection was accordingly bad. The revising barrister accordingly retained for voting the entry in respect of the appellant's place of abode, and placed against the appellant's name in the list of claims in the parish of St. Martin, which he then allowed, a note to the effect that the appellant was not entitled to vote in respect of the qualification therein contained.

The appellant gave notice that he desired to appeal, but the revising barrister, relying on the cases of *Arnold* v. *Sharp*, Fox & Sm. Req. Cas. 252, and *Reg.* v. *Revising Barrister of the Borough of Liverpool*, 43 W. R. 220, [1895] 1 Q. B. 155, refused to state a case.

Subsequently, an order having been made by Channell, J., in chambers, a case was stated for the opinion of the court.

Section 28 subsection (14) of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), provides as follows: "Where the name of any person appears to be entered more than once as a parliamentary voter on the list of voters for the same parliamentary borough, or more than once as a burgess on the burgess lists for the same borough, the revising barrister shall inquire whether such entries relate to the same person, and, on proof being made to him that such entries relate to the same person, shall retain one of the entries for voting, and place against the other or others a note to the effect that the person is not entitled to vote in respect of the qualification therein contained for the parliamentary borough or for the municipal borough, as the case may be, he being on the list for voting in respect of another qualification. Any person may, by notice in writing delivered to the revising barrister at the opening of the first court, select the entry to be retained for voting . . . but if he does not make any selection the entry to be so retained shall be selected by the revising barrister. . . ." Section 5 of the Registration Act, 1885 (48 Vict. c. 15), regulates the manner in which the revising barrister's selection is to be made.

Section 42 of the Registration Act, 1843 (6 & 7 Vict. c. 18), provides as follows: "It shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case, either himself or by some person on his behalf, to give to the revising barrister . . . a notice in writing that he is desirous to appeal. . . ."

Ward Coldridge, for the appellant.—The right to appeal arises under section 42 of the Registration Act, 1843. *Reg.* v. *Revising Barrister of the Borough of Liverpool* is not in point. The appellant is a person to whose claim effect has not been given, and he therefore has a right to appeal. There was a duplicate entry when the question of selection arose sufficient to bring into operation section 28 subsection (14) of the Parliamentary and Municipal Registration Act, 1878. The fact that one of the entries was only on the list of claimants does not affect the question.

Foote, Q.C., and *Ralegh B. Phillpotts*, for the respondent, were not called upon.

Lord RUSSELL OF KILLOWEN, C.J.—The appeal fails on two grounds. The appellant was not in the circumstances of the case in a position to give effective notice of selection. His name did not "appear to be entered more than once as a parliamentary voter on the lists of voters" within the meaning of section 28 (14) of the Parliamentary and Municipal Registration Act, 1878. This is a fatal objection. Further, there was no right to appeal at all. It is clear that under the sub-section referred to there must be, at the date of the notice of desire to select, two entries of the name as a parliamentary voter on the lists of voters. The question whether this is an appealable matter depends on section 42 of the Registration Act, 1843. Counsel for the appellant claims that the appellant's name has not been inserted on the list in an effectual manner; that he is aggrieved by the decision; and that he, therefore, has a right to appeal. But what does this complaint really amount to? Merely this, that the appellant for this year, at least, must select to exercise his residence qualification. If the appellant gives notice of selection before the next revision he will obtain all he requires, because his claim for his business qualification has already been allowed, and he will then appear on the list with a double qualification. I agree that the circumstances in *Reg.* v. *Revising Barrister of the Borough of Liverpool* differed from those in the present case; but it is nevertheless a strong authority that we are not to give a wide and unrestricted meaning to section 42 of the Registration Act, 1843.

WILLS, J.—I am of the same opinion. Section 28, sub-section 14, of the Act of 1878 clearly contemplates the existence of a double qualification at the date of the notice of selection; but here there was no double qualification, for the appellant's claim in respect of his business premises had not then been adjudicated upon. When the claim came before the revising barrister he allowed it, and noted it to the effect that the appellant could not vote in respect of it because he was already on the list for his residential qualification. At the next revision there will be a double qualification with regard to which the appellant will be entitled to exercise his right of selection.

LAWRANCE, J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Preston, Stow, & Preston*, for *Friend, Beal, & Tarbet*, Exeter.

Solicitors for the respondent, *Dunn & Baker*, Exeter.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills and Lawrance, JJ.) — Nov. 10.

KITCHEN v. JOHNSON. (a.)

Election law—Registration—Parliament—Borough vote—Claim—Misdescription of qualifying property—Mistake—Amendment—Parliamentary Registration Act, 1878 (41 & 42 *Vict.* c. 26), *s.* 28, *sub-sections* 2, 13.

Sub-section 13 *of section* 28 *of the Parliamentary Registration Act*, 1878, *applies only to the description of the legal character or nature of the qualification* (i.e., *the third column of the entry in a list or claim*)—*not to the description of the qualifying property* (i.e., *the fourth column*).

In a claim, the third column (*nature of the qualification*) *was "houses in succession," and the fourth column*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

(description of the qualifying property) was "202, *Gordon-road and* 31, *Monk-street.*" *The claim having been objected to, it was proved that the claimant had in fact occupied in immediate succession during the qualifying period,* 202 *Gordon-road and* 33 (*not* 31), *Monk-street; and that* 31, *Monk-street (which was in fact occupied by another person) had been inserted in the claim by mistake instead of No.* 33. *The revising barrister amended the claim by altering* "31," *Monk-street to* "33," *Monk-street in the fourth column.*

Held, that the revising barrister had power to make the amendment, as he did not thereby "change the description of the qualification" within the meaning of those words in sub-section 13 *of section* 28.

Case stated by the revising barrister for the borough of Nottingham.

A claim on behalf of one Ernest Dann to have his name inserted in Division I. of the occupiers' list of electors for the borough of Nottingham had been sent to, and published by, the overseers. The claim was as follows:

Name.	Place of abode.	Nature of qualification.	Description of qualifying property.
Dann, Ernest	31, Monk-street	Houses in succession	202, Gordon-road, and 31, Monk-street.

The claim having been opposed, it appeared at the hearing of the objection that the claimant had occupied in immediate succession during the qualifying period two houses—viz., 202, Gordon-road and 33, Monk-street (not 31, Monk-street). The claimant had authorized a political agent to send in the claim, and had given the agent the particulars of the qualifying property correctly; but a clerk of the agent in filling in the form of claim, by mistake inserted 31, Monk-street instead of 33, Monk-street, in the second and fourth columns of the claim; and the claimant had subsequently signed the claim without observing the mistake. 31, Monk-street was, in fact, a house occupied by another person, and it adjoined 33, Monk-street, but any communications or inquiries for Ernest Dann sent to or made at 31, Monk-street would have reached him at 33, Monk-street.

The revising barrister amended the second and fourth columns of the claim by substituting therein 33, Monk-street instead of 31, Monk-street, and disallowed the objection to the claim; but at the request of the objector the barrister stated the present case, in which the above-mentioned details were stated as his findings of fact.

The Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, enacts as follows: "A revising barrister shall, with respect to the lists of voters . . . which he is appointed to revise, perform the duties and have the powers following: (1) He shall correct any mistake which is proved to him to have been made in any list. (2) He may correct any mistake which is proved to have been made in any claim or notice of objection. (6) The revising barrister shall expunge the name of every person, whether objected to or not, whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property, if the qualification is in respect of property, or any other particulars respecting whom, by law required to be stated in the list, is or are either wholly omitted or, in the judgment of the revising barrister, insufficiently described for the purpose of being identified, unless matter or matters so omitted or insufficiently described be supplied to the satisfaction of the revising barrister . . . and in case such matter or matters shall be so supplied he shall then and there insert the same in such list; (13) except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same."

Section 24 of the same Act (Parliamentary and Municipal Registration Act, 1878) enacts that "Any person who is entered on any list of voters . . . and whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property is not correctly stated in such list . . . may . . . if he thinks fit, make and subscribe a declaration . . . before any justice of the peace or commissioner." The form for such declaration as to misdescription is now Form M, Schedule 3, of the Registration Order, 1895.

W. Graham, for the appellant.—The description of the qualifying property in the claim is inapplicable to the house in fact occupied by Ernest Dann, and the revising barrister had no power to amend it, as by so doing he was changing the description of the qualification contrary to section 28, sub-section 13, of the Act of 1878: *Foskett* v. *Kaufman*, 34 W. R. 90, 16 Q. B. D. 279; *Bendle* v. *Watson*, 20 W. R. 145, L. R. 7 C. P. 163; *Hurcum* v. *Hilleary*, 42 W. R. 321, [1894] 1 Q. B. 579; and *Soutter* v. *Roderick*, *Le Blondes Case*, 44 W. R. 205, [1896] 1 Q. B. 91.

Appleton, for the respondent.—Section 28, sub-section 13, does not apply. It deals only with the "qualification," that is to say, the matter which appears in the third column under "Nature of qualification," and it does not apply to that which appears in the fourth column—the description of the qualifying property. The enactment applies to the legal qualification, as, for instance, "dwelling-house," "houses in succession"; it does not apply to the description of the property which gives the legal qualification. *Foskett* v. *Kaufman* and *Hurcum* v. *Hilleary* do not apply, as the alteration made by the revising barrister in each of those cases was from one legal qualification to another. *Bendle* v. *Watson* (1872) is really a case in favour of my argument, as there the alteration made by the barrister related to the description of the qualifying property, and it was held that he had power to make it. The Court of Appeal in Ireland have, in three cases, held that the barrister had power to amend the fourth column—the description of the qualifying property: *Short* v. *Daly* (1891), Lawson's Registration Cases (Ireland), 1885-93, at pp. 310-12; *Hanbridge* v. *Beveridge*, *Donnelly's case*, *Ibid.*, at pp. 303-4; *McClafferty's case*, *Ibid.*, 1894-7, at p. 40. Even if sub-section 13 does apply to the fourth column, the alteration made in the present case was for the purpose of more clearly and accurately defining the qualification, and therefore comes within the exception at the end of sub-section 13. The revising barrister was justified in making the alteration under sub-sections 2 and 6 of section 28.

Graham, in reply.—The Irish cases cannot be relied on as authorities on the revising barrister's power to amend the description of the qualification, owing to the difference in language between section 28 of the English Registration Act, 1878, and sections 4 and 27 of the Irish Registration Act, 1885 (48 Vict. c. 17):

see Rogers on Registration, 16th ed.. p. 306, note (*h*).*

Lord RUSSELL OF KILLOWEN, C.J.—Not without doubt I have come to the conclusion that the revising barrister acted within his powers. [After stating the facts and reading section 28 (1) (2) and (13) of the Parliamentary and Municipal Registration Act, 1878, his lordship proceeded:] The Court of Appeal in *Foskett* v. *Kaufman* have decided that the introductory words in sub-section 13 have reference to the provisions of section 24. In that section a clear distinction is drawn between "nature of the qualification" and "name or description of qualifying property." In sub-section 13 I think that "the qualification" means the legal nature and character of the qualification and not the identification or description of the property in respect of which the qualification arises. For example, where a claim is for occupation of a single house a change could not be made so as to make it a claim for successive occupation. Nor could a change be made from a dwelling-house qualification to a qualification in respect of a place of business; nor from an ownership qualification to an occupation one. It is to the third column only, therefore, that sub-section 13 applies, and while there is no power to alter the entry in the third column, there is ample power to alter that in the fourth column. *Foskett* v. *Kaufman* affords an apt illustration of a change in the nature of the qualification. The change in that case which was sought to be made, but was disallowed, was a change from single occupation to successive occupation. *Bendle* v. *Watson* is an authority in point, and does not differ in principle from the present case. The Irish cases, which were decided upon the provisions of an Irish Act not differing materially from the Act under consideration, are also in point. Having decided that sub-section 13 does not apply, it is unnecessary to consider the further point whether the alteration was for the purpose of more clearly and accurately defining the qualification.

WILLS and LAWRANCE, JJ., concurred.

Solicitor for the appellant, *Berryman*, Nottingham.

Solicitor for the respondent, *Sir William Johnson*, Nottingham.

C. C. R.
(Lord Russell of Killowen, C.J., and Hawkins, Wills, Wright, and Bruce, JJ.) — Nov. 5.

THE QUEEN v. BIRD. (*a*.)

Criminal law — Evidence — Admissibility — Prisoner's statement before the magistrate reaffirming evidence given by him on oath.

A prisoner charged with an offence under the Criminal Law Amendment Act, 1885, *gave evidence on oath at the hearing before the magistrate, and afterwards, in response to the usual inquiry whether he wished to make any statement, said, "What I have already said is true." He was committed for trial.*

Held, that his evidence given on oath before the magistrate was admissible as evidence against him on his trial.

Case stated by the recorder of the borough of Cambridge.

Fred Bird was tried at the midsummer quarter sessions for the borough of Cambridge for an indecent assault upon a girl under ten years of age.

At the hearing before the magistrate, after the depositions of the witnesses for the prosecution had been taken, the prisoner was asked whether he desired to call any witness. He replied that he had no witnesses to call, but desired to give evidence himself. Thereupon, no previous caution having been given to him, he was sworn and gave evidence, which was taken down in writing, read over to and signed by him and by the magistrate. Then after the usual caution he was further asked, "Having heard the evidence, do you wish to say anything in answer to the charge," whereupon he made this statement, "What I have already said is true. I have no witnesses to call." This statement was in due course returned with the depositions to the court, and was put in evidence for the prosecution.

The counsel for the prisoner having stated that he should not call the prisoner as a witness, and the prisoner also having declined to give evidence, counsel for the prosecution proposed to put in evidence the prisoner's deposition before the magistrate.

To this the prisoner's counsel objected, on the ground that the prisoner was present in court, and was a competent, though not a compellable, witness; and, further, that what he had said before the magistrate, being upon oath, was not admissible.

The recorder was of opinion, and so directed the jury, that when the prisoner stated in answer to the charge, "What I have already said is true," he meant that the evidence which he had already given before the magistrate was true; and that it was, in fact, a re-statement by him, not on oath, of what he had already stated on oath, and he allowed the deposition to be read.

The jury convicted the prisoner, and in answer to a question put by the recorder, said that the prisoner meant by "What I have already said is true" that the evidence which he had already given before the magistrate was true.

The question for the opinion of the court was whether the prisoner's deposition was rightly admitted.

H. S. O. Ellis, for the prisoner.—The prisoner was under the Criminal Law Amendment Act, 1885, a competent but not a compellable witness. Reading his deposition made him in effect a witness upon compulsion. His evidence before the magistrate was a statement made by him before he had been cautioned under 11 & 12 Vict. c. 42, s. 18, and was therefore inadmissible at the trial.

Henry Sutton, for the prosecution, was not called upon to argue.

Lord RUSSELL OF KILLOWEN, C.J.—I think it is as clear as possible that there was nothing irregular in what was done here. This evidence was admissible upon either of two grounds: First of all this was a statement made by the prisoner, he had given evidence upon oath and he was then asked after the usual caution if he wished to make a statement and he did so by saying "what I have already said is true"; what he had said upon oath was therefore admissible as a statement made by him after he had been duly cautioned. Secondly, even if he had not said that, the evidence which he gave before the magistrate was

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* Section 4 of the Parliamentary Registration (Ireland) Act, 1885 (48 Vict. c. 17), enacts (*inter alia*): "No evidence shall be given of any other qualification than that which is described in the list or claim as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same."

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

a statement made by him on oath properly administered and is within the decision in *Reg.* v. *Erdheim*, 44 W. R. 607, [1896] 2 Q. B. 260. In that case I said "I take the general rule to be (apart from any express statutory exceptions) that any statement made by a party relevant to the matter in hand may be given in evidence against him in any civil case and also in any criminal case except where such statement is made upon oath improperly administered or where such statement is not voluntary within the principle to which I have already referred." On these grounds I think the conviction must be affirmed.

HAWKINS, J.—I am of the same opinion. If the prisoner had made the statement voluntarily, but not upon oath, no one could doubt its admissibility. How can the fact of its being on oath make it inadmissible? The oath merely emphasises the statement. Then when he was asked if he wished to make a statement and in reply said "What I have already said is true" he in effect restated the evidence which he had already given.

WILLS, WRIGHT, and BRUCE, JJ., concurred.

Conviction affirmed.

Solicitor for the prisoner, *E. Vinter*, Cambridge.

Solicitor for the prosecution, *The Treasury Solicitor.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Oct. 27.

GOUGHLIN *v.* GILLISON AND ANOTHER. (*a.*)

Bailment—Loan of chattel—Defect in chattel—Injury to borrower therefrom—Liability of lender to borrower.

In the case of a gratuitous loan of a chattel the lender is not liable to the borrower for injury caused by a defect in the chattel unless he knew of the defect at the time of the loan, and either concealed it from the borrower or was guilty of gross negligence in not informing him of it.

Blakemore *v.* Bristol and Exeter Railway Co., 6 *W. R.* 336, 8 *E. & B.* 1035, *and* MacCarthy *v.* Young, 9 *W. R.* 439, 6 *H. & N.* 329, *approved.*

Appeal from the judgment of Hawkins, J., at the trial of the action with a jury.

The plaintiff was in the employment of a ballast contractor who had contracted with the defendants, shipowners, to ballast their ship. The work was to be done by means of winches worked by hand. The plaintiff and the other workmen who were employed by the contractor on the work asked the captain of the ship for the loan of a donkey-engine, which was on the ship, in order to expedite the work, and the captain agreed to do so upon condition that the men employed and paid a skilful person to work the engine. This was agreed to, and the donkey-engine was lent to them. While the engine was being worked, the boiler, in consequence of a defect in it, exploded, and injured the plaintiff. There was no evidence that the defendants knew of the defect, and there was evidence that they had used the engine the day before it was lent to the men.

In an action by the plaintiff to recover damages for personal injuries, Hawkins, J., directed judgment for the defendants.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The plaintiff appealed.

Cyril Dodd, Q.C., and *Minton-Senhouse*, for the plaintiff.—This is not a case of gratuitous bailment. The plaintiff was engaged on business in which both he and the defendants were interested, and he was there by the invitation of the defendants. The defendants were interested in getting the ship unloaded quickly, and therefore they supplied the donkey-engine. There was, therefore, evidence to go to the jury. [They referred, upon this point, to *White* v. *France*, 25 W. R. 878, 2 C. P. D. 308.] Secondly, assuming that this was a gratuitous bailment, where one person supplies a chattel for another person to use, and the latter is injured by a defect in the chattel, the former is liable if through gross negligence he did not discover the defect and tell the former of it when he supplied the chattel to him: *Moffatt* v. *Bateman*, L. R. 3 P. C. 114, 18 W. R. H. L. Dig. 11; and Pothier, in his Traité du Prêt à Usage, (ed. Dupin 1835) vol. 4, ch. 3, par. 84, says that if the lender, "*par dol ou par une faute lourde,*" fails to inform the borrower, he is liable to an action. The decisions in *Blakemore* v. *Bristol and Exeter Railway Co.*, 6 W. R. 336, 8 E. & B. 1035, and *MacCarthy* v. *Young*, 9 W. R. 439, 6 H. & N. 329, are not consistent with the subsequent decision in *Moffatt* v. *Bateman*. There was evidence here of gross negligence, and the case ought to have been left to the jury.

Pickford, Q.C., and *Maurice Hill*, for the defendants, were not called upon.

A. L. SMITH, L.J. — This is an action by the plaintiff who was injured by the explosion of the boiler of a donkey-engine on board a ship of which the defendants were the owners. Certain workmen, of whom the plaintiff was one, were employed by a ballast contractor to ballast the ship with winches worked by hand. The men, being desirous of getting the work done more quickly, asked the captain of the ship for the loan of the donkey-engine. The captain agreed to lend them the engine upon condition that they employed and paid a skilful man to work it. The men agreed to that, and the engine was handed over to them. While the engine was being worked the boiler exploded, and injured the plaintiff. The plaintiff brought this action against the owners of the ship. In the first place, it is said that this was not a gratuitous bailment of the donkey-engine by the captain of the ship to the plaintiff and the other men. To my mind it clearly was a gratuitous bailment. It was a mere loan of the donkey-engine. The evidence as to that is all one way, and therefore there was no question upon that point to leave to the jury. The next question is, What is the law applicable to such a case with regard to the obligations of the lender towards the borrower? The law was laid down by the Court of Queen's Bench in *Blakemore* v. *Bristol and Exeter Railway Co.* that in the case of a gratuitous loan, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows that the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. It is said that that is not a correct statement of the law, and that the borrower can maintain an action if he can show that there has been gross negligence in the lender in not finding out the defect in the chattel. The law goes this far, that if there is gross negligence on the part of the lender in not communicating to the borrower his knowledge of the defect in the chattel, and injury ensues therefrom to the borrower, that is on the same footing as a concealment of the defect, and the borrower can

maintain an action against the lender. The decision in *Blakemore* v. *Bristol and Exeter Railway Co.* was approved and followed by the Court of Exchequer in *MacCarthy* v. *Young*. I do not think that the case of *Moffatt* v. *Bateman* in the Privy Council is in point. It was not a case of a bailment of a chattel, but a case of an undertaking by one man to drive another in his carriage, and it was held that the first could only be liable for injury if caused by his gross negligence. But where is there any evidence here of gross negligence, or, indeed, of any negligence at all? It lay upon the plaintiff to show that the bailor knew of the defect in the engine. There is no evidence of that. The evidence showed that the engine had been used in the ship the day before it was lent to the plaintiff and the other men. There is not a particle of evidence of knowledge on the part of the defendants of any defect in the engine. The judgment of the learned judge was therefore right.

RIGBY, L.J.—I am of the same opinion. The question seems to me to be a clear one. In the case of a gratuitous loan of a chattel, in order to give a cause of action to the borrower there must be concealment by the lender of a defect known to him in the chattel, or gross negligence in not disclosing the defect known to him, which amounts to the same thing, and injury to the borrower arising therefrom. Here there was no evidence of any such thing. The engine had been in use the day before it was lent to the plaintiff and the other men, and there was no evidence to show that the defendant or his servants knew of any defect in it.

COLLINS, L.J.—I am of the same opinion. The present case is one of lender and borrower, and I desire to limit my observations to that class of bailment. Usually when dealing with the case of a gratuitous bailment the question arises as to the standard of duty on the part of the bailee. Where, however, a gratuitous bailment is for the benefit of the bailor, then the standard of duty on the part of the bailor is higher than if the bailment were for the bailee's benefit only. The loan here was for the benefit of the borrower only. There is no suggestion that the loan was in anyway for the benefit of the lender or that the engine was used on his invitation. What in such a case is the duty of the lender? The duty of the lender of a chattel towards the borrower is laid down in *Blakemore* v. *Bristol and Exeter Railway Co.* He is bound to communicate to the borrower what he knows as to any defect in the chattel lent. The lender is liable for any injury to the borrower occasioned by the defect, if he either deliberately keeps back the knowledge or by gross negligence fails to communicate it. A passage from Pothier in his Traité du Prêt a Usage (ed. Dupin, 1835), vol. 4, ch. 3, par. 84, has been relied on to show that a liability will exist if the lender is guilty of gross negligence in not finding out a defect which he ought to have found out. In my view, Pothier in the passage relied upon was dealing with the case of a lender knowing of the defect and not communicating it; and this view is borne out by looking at the passage in Pothier which immediately precedes it. Therefore there must be either a deliberate keeping back of something which the lender knows, or gross negligence in failing to tell the borrower what he knows. The law of England has not been carried beyond what is laid down in *Blakemore* v. *Bristol and Exeter Railway Co.* and *MacCarthy* v. *Young*. The case of *Moffatt* v. *Bateman* has no application to the present case. That case belonged to that class of bailments of which the case of a carrier is an example. The plaintiff had entrusted himself without reward to the bailee to be carried. There was a clear duty on the part of the bailee in that case towards the bailor not to be guilty of gross negligence causing injury to the bailor. That case has no application to the case before us, where the defendants are not bailees, but mere lenders.

Appeal dismissed.

Solicitors for the plaintiff, *Lovett & Liddell*.

Solicitors for the defendants, *Thomas Cooper & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — Aug. 9, 11, 1898.

In re HOCKING.
MICHELL *v.* LOE. (*a.*)

Will—Advancement—Power of—Expectant or presumptive interests — Possibility of issue — Woman past usual age of child-bearing.

When property stands limited to A. if (and only if) B should have a child, and B. is a childless woman above the usual age of child-bearing, the court will not treat A. as having no interest in the property.

Therefore, where property was given by will to certain persons if a childless woman of fifty-four should have children, a power of advancement to those persons in respect of their "expectant or presumptive shares" was exercisable by the trustees.

Appeal from Kekewich, J.

James Hocking, by his will dated the 2nd of March, 1891, gave all his residuary real and personal estate whatsoever and wheresoever to trustees upon trust to call in and convert into money and (after payment of debts, &c.) to invest the same, and out of the income to pay annuities to his sisters, Amelia Ann Hocking and Emma Loe, and to other persons. The will further provided as follows: "Should my sister, Amelia Ann Hocking, marry and have children, then when the youngest child of Amelia Ann Hocking or Emma Loe, whichever shall be the youngest, shall reach the full age of twenty-one years, then the whole of my estate shall be divided equally between all the children of Amelia Ann Hocking and Emma Loe in equal shares, share and share alike" (clause 11). "Should Amelia Ann Hocking die without being married, then, when the youngest child of Emma Loe has reached the full age of twenty-one years, my whole estate shall be divided equally between her children, share and share alike" (clause 12). "My said trustees or trustee may, subject to the payment of the annuities hereinbefore provided for, at his or their discretion, raise any part or parts of the then expectant presumptive or then vested share or fortune of any child of the said Emma Loe under the trusts herein contained, not exceeding in the whole for any such child one-third part of his or her then expectant presumptive or vested share or fortune, and apply the same for his or her support, education, advancement, or benefit" (clause 13).

The testator died on the 1st of April, 1892. In February, 1896, A. A. Hocking married George Benmore, who died in 1897. She was now fifty-four years of age, and had never had any children. There was no direct evidence that she was past child-bearing.

Emma Loe had four children, all of whom were still infants.

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

The testator's heir-at-law and sole next-of-kin was his father, William Hocking, who died intestate in 1893. The defendant Grace Hocking, who was William Hocking's second wife, was his administratrix. The trustees of the will took out an originating summons to have it determined, first, whether the power of advancement above set out was now exercisable; and, secondly, whether on the true construction of the will, and in the events which had happened, the residuary estate of the testator ought, when the youngest child of Emma Loe attained twenty-one, to be divided among the children of Emma Loe and their issue in accordance with the directions above set out, or who was now entitled to the capital and income of the testator's residuary estate, and in what shares.

Kekewich, J., held that the event of Mrs. Benmore marrying and having no children was not provided for by the will, and that if she died without having had a child the estate would pass, as undisposed of, to the testator's next-of-kin. On this question (as to which the case requires no report) the Court of Appeal affirmed the learned judge's decision. Kekewich, J., further held that the clause conferring the power of advancement ceased to be operative if it should be proved that Mrs. Benmore was past child-bearing.

Mrs. Loe's children appealed.

Warrington, Q.C., and *R. J. Parker*, for the appeal, cited *In re Dawson, Johnston* v. *Hill*, 37 W. R. 51, 39 Ch. D. 155; and *In re Lowman, Devenish* v. *Pester*, [1895] 2 Ch. 348, 43 W. R. Dig. 195.

P. O. Lawrence, Q.C., and *R. Younger*, for the defendant Grace Hocking.

Renshaw, Q.C., and *W. H. Cozens-Hardy*, for the trustees.

R. J. Parker replied.

Cur. adv. vult.

Aug. 11.—LINDLEY, M. R., after stating the nature of the order made by Kekewich, J., proceeded: The question is whether that declaration is right. It is a somewhat novel point, and we took time to consider it. We have come to the conclusion that the declaration must be struck out.

In *In re Lowman, Devenish* v. *Pester*, a fund was limited, in the events which happened, to the first and other sons of the testator's niece Ellen, with remainder to the first and other sons of his niece Flora. Ellen was seventy, and a spinster. Her possible son was the only person who stood in the way of Flora's son. The court ordered the fund to be paid to Flora's second son, the eldest having died before he attained a vested interest. The court deprived no living person of a possible interest, nor has it ever done so that I know of.

If property is given to A. in the event of B. having no children, can A. claim that property before the death of B.? My answer is: No, neither at law nor in equity, unless B.'s possible child is the only person who can deprive A. of the property. When that is the case the Court of Chancery has ordered funds under its control to be paid to A. when satisfied that B., owing to her age, can have no child.

Again, if property is given to A. in the event of B. having a child, the court has never gone the length of saying that A. can be treated in B.'s life-time as having no interest in the property. The old law as to the dower is opposed to any such view. If a woman, however old, marries a tenant in fee or fee tail, to which her issue, if any, can succeed, she is entitled to dower, although a woman whose issue cannot succeed to the property is entitled to none; see Co. Lit. 30B and 40A and 40B, and *In re Dawson, Johnston* v. *Hill*. The woman, however, must be nine years old at the death of her husband, which is curious: Co. Lit. 33A. I have looked in vain for any case in which the court has deprived one person of the chance of becoming entitled to the property if another should die childless or have a child. Nor ought the court so to do.

The declaration should therefore be varied, and instead thereof it should be declared that the discretion of the trustees under clause 13 of the will can be exercised during the life of Mrs. Benmore.

CHITTY, L.J.—I am of the same opinion. We have construed this will by the light of clause 11, which was the only one material to the point upon which we are now giving judgment. The children of Mrs. Loe were given an interest in the whole of the testator's estate in the event of the testator's sister Amelia, who is now living and is a widow, but has no child, having children.

I agree with the law as stated by the Master of the Rolls, and I think that *Jee* v. *Audley*, 1 Cox Ch. Cas. 324, when considered, is an authority for the propositions which he has laid down. It is quite true that *Jee* v. *Audley* was a case in which the doctrine of perpetuity came into question, but it appears to me to apply to a limitation such as we have now under consideration. As is well known, the court first construes the will, and finds out from the language of the testator what is the true effect of its limitations. In *Jee* v. *Audley* there was a gift on an indefinite failure of the issue of the testator's kinsman John and John's wife Elizabeth. John and his wife Elizabeth were both seventy years of age; but Lord Kenyon declined to consider that it was impossible that those two old people could have a child, and said that consequently, that being his construction of the will, he should apply the measure of the rule against perpetuities. He also said—and I think that this was good sense—that it would be a very dangerous experiment, and likely to introduce the greatest inconvenience, to give latitude to what he called "such sort of conjecture." It is, perhaps, more than a sort of conjecture; but that is the expression that he used, because if the law had been otherwise than as he stated, then, according to the declaration that has been made in the judgment under appeal, there would be the right of a person claiming, as the next-of-kin of the testator do here, to say of any married woman, however young she was, that on medical testimony it was impossible that she could have a child. That sort of thing, of course, has never been allowed—that is to say, the natural law is not taken into consideration as against the form of the limitation itself. The case would apply also, if this contention were to succeed, to the case of a man who, by medical evidence, might be shown to be incapable of being the father of a child. Therefore it is that I think that *Jee* v. *Audley* has a bearing, and a very close one, upon the present case. I mentioned in my judgment in *In re Dawson, Johnston* v. *Hill*, the case of dower from Coke. I shall not repeat what I then said. Lord Coke puts it very neatly, but in his quaint language, in the same proposition. After mentioning some statements, including one that in his time a woman over threescore years old "hath had a child," he adds, "*Ideo non definitur in jure*" (Co. Lit. 40A); which I said that I then understood, and which I now think, to mean that no legal proposition can be founded on the impossibility of issue. That is an old authority, but still, I think, an authority in the present case.

For these reasons, I think that as long as the testator's sister Amelia is living the power contained

in clause 13, which relates to the expectant and presumptive as well as to the then vested shares—of course these are not vested—is exercisable by the trustees, the power being, as has been pointed out, not merely for advancement, but for support, education, or benefit, the latter word being the largest.

COLLINS, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors, *Field, Roscoe, & Co.*, for *Ford, Harris, & Ford*, Exeter; *King, Wigg, & Co.*, for *J. P. Blight*, Callington; *Robbins, Billing, & Co*, for *Paige & Grylls*, Redruth.

High Court of Justice.

Chan. Div. } Stirling, J. } Oct. 26; Nov. 5.

In re NOURSE.
HAMPTON *v.* NOURSE. (*a.*)

Will—Condition—Gift on marriage with consent—Condition precedent—Alternative gift.

A condition of marriage with consent, attached to a gift of personal estate is, as a general rule, void as far as the consent is concerned, even though it be a condition precedent. This rule, however, does not apply where there is a gift over or an alternative gift.

Accordingly, a testator, having given an annuity to his son for life, with an additional annuity in the event of his marriage with the consent of the trustees of the will,

Held, that the testator had provided for his son either way by means of an alternative gift, and that the condition, therefore, was good as falling within that class of exceptions to the general rule which was established in Gillet *v.* Wray, 1 *P. Wms.* 284.

This was a summons by one of the defendants in an action to administer the estate of James Nourse, who died on the 4th of April, 1897, and raised the question of the validity of a condition which the testator had annexed to an annuity in the event of the marriage of his son, who was the present applicant.

The facts were as follow: By his will, dated the 29th of September, 1894, the testator gave to his son, H. J. Nourse, an annuity of £2,000 for his life, "and if he shall marry, or shall have married either in my lifetime or after my decease, an additional annuity of £1,000." He also gave an annuity of £1,000 to his son's widow, if his son should die leaving a widow. He then directed the accumulation of surplus income for a period of twenty-one years after his decease if his son or his son's widow should so long live, and that at the expiration of that period the surplus income of the investments and accumulations should be paid to such of the daughters and granddaughters of his cousins Francis and Thomas Carey as should be living at his decease, and subject to the preceding trusts the trustees should stand possessed of the trust premises in trust for the issue of his son as his son should appoint, and in default of appointment for his son's children equally on attaining the age of twenty-one years, or in the case of daughters marrying under that age, in equal shares as tenants in common. And subject to the preceding trusts in trust for the daughters and granddaughters living at his decease of F. and T. Carey in equal shares as tenants in common.

By a codicil dated the 30th of May, 1895, the testator declared as follows: "I direct that the annuity of £1 000 by my said will bequeathed to my son Henry James Duncan Nourse in the event of his marriage shall be payable to him only if he shall have married in my lifetime with my previous consent in writing or after my death with the previous consent in writing of the trustees for the time being of my said will." And the codicil contained a similar direction with reference to the annuity of £1,000 bequeathed to his son's widow.

The testator's will and codicil were duly proved on the 8th of May, 1897.

The estate of the testator included no realty.

An action was commenced by the executors for the administration of the testator's estate. H. J. Nourse, the testator's son, was still unmarried, and he now issued the present summons asking for a declaration that the conditions attached to the annuities given to himself and his widow respectively were inoperative.

The question as to the widow's annuity was not argued.

C. E. Jenkins, Q.C., and *Petersen*, for H. J. Nourse.—The question is whether, taking the will and codicil together, the obtaining the consent of the trustees is a condition precedent or a condition subsequent. Taking first the case of a condition subsequent, we understand the law to be this: that a gift of personal estate to which is annexed a condition of marriage with consent is void *qua* the consent, except in certain cases, of which the best known is the case of a gift over. The case of an alternative gift is another exception. It will probably be argued that this is a condition precedent. We submit, however, that the law is the same whether the condition be precedent or subsequent: *Semphill* v. *Bayly*, Pre. Ch. 562, and cases cited in Viner's Abr., vol. 5, p. 343, heading Condition, para. 41. The general rule is laid down in *Reynish* v. *Martin*, 3 Atk. 330. There is plenty of authority that the marriage must take place, and that the condition of consent is the only thing disregarded: *Elton* v. *Elton*, 3 Atk. 504; *Garbut* v. *Hilton*, 1 Atk. 381; *Atkins* v. *Hiccocks*, 1 Atk. 500; *Gray* v. *Gray*, 23 L. R. Ir. 399; Jarman on Wills, ed. 5, p. 887.

The cases of *Creagh* v. *Wilson*, 2 Vern. 572; *Gillet* v. *Wray*, 1 P. Wms. 284; *Stackpole* v. *Beaumont*, 3 Ves. 89; *Younge* v. *Furse*, 5 W. R. 394, 8 De G. M. & G. 75, all fall within the exception to the general rule, as being cases either of gifts over or of alternative gifts. But if any of these cases cannot be brought within these exceptions, they must be taken to be overruled by *Reynish* v. *Martin*.

Upjohn, Q.C., and *Whinney, contra.*—We submit that this condition is an effective one and not in *terrorem*. We submit that on the true construction of the will this condition cannot be anything but a condition precedent, as it is a condition which must be complied with before the gift can take effect. We admit that *Reynish* v. *Martin* is an authority against us if the case falls under the general rule. We say, however, that the general rule does not apply to the present case: *Harvey* v. *Aston*, 1 Atk. 361; *Stackpole* v. *Beaumont*, 3 Ves. 89; *Scott* v. *Tyler*, 2 Bro. Ch. 431, 2 Dick. 712, 1 W. & Tu. L. C. 535. At any rate there are exceptions to the rule, and we submit that this is a case of an alternative gift, like *Creagh* v. *Wilson*, *Gillett* v. *Wray*, and *Holmes* v. *Lysaght*, 4 Bro. Parl. Cas. 185 (in Tomlin's Edition, 2 Br. 261). But we also submit that there is here in effect a gift over. A direction that a gift shall, on breach of a condition, fall into residue is equivalent to a gift over. The

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

present case therefore falls within the other class of exceptions: *Lloyd* v. *Branton*, 3 Mer. 108.

P. S. Stokes, in the same interest.—The present case can be distinguished from *Reynish* v. *Martin* because in that case there was no provision made for the daughter at all.

Butcher, Q.C., and *Warlters Horne*, for the trustees of the will.

Jenkins, Q.C., in reply.—Even if it cannot be maintained that this is a condition subsequent, the general rule laid down in *Reynish* v. *Martin* applies. This case has not been shown to fall within either class of exceptions, and, further, the cases cited as authorities for the exceptions were all decided before *Reynish* v. *Martin*. [STIRLING, J.—But they were not overruled by it.] I submit that this is not a gift by way of substitution: *Hick* v. *Pendarvis*, 2 Eq. Ca. Abr. 212, 2 Freem. 41. [*Whinney* referred to Jarman on Wills, 5th ed., p. 388.] As to *Scott* v. *Tyler*, Lord Thurlow seems to have had no doubt that *Reynish* v. *Martin* was good law. On the true construction of this will there is no alternation or substitution. Nor is there any gift over: *Bellasis* v. *Ermine*, Cas. in Ch. 22; *Wheeler* v. *Bingham*, 3 Atk. 364. *Gillett* v. *Wray*, does not lay down any general rule of law.

Cur. adv. vult.

STIRLING, J.—The question which arises on this summons is whether a condition which a testator has seen fit to annex to an annuity in the event of the marriage of his son is a condition in restraint of marriage, and therefore bad according to law. [His lordship stated the terms of the will and codicil to the effect set forth above, and after remarking that they must be taken together, continued:] I cannot give any decision as to the son's widow's annuity, but that must be borne in mind in construing the gift to the son. As to the nature of the condition, it seems to me that it must be treated as a condition precedent and not as a condition subsequent. Then the question arises, is it valid or invalid? If one had to deal with it according to the English common law it would be valid, as is shown by decisions as to real estate, and the donee if he married without consent would not be entitled to take the benefit of the devise, he would not be entitled unless he satisfied the condition. But that is not so as regards pure personalty, and in the present case the testator had no real estate. The doctrine was laid down and established by Lord Hardwicke in *Reynish* v. *Martin*. There a mother by her will said that if her daughter married with the consent of the trustees or the major part of them signified in writing, before such marriage, "then and not otherwise I give and devise unto my said daughter Mary the sum of £800"; and the testatrix directed another daughter Martha (to whom she had devised all her real estate) to pay her £30 yearly whilst she continued sole, by payments of £15 each on May Day and All Saint's Day, and charged all her real estate with debts of all kinds and legacies. The daughter Mary, after the death of the mother, married the plaintiff without the consent of the trustees, and died soon after, but before her death the trustees declared their consent and approbation in writing. The Lord Chancellor directed that the plaintiff should be paid the arrears of the £30 *pro rata* until the marriage, and in case the personal estate should be exhausted by payments of debts, so much of the real estate should be sold as would pay the £800 and arrears of the annuity. On the face of that I may remark that payment of the annuity of £30 was only while the annuitant continued sole, and was not dependent upon whether she married with or without consent. As to the £800, Lord Hardwicke says: "I apprehend that, taking this as a mere personal legacy, the plaintiff, by the rules of the civil and ecclesiastical law, and which have been constantly adhered to in this court, will be entitled to the legacy; for it is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, that this is not looked on as a condition annexed to the legacy, but as a declaration of the testator *in terrorem*. This rule is so strictly adhered to in the ecclesiastical court that the marrying without consent is not considered there as a breach of the condition, although the legacy is actually given over; but that rule has not been carried so far in this court, for in many instances here it has been considered as a breach of the condition, and the legacy thereby forfeited. But that differs from the present case, because here the legacy is given to Mary only, without any limitation over. But then it was objected that there is a strong and material difference between a condition precedent and subsequent, and this being a condition precedent, and as the condition was not performed, nothing vested because the event was not come on which the legacy was to take effect. Undoubtedly this is true in general, both in law and equity, but I do not find that the civil or ecclesiastical law have made any distinction between conditions precedent and subsequent, but that in both cases the condition as such is merely void." In that case the Lord Chancellor held that the condition was inoperative and the legacy payable, and made a decree, in case the personal estate should be exhausted, that the plaintiff should receive satisfaction out of the real estate. That is a decision that, though the condition was precedent, it was inoperative, and the legatee was entitled to the legacy though the condition was not fulfilled. There has been no case cited before me to throw any doubt upon that decision. That decision is plain and clear, and would be easy to apply; but Lord Hardwicke pointed out that the rule of the civil and ecclesiastical authorities, in cases where the legacy was given over, had not been so fully followed or carried out to the same extent in the Court of Chancery. In *Lloyd* v. *Branton* Sir William Grant, M.R., refers to this distinction, and, after saying that, whatever diversity of opinion there may have been with respect to the necessity of a devise over in the case of conditions precedent, a subsequent condition, without such a devise, of forfeiture on marriage without consent has never been enforced, goes on to say: "Different reasons have been assigned by different judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the devisee over which made the difference, and that the clause ceased to be merely a condition of forfeiture and became a conditional limitation to which the court was bound to give effect." That exception (of a gift over) does not, I think, cover the present case, and what was relied upon in argument was another class of exceptions which was established in *Gillet* v. *Wray*. That rule was this. One by will left an annuity of £10 to his granddaughter, and afterwards by a codicil declared that if his granddaughter should marry with the consent of his trustees, then she should have £150 in lieu of the annuity, which should cease. The granddaughter married without the consent of the trustees. Whereupon it was objected that the restraint on marriage was only *in terrorem*, and that the granddaughter, notwithstanding her having

married as above, ought to have the £150 portion. But Lord Cowper decreed the contrary, saying there was a provision made either way, and, where the provision was in the alternative and there was a condition precedent to the gift of the portion—namely, of marriage with consent, and that was not performed, and the donee was still provided for, though not with the greater portion, equity in that case did not relieve. Prior to that decision of Lord Cowper there had been decisions in an opposite sense. And in *Scott* v. *Tyler* Lord Thurlow says: "It was made a question formerly what a legatee should take on her marriage under a bequest of £200 if she married or £100 if she did not. Some thought £300, some £200, some £100. In our books we find it determined formerly, in the case of a greater legacy given upon marriage with consent or after a certain age, and a less in the other events, that the greater legacy was not forfeited by marrying against the condition; but those decisions happened in the period alluded to before, when the worth of the alliance was thought a sufficient reason for a favourable interpretation, as it was called, of the condition; but Lord Cowper determined otherwise on alternative bequests." Lord Thurlow recognized the decision of Lord Cowper, whose decision has been taken to settle the law down to the present time. I must, therefore, take this exception to the general rule as laid down in *Reynish* v. *Martin*. Whether or not I should myself have taken the same view as was taken in *Gillet* v. *Wray* it is not necessary to decide. There is the exception which has been established.

Then the question is, Does the present case fall within it? The language used by the testators in the two cases is not the same, but there seems to me to be no difference in substance. Lord Thurlow treats generally the question of a larger sum if the donee marries and a smaller sum if she does not. In the present case the gift is a smaller one if the son does not marry and a larger one if he does. It seems to me the cases are substantially the same and ought to be governed by the same rule. This seems to me to be in accordance with the decision in the Irish case of *Holmes* v. *Lysaght*. That case was taken before the House of Lords but was settled by a compromise, and so is of no great authority. I think, therefore, that the condition is operative.

Solicitors, *Corsellis, Mossop, & Berney; Monro, Slack, & Co.*, for *Wheeler & McCutcheon*, Belfast; *L. C. Webb; Pollock & Co.*

Chan. Div.
Wright, J. } Oct. 26.

In re LONDON DRAPERY STORES (LIMITED). (a.)

Company—Winding up—Supervision order—Pending action—Costs prior to winding up—Payment in full.

The costs of an action begun by a company while a going concern and continued, with leave, by the liquidators after the company has been ordered to be wound up under supervision, and in which judgment was entered in favour of the defendant with costs, are payable in full even when the order granting the liquidators leave to continue the action is silent on the subject.

The company while a going concern had commenced an action against Earl Brownlow. While the trial was pending the company passed an extraordinary resolution to wind up voluntarily, a supervision order being afterwards made. The liquidators decided to continue the action, and obtained the leave of the court to do so. On the trial of the action the defendant (Earl Brownlow) obtained judgment against the company with costs. The question which had now to be decided was whether the defendant was entitled to his full costs in the action during the time that the company was a going concern, or whether he could only prove in the winding-up for these costs and rank for dividend with the other creditors of the company.

H. F. Manisty, for Earl Brownlow.—If the company had been successful in the action it would have been paid the costs of the suit in full, and as it has failed it must now pay them in full: *Boynton* v. *Boynton*, 27 W. R. 825. 4 App. Cas. 733. In *Cook* v. *Hathaway*, 17 W. R. 1057, L. R. 8 Eq. 612, the assignee in bankruptcy was stayed from proceeding with a suit of the bankrupt, who had been ordered to pay certain costs, until such costs were paid. The costs are payable and not provable.

Martelli, for the liquidators.—Where nothing is said as to costs in the order giving leave to the liquidators to continue the action, the costs incurred before winding up are only provable in the ordinary way.

He also quoted Buckley on the Companies Acts, 7th ed., p. 271, and *In re Snyder Dynamite Projectile Co.*, [1893] W. N. 37.

WRIGHT, J.—It seems to me that the liability of the liquidators to pay the costs in full may be held to follow upon what was laid down by Lord Cairns in *Boynton* v. *Boynton*, when, dealing with the case of an executor who had obtained an order allowing him to continue the proceedings in an action instituted by his testator, he said: "He"—that was the executor—"thus adopted the suit, and adopted it *ab initio*. Had he been successful on the appeal he would have retained the cancelled deed, and received the costs ordered to be paid to Lady Boynton, together with the costs of the appeal, and, as he has failed, he must, according to the well-settled practice of the court, submit to an order for payment of costs personally." Of course that does not carry the matter the whole way, because the question here is not whether the liquidator is liable to pay the costs, but whether the company is liable to pay them in full. It may very well be that in giving leave to a liquidator to continue an action a term ought to be inserted in the order that the liquidator if he fails, should pay the costs of the defendant in full, but it does not follow that, because there is no such term in the order, the liquidator is not liable to do so. It seems better to hold that, as the company would have got all the costs if it had succeeded in the action, it ought, if it fails, to be held liable to pay all costs in full of the defendant. That seems to me only just and reasonable. No authorities directly in point have been cited before me, but it seems to be more reasonable to hold that, if in the interests of the company a liquidator elects that an action commenced by it should be continued, the assets of the company should, if the action fails, bear the whole of the costs, than to hold that a part of them should be thrown upon the successful litigant.

Solicitors, *Nicholl, Manisty, & Co.; W. H. Warner.*

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Q. B. Div. (Bigham, J.) June 24, 29; July 4, 1898.

FRACIS, TIMES, & CO. v. THE SEA INSURANCE CO. (LIMITED). (a.)

Insurance—Marine—Arms and ammunition shipped to foreign country in time of peace—Capture—Alleged prohibition of foreign country against importation of such goods—Alleged concealment of fact material for calculating risk—Alleged illegal venture—Validity of policy.

The plaintiffs insured with the defendants arms and ammunition for delivery at certain ports in the Persian Gulf, under a policy which covered "capture at sea." The goods were seized and confiscated by an English man-of-war, acting, it was alleged, on behalf of the Persian Government, under an edict passed in 1881 but which had never been enforced so long as the duty demanded for import of such goods was paid) prohibiting the importation of arms and ammunition into Persia.

Held, that the plaintiffs could recover on the policy, because there had been in fact no wilful concealment on their part from the underwriters of the risk of seizure; for, if they knew of the edict, they had no reason to suppose that it would be enforced so long as the duty payable was forthcoming. Nor was the policy void, as being on goods shipped for an illegal venture, for the importation of such goods into Persia, was neither contrary to the law of Persia as that law was in practice administered, nor illegal by the law of the country of the assured, England being at the time in amity with Persia.

Commercial cause.

This was an action tried by Bigham, J., without a jury. The plaintiffs claimed for loss of goods consisting of arms and ammunition, insured under two policies of marine insurance effected with the defendant company. The "warranty free of capture" clause had been struck out of the policies, and the perils insured against were "men-of-war, enemies, takings at sea, arrests, restraints and detainments, and all other perils as well as all misfortunes.' The goods were seized on the voyage, and the plaintiffs claimed as and for a total loss. The defendants denied liability, alleging that the policies were void because the plaintiffs had concealed a material fact—namely, that the importation of arms and ammunition into Persia was forbidden by an edict of the Persian Government, made in 1881, and the voyage being thus an illegal venture the policies were rendered void.

Pickford, Q.C., and *Hollams*, for the plaintiffs, denied that the voyage was an illegal venture since its object was neither opposed to the law of the nation of the assured nor to the law of nations, and they relied on *Planché* v. *Fletcher*, 1 Doug. 251.

Joseph Walton, Q.C., Carver, Q.C., and Scrutton, for the defendants, cited *Redmond* v. *Smith*, 7 Man & G. 457, and *De Wütz* v. *Hendricks*, 2 Bing. 314. *Planché* v. *Fletcher* was disapproved of by several text-writers, and had never been followed by any judge: see Arnould on Marine Insurance, 6th ed. 694; Pollock on Contracts, p. 307.

Cur. adv. vult.

BIGHAM, J. — This was an action brought by the plaintiffs, who are merchants carrying on business in London and at Bushire in Persia and at Muscat, against the defendants, who are underwriters, on two policies of marine insurance to recover a total loss caused by a capture at sea of the goods insured. The policies were dated respectively the 29th of November, 1897, and the 6th of December, 1897. The first policy was described to be on four cases of cartridges, valued at £125, per steamer *Baluchistan*, London to Bahrein and (or) other Persian Gulf ports; and the second policy on one case rifles and one case cartridges, valued at £200, by the same vessel to Bunder Abbas and (or) other Persian Gulf ports. The bills of lading for the goods mentioned in the first policy described the goods as shipped for "Bahrein, *vid* Bushire. Muscat optional." The bills of lading for the second parcel described the goods simply as shipped for Bunder Abbas. Bahrein is an island on the west coast of the Persian Gulf, and Muscat is a port on the Gulf of Oman, neither of the places being in Persian territory. Bushire and Bunder Abbas are ports in the Persian Gulf and are both in Persian territory. *The Baluchistan* sailed from London about the 26th of November, 1897, and on the 26th of January, 1898, when off Muscat, she was intercepted by her Majesty's ship *Lapwing*, purporting to act on behalf of the Government of the Shah of Persia, and the goods in question were seized and confiscated. The alleged ground of the confiscation was that the goods were intended for importation into Persian territory, and that the importation of arms and ammunition was forbidden by the Persian law. The plaintiffs thereupon made a claim against the defendants as for a total loss. The defendants objected to pay on two grounds. First, they said that the plaintiffs had, when effecting the insurance, concealed a fact material to the estimation of the risk—viz., that the importation of arms was forbidden by Persian law; and, secondly, they said that the adventure was illegal, as being in contravention of what they called the law of nations.

Dealing first with the question of concealment, the evidence before me was to the effect that as long ago as the 1st of July, 1881, the Persian Government had issued a decree that no arms or ammunition should enter Persian territory without the leave and permission of the Government, and that if any such goods arrived at Bushire they were to be detained and the fact was to be reported to the authorities at Teheran. A copy of the decree was put in evidence. At the same time directions seem to have been given to the Customs officials at Bushire to bring this decree to the notice of merchants and traders, so that they might be warned, and steps seem to have been taken in this direction, although in point of fact the decree appears never to have been brought to the notice of the plaintiffs. The prohibition is said to have been reiterated by the Shah on more than one occasion, and its existence is alleged to have been universally known. I do not, however, find that any attempt to enforce it was ever made, except possibly on one occasion. In the year 1895 a parcel of arms shipped from England for Muscat by the steamer *Zulu* was landed at Bushire. The Customs officials there detained the goods on the plea (so said the English shipowners in their letter of the 21st of January, 1896) "that the heavy duty on arms and ammunition imported into Persia must be paid." The owners of the goods objected to pay on the ground that the goods were not intended for Persia, and were merely landed at Bushire in transit for Muscat. Both the Persian authorities and Sir Mortimer Durand, our representative at Teheran, seem to have suspected the truth of this assertion; but ultimately the goods were released and forwarded to Muscat. In my opinion, the real dispute between the owners of the goods and the Persian Customs on that occasion was as to whether the former should pay the arbitrary and heavy duty which the latter sought to exact, the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

goods owners saying that they ought to pay nothing because the goods were merely in transit, the Customs authorities saying that full duty ought to be paid because the goods were in fact landed in Persian territory, and were, as they suggested, not going to Muscat at all. The incident has, in my view, little or nothing to do with the case now before me, and I only refer to it because it was relied upon by the defendants at the hearing as supporting their contention that the prohibition was effective and notorious. That there was in fact a qualified prohibition against the importation of arms and ammunition is clear, but I think it is necessary to inquire whether it was really operative. Now, the plaintiffs tell me (and I am satisfied that they are telling me the truth) that for many years past, indeed, since 1884, they have been regularly engaged in the importation of arms into Bushire. They at first imported the goods in execution of the orders of buyers in Persia, but later on they imported the goods for sale on their own account. The trade was conducted during all these years quite openly. The goods were described in the bills of lading and ship's manifests as arms, and they were so entered at the Customs, both in England and in Persia. After importation they were placed in the plaintiffs' godown in Bushire and there publicly sold. Other firms at Bushire carried on similar trade in the same way. I think it probable that the plaintiffs knew that there was something in the nature of a prohibition against the trade, but I am quite satisfied that they believed it to be a dead letter, and that they had never heard of any attempt to enforce it, or of any complaint by the Persian Government that it was being disregarded. If the so-called prohibition was effective for any purpose at all, it was merely for the purpose of enabling the representative of the Shah at Bushire, who apparently farms his office from the Government, to levy heavy and arbitrary duties on the goods imported. This representative is an official who has the very largest powers; he is no doubt frequently changed, but while holding his office he can do practically what he pleases. The plaintiffs told me that the duties were fixed and levied by these officials, who were well aware of the nature of the trade, and who, so far from objecting to it, complained that there was not enough of it. All this is borne out by Major Meade, our political resident in the Persian Gulf. In his trade report, addressed to the Government of India for the year 1896-97, at p. 5, he says: "ARMS AND AMMUNITION.—This trade was found to be so flourishing last year, and the sums obtained by the local authorities for conniving at it were so considerable, that the central Government considered that there was room for another partner in it, and a special official was appointed from Teheran nominally to enforce the prohibition against the import of arms; but, as the official in question paid for his post in the usual fashion, it is certain that neither he nor the Government had any intention of really carrying out the orders. In spite of this new tap on the profits the trade shows an income of ten lakhs, and, I believe, forward shippings are satisfactory for all those who share in this nominally illicit trade." This, in my opinion, is a frank, honest, and accurate account of the position. There was no real prohibition at all; nor did anyone engaged in the trade imagine, certainly the plaintiffs did not, that there was the least danger of interference so long as the duties were forthcoming in answer to the demands of the Government officials. If further evidence on this point were wanted it is found in the report of our Consul-General, Mr. Fred A. Wilson, for the year 1895 on trade at Bushire. Speaking of the importation of arms and ammunition, he says: "Theoretically this trade is prohibited by the Persian Government, but, like all similar prohibitions in Persia, this practically only substitutes an arbitrary impost for a fixed duty." What, then, did the plaintiffs know and believe at the time they took out the policies sued on? They knew probably that there was a nominal prohibition against the importation of arms. They knew, as the fact was, that it was never acted upon; they had never heard of any attempt to enforce it; they knew that so long as the duties (which no doubt were arbitrary and variable) were paid there was no prospect at all of interference, and they knew that the trade was open and notorious. They dealt with the defendants with perfect honesty. They did not suggest that the clause in the policies warranting the goods free of capture should be struck out. This was done on the initiative of the defendants themselves, following what appears to be the ordinary practice on an insurance of goods, so that the defendants by their own act became liable for a loss by capture. It was, indeed, suggested in the course of the case that the shipment with an option to land the goods at Muscat pointed to some fear in the minds of the plaintiffs that there might be a danger of the goods being interfered with at Bushire. I am, however, quite satisfied that the only object in obtaining from the shipowner the option to land the goods at Muscat was to enable the plaintiffs to avail themselves of either market, Muscat or Bushire, whichever might be most advantageous. It had no reference to possible difficulties at Bushire, no such difficulties being, in my opinion, anticipated by the plaintiffs. Now, in these circumstances, were the plaintiffs guilty of any omission such as would invalidate their insurance? Their duty to the underwriters was not only to be honest and straightforward (which I am satisfied they were), but to disclose to them all the facts in their knowledge which could reasonably affect the judgment of the underwriters in estimating the risk; however honest the plaintiffs may have been, if they failed in this duty they must lose the benefit of their insurance. The question thus resolves itself into one of pure fact. Were the circumstances as known to the plaintiffs material in estimating the risk? I am of opinion they were not. I have to exercise my knowledge of business, and I am quite satisfied that if the plaintiffs had told to the defendants all that they knew about this trade it would not have affected the judgment of the underwriters in estimating the risk at all. I do not forget that an underwriter was called to tell me that, in his opinion, the existence of an obsolete prohibition would affect the risk; nor do I forget that there were other underwriters in court ready to say the same thing. They speak after the event. For my own part I doubt whether *The Lapwing* acted on the initiative of the Persian Government at all. A copy of the *Times* of the 16th of December, 1897, containing a telegram from that newspaper's correspondent, dated Teheran, the 15th of December, 1897, was put in evidence, in which a seizure of arms which had just been made at Bushire was attributed to the vigorous action of the British and Persian authorities. I think the telegram would have been more accurate if it had attributed the seizure to the vigorous action of the British authorities alone. No doubt it was at this time suspected (probably wrongly) that these arms were destined for the Afghanistan frontier, where the native tribes were giving trouble to the Indian Government, and I cannot help thinking that the action of the Persian Government in December, 1897, and also on the occasion in question in this action, when the services of *The Lapwing* were requisitioned, was really due, not to the prohibition which existed against the importation of arms, but to some representations of the British Government made to the Shah. Whether I am right or wrong in this conjec-

ture is, however, of little or no importance. It is sufficient for me to say that, in my view of the facts, there was nothing in the knowledge of the plaintiffs which could reasonably have affected the calculation of the risk, and which they failed to disclose to the defendants. As to the second point taken by the defendants—viz., that the adventure was illegal because the import of arms was contrary to the law of Persia, and that, therefore, the policy in respect of it was void, I am of opinion that there is nothing in it. The import of arms was not illegal according to the law of Persia, as that law was administered in practice and enjoined; and the export of arms from England to Persia was certainly not contrary to our law.

Judgment for the plaintiffs, with costs.

Solicitors for the plaintiffs, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the defendants, *Rowcliffe, Rawle, & Co.; Hill, Dickinson, & Hill,* Liverpool.

C. C. R.
(Lord Russell of Killowen, C.J., and Wills, Wright, Bruce, and Darling, JJ.) Nov. 12.

THE QUEEN *v.* RHODES. (*a.*)

Criminal law — False pretences — Evidence — Admissibility — Similar acts by defendant after offence charged — Right of defendant to give evidence before grand jury — Right of judge to comment on failure of defendant to give evidence — Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1.

The Criminal Evidence Act, 1898, *does not entitle the person charged, to give evidence for the defence before the grand jury, nor does it negative the right of the presiding judge to comment upon the failure of the person charged to give evidence at the trial.*

On the trial of a person charged with obtaining goods by false pretences, it was proved that the prisoner caused an advertisement to be inserted in newspapers suggesting that he was carrying on a bonâ fide *business, and required the goods for that business, and that the prosecutor supplied him with the goods on the faith of that advertisement. Evidence was admitted that, at intervals of one week and two months respectively after the transaction with the prosecutor, two other persons supplied the defendant with similar goods on the faith of the same advertisement and were not paid for their goods.*

Held, that the evidence was rightly admitted as tending to show that the defendant had no genuine business, but was carrying on a system of fraud.

Reg. *v.* Holt, 9 *W. R.* 74, 30 *L. J. M. C.* 11, *distinguished.*

Reg. *v.* Francis, 22 *W. R.* 663, *L. R* 2 *C. C. R.* 128, *followed.*

Case stated by the chairman of the quarter sessions for the Isle of Ely.

The defendant was tried on the 19th and 20th of October, 1898, on a charge of obtaining a certain quantity of eggs on the false pretence to one William Bays that he was then carrying on business as a farmer or dairyman and did then require eggs for use in the said business and was then in a position to pay for the eggs by means of which said false pretences he did then unlawfully obtain the eggs from the said William Bays with intent to defraud.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Before the bill of indictment was sent to the grand jury the defendant applied in person under section 1 of the Criminal Evidence Act, 1898, to give evidence for the defence before the grand jury. The chairman declined to permit him to do so, but reserved the point for the consideration of this court.

It was proved by the prosecution that the defendant had advertised in the newspapers circulating in the county for new-laid eggs; that he gave no name, but only an address, "Norfolk Farm Dairy, High-street, Mitcham, Surrey," and that the prosecutor, believing he was dealing with a responsible firm, sent two consignments of eggs for which he was never paid. Further evidence was given to prove that the defendant had no right to the title "Norfolk Farm Dairy."

In the course of the trial two witnesses, William Elston and James Chambers, were called for the prosecution to prove that the defendant had obtained eggs of them also, and that they had sent him twelve dozen and fifteen dozen eggs respectively under precisely similar conditions to those sent by the prosecutor. It was stated by the counsel who argued this case for the prosecution (although not stated in the case reserved) that the transaction with Elston occurred about one week, and that with Chambers about two months, after the transaction with Bays upon which the charge against the defendant was founded.

Counsel for the defence objected to the reception of their evidence on the ground that counts against the defendant in respect of his dealings with the two witnesses in question had been struck out by order of the chairman, and their evidence could not be received as proof of fraud. He referred to the case of *Reg.* v. *Holt,* 9 W. R. 74, 30 L. J. M. C. 11.

The chairman overruled this objection and admitted the evidence on the authority of *Reg.* v. *Foster,* 3 W. R. 411, 24 L. J. M. C. 134, and *Reg.* v. *Francis,* 22 W. R. 663, L. R. 2 C. C. R. 128, on the ground that such evidence was relevant to the issue as tending to show motive, intention, or guilty knowledge. He reserved this point also for the opinion of this court.

There was evidence to prove that the defendant did very little trade, and as to this fact a Mrs. Freeborn was called for the prosecution. She had bought the business from the defendant in July, 1898, shortly after he had obtained the eggs from the prosecutor and others, and was examined to prove that the defendant did no trade worth speaking of, judging from her experience of the business she did after taking possession of the shop.

On cross-examination for the defendant she stated that she once had a customer who wanted six dozen eggs, which she had not in stock, but she did not know his name.

Counsel for the prosecution suggested that there was no *bonâ fide* customer, but that the person, whoever he was, had been sent at the defendant's instance to create an impression that there was a large demand for eggs.

Upon this the defendant made a communication to his solicitor, and thereupon his counsel said it was "a Mr. King, of Mitcham," who wanted the eggs, and, upon the chairman observing that a bare statement of such a kind was insufficient, he undertook to clear the matter up when he came to the defence and if necessary to call evidence.

On the close of the case for the prosecution counsel for the defendant intimated that he called no witnesses for the defence, whereupon both counsel addressed the jury, and one witness to character was called.

In summing up the evidence to the jury, the chairman drew attention to the fact that it would have

been more satisfactory if evidence had been called to clear up the mystery of the person who was said to have wanted six dozen eggs, and he pointed out that under the Criminal Evidence Act, 1898, it was open to the defendant to give evidence on his own behalf in support of the statement made by his counsel that it was "a Mr. King, of Mitcham." Counsel for the defence objected, but the chairman ruled that the prohibition in section 1 (*b*) of the above Act as to comment by the prosecution upon the defendant's failure to give evidence did not apply to the court. This point also was reserved for the consideration of this court.

The jury returned a verdict of guilty, and the defendant was sentenced to ten calendar months' imprisonment.

In the event of the court being of opinion that the chairman's rulings as affecting the defendant were erroneous in point of law, the conviction was to be quashed, otherwise to stand.

The defendant was not represented.

H. Raikes, for the prosecution, was not called upon to argue as to the right of the defendant to give evidence before the grand jury.—The evidence of Elston and Chambers was rightly admitted as showing that the defendant was an impecunious person having no real business. Although the transactions with Elston and Chambers were subsequent to that with the prosecutor, they were so connected with it by the advertisement which gave rise to all three transactions as to be evidence of one course of fraud. The evidence was therefore admissible on the principle laid down in *Reg.* v. *Francis*, which case practically overrules *Reg.* v. *Holt*. There is nothing in the Criminal Evidence Act, 1898, to take away the right of the court to comment on the evidence. [He was stopped on this point.]

Lord RUSSELL OF KILLOWEN, C.J.—The first point which affects the defendant is that he applied to be allowed to give evidence for the defence before the grand jury and that the chairman of quarter sessions decided that he ought not to be allowed to do so. In my opinion the chairman was clearly right. This question turns on the construction of section 1 of the Criminal Evidence Act, 1898, which came into operation on the 13th of October last. It enacts that "every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings." It is clear that the right to be called as a witness there given to the person charged is limited; he can be called for the defence only. Now, the grand jury have nothing to do with the defence: their functions are well known and understood—they have to hear the witnesses or some of the witnesses for the prosecution to enable them to determine if there is a *primâ facie* case against the prisoner to be tried before the petty jury before whom the prisoner can be heard by himself or his counsel. The Act does not introduce such a novelty as that witnesses for the defence should be called before the grand jury. The prisoner is a competent witness for the defence but he is not entitled to give evidence before the grand jury. Even if he did come before them and swear that he did not commit the offence and they believed him they could not act on his evidence and throw out the bill, for they have only to say if there is a *primâ facie* case against him. The chairman was therefore perfectly right.

The second question is whether the evidence of Elston and Chambers was receivable. The charge on which the defendant stood his trial was that he obtained certain eggs from the prosecutor by false pretences. The alleged false pretences may be briefly described as these—that the defendant falsely pretended that he was honestly carrying on the business of a farmer or dairyman, and that he wanted these eggs for the purposes of his business (according to the advertisement which he caused to be inserted in the newspapers for a considerable time), and was able to pay for them; whereas in fact he had no real business, and was not in a position to pay for the eggs. It must be assumed that the prosecution proved the false pretences in the case of the prosecutor. But they called Elston and Chambers to prove that they, acting on the same advertisement, had supplied eggs to the defendant upon the same false pretences. It does not appear in the case at what dates these transactions with Elston and Chambers occurred, not even whether they were before or after the transaction with the prosecutor. If they were before, and not remotely before, that transaction, evidence of them was clearly admissible. We are now told by counsel that one of them took place a week and the other two months after the transaction upon which the charge was founded, and I propose to deal with the evidence relying on the accuracy of that statement. The admissibility of the evidence depends on whether or not the real charge was that this was a course of sham or bogus business carried on by the defendant. If there was merely one isolated transaction, and two months afterwards another isolated transaction occurred, I think the evidence of the later transaction would not have been admissible; and even in the present case, if I had been presiding, I would have advised the prosecuting counsel not to press the evidence. But, on the whole, I think it was admissible on the ground that the allegation was a course of fraud carried on by a series of advertisements. These transactions were so connected by means of the advertisement that evidence of the later transactions was admissible in the trial of a charge founded on the earlier one.

In so holding I say nothing in conflict with the decision in *Reg.* v. *Holt*; there the false pretences alleged were that the defendant represented that he was authorized by his master to receive money for goods; the evidence held to be inadmissible related to a similar representation made by him on a subsequent occasion; there was nothing to connect the two occurrences, and the evidence as to the later act threw no light on the former.

The case nearest to the present is *Reg.* v. *Francis*. It is true that the evidence which was there admitted related to a transaction occurring before the transaction the subject of the indictment. [His lordship read the headnote, L. R. 2 C. C. R. 128.] But in the judgment of the Lord Chief Justice is the following passage: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received, must be admissible. It tends to show that he was pursuing a course of similar acts." And, later on, "the prisoner was tried on two charges of attempting, on the 8th of January, at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewellery consisted of real stones. Evidence that he, on the 6th of January, at Bedford, obtained money from another pawnbroker on the pledge of a chain, which he represented to be gold when in fact it was not gold, was surely matter from which the jury might infer that he was in a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine." Though the evidence there was of a fact anterior in date to the

offence charged, the reasoning is applicable to evidence of facts subsequent to the offence where there is a *nexus* or connection between the acts charged in the indictment and the acts of which the evidence is given, such as the *nexus* which I have pointed out in the present case.

The next point is as to the comments of the chairman. The counsel for the defendant was cross-examining a woman who gave evidence to the effect that no genuine business was being carried on at the defendant's address. She stated that there was once a customer who asked her to supply six dozen eggs, but she did not know his name. The defendant's counsel, prompted by the defendant, suggested the name of "Mr. King, of Mitcham," and he undertook to clear the matter up, and, if necessary, to call evidence. Then when it came to his turn he said he called no witnesses. The chairman in summing up drew attention to this, and to the fact that it was open to the defendant to give evidence on his own behalf in support of the suggestion as to Mr. King, of Mitcham. The only question for us is whether he had a right to make this comment. There is nothing in the Criminal Evidence Act, 1898, which takes away or purports to take away the right of the presiding judge to comment on the evidence. Such comments must rest on the discretion of the judge, and it is impossible to lay down any rule as to cases in which he ought or ought not to make comments or what comments he ought to make. This depends on the varying circumstances of cases. In some cases it is wise and even necessary, in others it is not wise to make comments. Here there is no reason to think the chairman was wrong in making these comments: his observations seem to me to have been called for. On these grounds the conviction must be affirmed.

WILLS, J.—I am of the same opinion. I will only add a word as to the admissibility of the evidence. In all these cases as to evidence of similar acts of the prisoner it must be considered exactly what the charge is. Here the charge is that the prisoner falsely pretended that he was carrying on a real business when he was carrying on a mere bogus business. How is it to be shown that he was not carrying on a real business, especially where, as here, he had some of the apparatus of a business—a shop with a name over it? You cannot show it unless you give evidence of other transactions showing that this was not a solitary transaction but part of a system. If the other transactions are prior in date (within a reasonable time) there is no doubt as to the admissibility. There is no principle upon which transactions occurring immediately after the transaction charged ought to be distinguished, the object being to show the system. To my mind the only difficulty is the interval between the transaction the subject of the indictment and the last of the two other transactions. If there were no *nexus* between them I should think it very doubtful whether the evidence of the last transaction ought to be admitted. But where you have the same advertisement giving rise to both transactions and leading to the same results I think the evidence is admissible and the jury must decide as to the weight to be given to it. I have no doubt as to the admissibility of the evidence in question here, and I am glad that no doubt is to be thrown on it by this court. If a man who was not a lawyer were asked to say that his mind ought not to be influenced by it he would say it would be absurd.

WRIGHT, J.—I am of the same opinion on the grounds stated by my lord. On the second point, the allegation being that this was a bogus business, evidence of facts relating to the business during a period from a short time before to a short time after the event in which the charge was founded is relevant. As to the interval of two months it seems to me that the length of time detracts from the value of the evidence unless the interval is filled up by similar instances, but it is not an objection to its legality.

BRUCE, J.—I am of the same opinion, though during the argument I felt some doubt as to the admissibility of this evidence. I think, however, that it was relevant as tending to show that the business was a sham business. Evidence that after the occurrence the subject of the charge the defendant obtained further eggs which he did not pay for seems to me to have only a remote bearing on the charge, but that goes to the weight and not to the admissibility of the evidence.

DARLING, J.—I am of the same opinion. As to the right to give evidence before the grand jury, even if there had been any doubt on the words of the Act it would take a great deal to convince me that it was intended to set up a secret tribunal for the trial of a criminal case: this would have been the effect of enabling evidence for the defence to be called before the grand jury, the public being excluded from their deliberations.

Conviction affirmed.

Solicitor for the prosecution, *E. E. Ruston*, Chatteris.

Prob. Div. & Adm. Div. Admiralty. } Aug. 2, 1898.

"THE VULCAN." (*a*.)

County court—Admiralty—Practice—Payment into court with denial of liability—Meaning of word "tender"—Final order—County Courts Admiralty Jurisdiction Act, 1868, *s.* 26—*County Court (Admiralty) Rules*, 1892, *Ord.* 39b, *rr.* 48-50.

Order 39b *of the County Court Rules of* 1892 *contains special rules to be applied in admiralty actions in county courts having admiralty jurisdiction, and certain rules of such Order are headed "Tenders." Of these rules so headed, rule* 48 *requires a notice of tender to be given, and provides, further, that money may be paid into court with a denial of liability, and that if this is done the form of notice of tender shall be altered accordingly; and rule* 49 *directs that within forty-eight hours after receipt of such notice of payment into court the adverse party shall file a notice of acceptance or rejection of "the tender," whilst rule* 50 *is in terms as follows: "A party accepting a tender shall be entitled to his costs of suit, and shall be at liberty to tax and enforce payment of the same without the necessity of an application to the court for the purpose."*

Held, that the term "tender" in rules 49 *and* 50 *of the above-mentioned Order referred to and included both a payment into court without denial of liability and a payment into court with a denial of liability.*

An order of the judge of a county court having admiralty jurisdiction refusing the taxation of his costs to a party entitled to the benefits given by the latter of these two last-mentioned rules is a final order within section 26 *of the County Courts Admiralty Jurisdiction Act*, 1868, *and is consequently appealable without the permission of the judge of the court appealed from.*

This was an appeal from an order of the judge of the City of London Court.

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

An action had been instituted by Clarke, Sharp, & Co., the owners of the steamship *The Vulcan*, to recover damages (£30) and costs in respect of a breach of an agreement in relation to the use or hire of *The Vulcan* by the defendants, Messrs. A. & F. Good, charterers of *The Vulcan*. The defendants, by their solicitors, paid £17 10s. into court "in satisfaction of the whole of the plaintiffs' claim herein, and we do hereby give notice that notwithstanding such payment the defendants deny their liability." The solicitors for the plaintiffs accepted the sum of £17 10s. so paid by the defendants into court "in satisfaction of the claim in respect of which it was paid in"; and gave notice of an application "that the plaintiffs should be at liberty to tax their costs of the action, including the costs of and consequent upon the application; and that the defendants be ordered to pay such costs."

The judge of the City of London Court refused the plaintiffs' application for taxation and payment of their costs by the defendants. The plaintiffs appealed.

The appeal was now heard by a Divisional Court of the Probate, Divorce, and Admiralty Division (the President (Sir Francis Jeune) and Barnes, J.).

F. Laing, for the respondents, took a preliminary objection.—The judge of the court below has not granted leave for an appeal in this case, and without such leave this court has no jurisdiction to entertain the appeal, having regard to the provisions of the 26th section of the County Courts Admiralty Jurisdiction Act, 1868, which provides that "an appeal may be made to the High Court of Admiralty of England from a final decree or order of a county court in an admiralty cause, and by permission of the judge of the county court from any interlocutory decree or order therein."

[JEUNE, P.—The order appealed from is a final decree or order within the section. It is an order finally determining the only rights of the parties which remained at issue, therefore no leave to appeal can be necessary.]

Kilburn, for the appellants, plaintiffs in the court below.—This is an admiralty action, and both the plaintiffs and defendants have complied with the provisions of Ord. 39*b*, rr. 48, 49, and 50, of the County Court Rules, 1892, relating to admiralty actions and tenders, a term which since the addition to rule 47 allowing a payment into court in admiralty actions with a denial of liability, must be construed as including the offer by a defendant of money paid into court where liability is denied. The plaintiffs were therefore entitled to tax and recover their costs, and the order refusing them that relief was made without jurisdiction. The General County Court Rules (County Court Rules, 1892, Ord. 9, rr. 11 and 12*a*) as to payment into court with a denial of liability on the common law side of the county courts have no application to admiralty actions The admiralty practice is laid down in *The William Symington*, 33 W. R. 371, 10 P. D. 1, and *The Mona*, 43 W. R. 173, [1894] P. 265, and that practice is carried out by the above rules, under which the plaintiffs are entitled to costs.

F. Laing, for the respondents, defendants in the court below.—A payment into court, without denying anything to be due, was, before the Judicature Acts, unknown in admiralty actions. And the rules in ord. 39*b*, under which a party making a "tender" which is accepted becomes entitled to tax his costs, are confined to cases of "tenders" as the word was used in admiralty practice before the Judicature Acts: see the Rules for County Courts having Admiralty Jurisdiction in force before 1875. The rules cannot be construed differently merely because a party in an Admiralty action is now entitled to make a payment into court without denial of liability. And where this has been done the forms and proceedings required by the General County Court Orders of 1892, Ord. ix, rr. 11 and 12*a*, rules which are applicable to actions both on the common law and admiralty sides of the county court must be deemed to have been followed. Under these rules the plaintiffs ought not to have accepted the money paid in if they wanted costs, or should have applied to the judge for extra costs beyond the amount paid in. The defendants are therefore only entitled to the money paid into court, which includes costs, and the court below rightly on that ground made the order it did, or in the alternative the application for costs was an application for extra costs and was refused by the judge of the court below in his discretion.

JEUNE, P.—The question in this case is whether the County Court Rules applicable to common law proceedings in the county court, or the County Court (Admiralty) Rules specially applying to admiralty actions, govern. My view is that in an admiralty action where there are special rules applicable, they override the rules applicable to actions on the common law side of the county court; and that view seems to have been followed in this case because the defendants when filling in the præcipe for paying the money into court substantially followed Form No. 333 of the Admiralty forms given in the County Court Rules. I think, therefore, that the special rules 48, 49, and 50, contained in Order 39*b* of the County Court (Admiralty) Rules, apply here. It has been pointed out by counsel for the plaintiffs that the County Court Rules for the common law side proceed upon a different principle from that which has been followed by the defendants in this case, for under the common law rules, the court fees and costs must be paid into court at the same time; and it then lies with the plaintiffs whether they will elect to take the money and costs or apply for further costs. In this case no sum was paid into court for court fees or costs. A difficulty no doubt arises in applying the County Court Admiralty Rules to a payment into court with denial of liability, because the word "tender" is used in all the three rules I have referred to, but the word in rule 47 seems to be used in the sense in which that word is used in admiralty proceedings, as explained in *The Mona*, [1894] P. 265, and not in the common law sense. Rule 48 allows of payment into court being made with a denial of liability, and rule 49 appears to apply the word "tender" to both kinds of payment into court—that is, to payment into court without a denial of liability and to payment into court with a denial of liability. I think that in rule 50 tender may be supposed to be used in the same sense as in rule 49, and to be intended to include a payment into court with a denial of liability. In the result—though it were well if the rules were made more explicit—I think that rules 48, 49, and 50 of Order 39*b* of the County Court Rules, 1892, apply, and that therefore the plaintiffs are entitled to their costs and to an order for the taxation of the same.

BARNES, J.—I am of the same opinion.

Solicitors for the appellants, *Keene, Marsland, Bryden, & Besant.*

Solicitors for the respondents, *Bramall, White, & Sanders.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 14, 15; Aug. 5, 1898.

WEST LONDON SYNDICATE (LIMITED) v. COMMISSIONERS OF INLAND REVENUE. (a.)

*Inland Revenue—Stamp—Conveyance on sale—Agreement for sale—*Ad valorem *duty—Leasehold interest in licensed house—Goodwill—"Legal or equitable transfer"—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-section* 1.

By an agreement under seal a vendor agreed to sell to the West London Syndicate (inter alia) *the goodwill of a hotel proprietor and licensed victualler; the lease of the hotel and premises and the vendor's interest therein; all the household furniture, fixtures, fittings, and other effects (other than stock-in-trade); all cash in hand and at the bank to which the vendor was then entitled; and all the book and other debts due to the vendor in connection with the business. The consideration for the sale was the discharge by the syndicate of the debts and liabilities of the vendor then due in relation to the business, and the sum of £4,250, of which £1,462 16s. 3d. was the apportioned consideration for the furniture, stock-in-trade, and cash.*

The amount of the debts and liabilities forming part of the consideration was found to be £1,335 8s. 4d., so that the purchase consideration amounted to £5,585 8s. 4d. It was agreed that the vendor should show a good title to the premises and assign the lease thereof and the goodwill of the business to the syndicate, and that, in the event of of the landlords not consenting to the assignment of the lease, that the vendor would execute a declaration of trust in favour of the syndicate. The consent of the landlords was not obtained, and a declaration of trust was therefore executed and was stamped with the fixed duty of ten shillings.

Held, by A. L. Smith *and* Vaughan Williams, L.JJ., *that there was not an agreement for the sale of an equitable interest in any property whatsoever within the meaning of section* 59, *sub-section* 1, *of the Stamp Act,* 1891.

Held, by Rigby, L.J., *that, though on the face of the agreement it was not for the sale of an equitable interest in property within that section, yet, looking at the facts of the case, it ought to be inferred that the agreement was only for the sale of an equitable interest.*

Held, further, by A. L. Smith *and* Rigby, L.JJ., *that the goodwill was capable of being sold separately and independently of the leasehold premises, and that, in respect of the goodwill, the agreement was liable to an* ad valorem *duty, as such goodwill was property other than lands.*

Held, by Vaughan Williams, L.J., *dissenting, that the goodwill could not be separated from the leasehold premises, and that, consequently, the agreement was not liable to an* ad valorem *duty upon that part of the consideration apportioned to the sale of the goodwill and lease of the hotel.*

Appeal from Grantham and Channell, JJ., 42 S. J. 133.

Case stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13. An instrument was presented to the commissioners on behalf of the West London Syndicate under the provisions of section 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which the instrument was chargeable.

This instrument, which bore date the 19th of March, 1895, was an agreement under seal for the sale by Percy Thorne (thereinafter called the "vendor") to the syndicate of, firstly, the goodwill of a hotel proprietor and licensed victualler carried on by the vendor at Fischer's Hotel, Clifford-street, New Bond-street, and the full benefit of the victualler's and other licences, and of all contracts, engagements, and privileges to which the vendor was entitled in relation thereto; secondly, the lease of the hotel and premises, and the vendor's right, title, and interest therein, subject to the yearly rent of £964, together with the policy of insurance against fire then subsisting on the premises; thirdly, all the household furniture, fixtures, fittings, and other effects (other than stock-in-trade) in and upon the premises belonging to the vendor, and the benefit of the policy of insurance against fire then subsisting therein; fourthly, the stock-in-trade to which the vendor was on the 17th of November then last past entitled; fifthly, all cash in hand and at the bank to which the vendor was entitled at the aforesaid date; sixthly, all the book and other debts due to him, the vendor, in connection with the business. By clause 2 of the agreement it was provided that the consideration for the sale should be the discharge by the syndicate of the debts and liabilities of the vendor due and owing by him at the aforesaid date in relation to the business, and the sum of £4,250, of which £1,462 16s. 3d. was the apportioned consideration for the furniture, stock-in-trade, and cash. By clause 3 it was provided that the vendor should show a good title to the leasehold premises, and assign to the syndicate or their assigns the lease thereof and the goodwill of the business. By clause 6 it was provided that in the event of the consent of the landlords to the assignment of the leasehold premises not being obtained the vendor should, at the option of the syndicate, execute a declaration of trust of the premises in their favour.

The consent of the landlord not having been obtained, a declaration of trust was executed in favour of the purchasers. The commissioners were informed that the amount of the debts and liabilities forming part of the consideration under clause 2 was the sum of £1,335 8s. 4d., and that the purchase consideration was therefore that amount plus £4,250—namely, £5,585 8s. 4d., and that this total sum was arrived at as follows: For lease and goodwill, £4,085 8s. 4d.; household furniture, &c., £1,260; stock-in-trade, £100; cash at bank, £102 16s. 3d.; book debts, £37 3s. 9d.; total, £5,585 8s. 4d. They were also informed that it was impossible to sever the goodwill from the lease because the goodwill was of no value, as it could not exist apart from the lease, but that without a covenant restricting the vendor from carrying on business the lease would be of less value by £400 to £500. The commissioners called for the production of any assignment of the leasehold premises which might have been executed, and the aforesaid declaration of trust, bearing date the 21st of March, 1895, by which the equitable interest in the leasehold premises became vested in the syndicate, was produced. No part of the consideration was expressed by the declaration of trust as being apportioned to the leasehold premises, and that deed was not stamped with *ad valorem* duty on £4,085 8s. 4d., but was stamped only with the fixed duty of 10s.

The commissioners were of opinion that, inasmuch as neither the sum of £4,085 8s. 4d. nor any other part of the consideration had been expressed by the declaration of trust to be apportioned to the leasehold premises so as to make that instrument chargable according to its terms with *ad valorem* duty

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

as a conveyance on sale, the whole consideration except the sum of £1,462 16s. 3d., apportioned by clause 2 of the agreement as the consideration for the furniture, stock-in-trade, and cash, was to be regarded as applicable to the other property sold under the agreement, and that the instrument was chargeable under section 59, sub-section 1, of the Stamp Act, 1891, with *ad valorem* conveyance duty on £5,585 8s. 4d., less the sum of £1,462 16s. 3d., making the net sum of £4,122 12s. 1d. They accordingly assessed the *ad valorem* stamp duty of £20 15s. upon the agreement, being the *ad valorem* duty of 5s. for every £50 of the sum of £4,122 12s. 1d., payable under the head "Conveyance or Transfer on Sale" in the first schedule of the Stamp Act, 1891; and they also assessed the fixed duty of 10s. in respect of the agreement for sale of the premises, furniture, stock-in-trade, and cash. The instrument was stamped accordingly.

The questions for the opinion of the Divisional Court were (1) whether the instrument was chargeable with the *ad valorem* duty of £20 15s.; (2) if not, with what amount of *ad valorem* duty the instrument was chargeable.

The court (Grantham and Channell, JJ.) held that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of section 59, sub-section 1; that as the goodwill was incapable of being severed from the enjoyment of the leasehold premises, the instrument was not an "agreement for the sale of an estate or interest in any property except lands," and was therefore not liable to *ad valorem* duty upon that part of the consideration attributed to "lease and goodwill," and that it was liable to *ad valorem* duty upon the amount of the book debts only.

From this decision the Commissioners of Inland Revenue now appealed.

By section 59, sub-section 1, of the Stamp Act, 1891 (54 & 55 Vict. c. 39), it is provided that "any contract or agreement made in England or Ireland under seal, or under hand only . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages . . . or goods, wares, or merchandize . . . shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

Sir R. E. Webster, A.G., and *Danckwerts* appeared for the Crown.

A. T. Lawrence, Q.C., Spearman, and *W. R. Smith* appeared for the respondents.

The arguments sufficiently appear in the following written judgments.

Cur. adv. vult.

Aug. 5.—A. L. SMITH, L.J.—This is an appeal by the Crown against a judgment by the Divisional Court which held that the Crown was not entitled to an *ad valorem* stamp duty under section 59, sub-section 1, of the Stamp Act of 1891 (54 & 55 Vict. c. 39), upon an instrument presented by the West London Syndicate to the Commissioners of Inland Revenue under the 12th section of the Stamp Act of 1891. The grounds upon which the Divisional Court so held were that the instrument carried in to be stamped was not a contract or agreement for the sale of an equitable estate or interest in any property whatever, nor was it a contract or agreement for the sale of any estate or interest in any property except land so as to come within section 59 of the Stamp Act of 1891. It is common ground that that section was passed to saddle with a stamp duty at the earliest possible moment contracts and agreements which came within the section so that the Crown should not have to wait for its duty until a more formal document might be executed, and if not executed be deprived of the duty altogether, which was found to be the case under the provisions of the older Stamp Act of 1870 (33 & 34 Vict. c. 97). The commissioners held that the instrument in question was liable to a stamp duty within section 59 of the Act of 1891, and assessed the duty payable thereon, but stated a case for the opinion of the court.

The first question which arises is whether the instrument is a contract or agreement for the sale of any equitable estate or interest in any property whatsoever. The instrument will be found set out in the case stated by the commissioners. [The Lord Justice stated the terms of the contract of the 19th of March, 1895, and proceeded:] Now, taking this instrument of the 19th of March, 1895, itself, which was the instrument taken in to be stamped, and which the commissioners hold is the instrument to be stamped with an *ad valorem* duty, does the option given by clause 6 to the purchasers (the syndicate) to take a declaration of trust, if so minded, instead of a conveyance of a legal interest, constitute a contract or agreement for "the sale of an equitable estate or interest in any property whatsoever?"

It will be seen that apart from the option the document is a contract to convey a legal and not an equitable interest. The purchasers were under no obligation to take a declaration of trust. They had not contracted that they would do so, and to constitute a contract or agreement within the meaning of the section there must be, as it seems to me, correlative obligations on each side—on the one to sell and on the other to purchase, and as there is in this case no obligation upon the side of the purchasers to take a declaration of trust, for they might or might not do so just as they pleased, in my judgment the instrument of the 19th of March, 1895, is not a contract or agreement for the sale of any equitable interest whatsoever within the section.

It was argued for the Crown that at the time the document of the 19th of March, 1895, was taken in to the commissioners, inasmuch as the purchasers had by then taken a declaration of trust, this fact converted the document of the 19th of March, 1895, into a contract or agreement for the sale of an equitable interest; but in my opinion this is not so, for the question, as it appears to me, is, what was the document of the 19th of March when it was signed, which was the document which had to be stamped? I agree with what my brother Channell has said as to this, and I think this point taken by the Crown cannot be maintained. My brother Rigby draws the inference outside the documents that the intention of the parties was to merely take an equitable interest, but I would rather not found my judgment upon this.

I now come to the second question, which is whether the goodwill, which was agreed to be sold and purchased by the instrument of the 19th of March, 1895, was a "sale of property other than land." That goodwill is property within the meaning of the Stamp Acts is clear (see the case of *Potter* v. *The Commissioners of Inland Revenue*, 2 W. R. 561, 10 Exch. 147). It is also clear that goodwill is not land. Goodwill, therefore, *primâ facie* comes within the express terms of section 59 of the Act of 1891 as being "property other than land," and so far the Crown makes out its case. But it was thus argued for the respondents, the purchasers. They say that Sir George Jessel, M.R., in *Ex parte Punnett, In re Kitchen*, 29 W. R. 129, 16 Ch. D. 226, held that upon the

sale of a public-house the goodwill of the public-house passes with the public-house, for the goodwill is the mere habit of the customers resorting to the house. It is said that goodwill in this case is therefore nothing but the enhancement of the value of the premises agreed to be sold, and cannot be, and is not, property apart from such premises. I do not agree in this, for in my opinion goodwill is as capable of being sold as a separate entity for what it is worth, and is the tenant's interest in the lease. It may be that by the terms of a lease each must be sold, if sold at all, to the same person, but that does not prevent them being sold as separate and distinct entities, and if so sold, goodwill, in my judgment, is property, and is clearly not land. Now, in this case the parties, by the instrument of the 19th of March, 1895, have expressly sold, as it appears to me, the goodwill, licences, and contracts relating thereto, separate and apart from the lease and the other entities contracted to be sold. If the intention of the parties is the governing factor in this case, have not the parties declared what was their intention upon the face of the instrument by agreeing to sell and to purchase the different matters as separate and distinct entities, and especially the goodwill and full benefit of the licences and of all contracts, engagements, and privileges to which the vendor was entitled in relation thereto, separate and apart from the lease? It is true that the different entities are agreed to be bought and sold for the lump sum of £5,585, out of which the sum of £1,462 was allocated to the furniture, stock-in-trade, cash, and book debts. It would seem upon looking at the declaration of trust, in which no value was put upon the lease, that the goodwill was the thing of value, and not the lease; but, however this is, I do not see how it can be said that in this case the goodwill was not property contracted and agreed to be separately sold by the vendor to the vendee so far as the vendor's interest extended therein, and, if so, this property clearly is not land. It cannot, in my judgment, be truly said that the goodwill in this case is merely an enhancement of the value of land and nothing more, and is sold as part and parcel of the lease so as to be land. It is alleged by the learned counsel for the Crown that this goodwill was worth £4,250, and the lease was worth nothing. They seek to adduce this from what the syndicate have not done, I mean by not putting any value upon the lease in the declaration of trust.

I think that the Crown is right in saying that the goodwill in this case is property other than land, and I see no reason to think that the value assessed by the commissioners thereon is not correct, and inasmuch as before this case was even argued in the Divisional Court, a conveyance of the legal interest in the property sold had been executed and stamped with the identical *ad valorem* stamp duty which the counsel for the Crown are now contending should have been affixed to the agreement of the 19th of March, 1895, the point as to the exact value of the goodwill appears to me to be of no practical importance.

In my judgment, the Crown succeeds upon the appeal, which must be allowed, and the Crown must have costs here and below.

RIGBY, L.J.—This was an appeal of the Commissioners of Inland Revenue against an order of the Queen's Bench Division, dated the 15th day of December, 1897, assessing the *ad valorem* duty payable under section 59 of the Stamp Act, 1891, on a certain instrument dated the 19th of March, 1895, made between one Percy Thorne of the one part, and the West London Syndicate (Limited), hereinafter called the syndicate, of the other part, at the amount payable on £37 3s. 9d., the value of certain debts hereinafter more particularly mentioned. Under section 12 of the Act the commissioners were required and bound to express their opinion, with reference to this instrument, upon the question with what amount of duty it was chargeable. The requisition was not made until nearly two years after the execution of the instrument—that is to say, in January, 1897. The document of the 19th of March, 1895, is very special, and many of its terms require close consideration. The surrounding circumstances are also very special and unusual. From the recitals it appears, amongst other things, that the syndicate had, with the privity and consent of the vendor, been acting as proprietors of the hotel and premises and property dealt with in the instrument from a time not defined in the recital, but shown by clause 8 in the instrument to have begun with the 17th of November, 1896 (say, a period of four months), and that the business thereof had been carried on by it (that is to say, the syndicate) with moneys advanced by the vendor in anticipation of the completion and by way of payments in advance for certain debentures agreed to be subscribed, such moneys so advanced amounting to £2,000. The hotel dealt with was No. 11, Clifford-street, New Bond-street, and was known as Fischer's Hotel.

By clause 1 of the instrument the vendor was to sell and the syndicate was to purchase, first, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor, and the full benefit of all victualler's and other licences, and of all contracts and engagements and privileges to which the vendor was entitled in relation thereto; secondly, the two leases of the hotel, particularly described for terms making together a term of twenty-one years from Christmas, 1894, subject to the yearly rent of £964. Then, under the heads thirdly, fourthly, and fifthly, follow particulars of furniture, stock-in-trade, and cash (in respect of which no *ad valorem* duty would be payable), and under head sixthly certain book debts estimated at the value of £37 3s. 9d. By clause 2 the consideration for the sale of the whole of the particulars mentioned was stated to be the satisfaction by the syndicate of the debts and liabilities of the vendor (the amount of which was not mentioned on the face of the instrument, but was stated by the solicitor to the syndicate, in answer to an inquiry by the commissioners, to be £1,335 8s. 4d.) and the sum of £4,250, of which sum £1,462 16s. 3d. was represented to be the apportioned consideration for the furniture, stock-in-trade, and cash. No other apportionment of the consideration was shown by the instrument. Clauses 3 and 4 were appropriate clauses for the sale of the legal interest in the leases. By clause 5 it was provided that the purchase should be completed on the 23rd of March (four days after the date of the instrument), on which day the purchase-money was to be paid and satisfied. Clause 6 was as follows: "The leasehold premises hereby agreed to be sold being only assignable with the consent of the landlords from whom the same are held, the vendor shall use his best endeavours to obtain the requisite consent for the assignment thereof to the syndicate or their assigns, and in the event of such consent not being obtained the vendor shall, at the option of the syndicate, execute a declaration of trust of the said leasehold premises in its favour." Clause 7 gave the syndicate an option of satisfying £3,000, part of the £4,250 cash purchase consideration, by the issue to the vendor of 120 debentures of £25 each, and the balance of £1,250 was to be satisfied by the issue to him or his nominees of 1,250 shares of £1 each to be numbered 8 to 1,257 inclusive (obviously following on the 7 allotted to the subscribers to the memorandum

of association). The debentures were to form part of the total issue of 200 debentures of £25 each, ranging *pari passu* as a first charge on the syndicate's undertaking. By clause 8 the syndicate was from the 17th of November to be deemed to have had possession of the hotel premises and property and to have carried on the business, and were accordingly to indemnify the vendor against all expenses and liabilities incurred in the course of so carrying on the same. By clause 10 the syndicate were to issue the balance of the debentures provided for in clause 7 and in discharge of the sum of £2,000 advanced by the vendor to the syndicate, and the vendor agreed to accept such debentures in satisfaction and discharge of such £2,000.

The material provisions of the instrument being as above set forth, the commissioners were entitled under sub-section 2 of section 12 to be furnished with such evidence as they might deem necessary in order to show to their satisfaction whether all the facts and circumstances affecting the liability of the instrument to the amount of duty chargeable thereon were fully and truly set forth therein.

The commissioners, under the power so given, obtained from the solicitors to the syndicate, in answer to inquiries made by them, information to the effect that the whole consideration for the contract consisted of debts and liabilities to the amount of £1,335 8s. 4d., making with the sum of £4,250 mentioned in the contract a total consideration of £5,585 8s. 4d.; deducting from which £1,462 16s. 3d. apportioned in respect of items on which *ad valorem* duty was chargeable, and £37 3s. 9d. the value of the book debts, there was left as consideration for the only remaining items—viz., the lease and goodwill—a sum of £4,085 8s. 4d., as to which no apportionment was attempted to be made.

It was indeed alleged on behalf of the syndicate that it was quite impossible to sever the goodwill from the lease itself, because the goodwill was considered to be of no value as it could not exist apart from the lease, but it was at the same time stated that without a covenant to restrict the vendor from carrying on business the lease would be of less value from £400 to £500. The commissioners called for the production of any assignment of the leasehold premises, and the declaration of trust dated two days after the execution of the instrument of the 19th of March, 1895, was produced, whereby it was declared that Percy Thorne, his executors and administrators, should henceforth stand seised of and interested in the hotel and premises in trust for the syndicate, and the syndicate covenanted thereafter to pay the rent reserved by the existing indentures of lease and observe and perform the covenants therein and to indemnify the said Percy Thorne in respect of any breach. The declaration of trust contained a recital: "And whereas the said leases contain certain covenants which preclude the said Percy Thorne from underletting the premises without the consent in writing of the lessor, and it is not deemed expedient at the present time to apply for such consent." After the declaration of trust Percy Thorne had nothing left in him but the bare legal estate in the leasehold property. The commissioners were of opinion that, inasmuch as no part of the consideration had been expressed by the declaration of trust to be apportioned to the leasehold premises, so as to make that instrument chargeable with *ad valorem* duty as a conveyance on sale, the whole consideration except the £1,462 16s. 3d. apportioned by clause 2 of the instrument was to be regarded as applicable to the other property sold. They therefore expressed the opinion that the instrument was chargeable under section 59 sub-section (1) of the Act with *ad valorem* conveyance duty on the whole consideration of £5,585 8s. 4d. less £1,462 16s. 3d., or £4,122 12s. 1d., and assessed the *ad valorem* duty on that sum, which at the rate of 5s. for every £50 amounted to £20 15s.

Under section 13 (1) of the Act, any person dissatisfied with the assessment of the commissioners may, within twenty-one days after the date of the assessment, and on payment of duty in conformity therewith, appeal against the assessment to the High Court, and may for that purpose require the commissioners to state and sign a case setting forth the questions upon which their opinion was required. The syndicate, in accordance with the terms of the section, in due time paid the duty of £20 15s., and required the commissioners to state a case. This was done, and the case stated set forth the facts as hereinbefore noticed, and made copies of the instrument of the 19th of March and the declaration of trust of the 21st of March part of the case. The questions for the opinion of the court were: First, whether the instrument is chargeable with the *ad valorem* duty of £20 15s., in accordance with the assessment of the commissioners; and, second, if not, with what amount of *ad valorem* duty the instrument is chargeable.

Under section 13 (2) of the Act the duty of the court is upon the hearing of the case to determine the questions submitted, and if the instrument in question is in the opinion of the court chargeable with any duty, to assess the duty with which it is chargeable. Sub-sections 4 and 5 of the same section provide for the repayment of any excess of duty and for costs in the alternative events of the commissioners' assessment being held to be erroneous or confirmed.

By an order dated the 15th of December, 1897, the court of Queen's Bench expressed the opinion that the assessment of the commissioners was erroneous, and that the said instrument was chargeable with *ad valorem* conveyance duty on the amount of the book debts only (amounting as hereinbefore appears to £37 3s. 9d.), and reversed the decision of the commissioners and ordered that any excess of duty paid by the appellants should be returned to them by the respondents, and ordered the costs of the appellants to be paid by the respondent. During the argument before the Court of Queen's Bench it was stated that at some time after the decision of the commissioners an assignment of the legal estate in the leasehold had been executed to the syndicate or their nominees, and stamped with an *ad valorem* duty of £20 15s., the amount assessed by the commissioners on the instrument of the 19th of March, 1895.

Against this decision the commissioners appealed, and the court has now to determine whether the assessment of the Court of Queen's Bench is right, and, if not, has to assess the amount of *ad valorem* duty payable.

Two main points were argued on the appeal to this court, and apparently in the court below. (1) Whether the contract on the face of it was a contract for the sale of the equitable interest in leaseholds; (2) whether the goodwill was property in respect of which *ad valorem* duty should be charged apart from the leaseholds. Both points were decided in the court below against the commissioners. As to the first point, I am not disposed to differ from the decision of the court below so long as attention is confined to the language of the instrument itself. The only clause relied upon as showing that the contract was for the sale of an equitable interest was clause 6, and that clause does not throw any obligation upon the syndicate to accept a declaration of trust in lieu of a legal assignment, but only gives them an option. On the face of the instrument, therefore, the only contract is for the sale of the legal interest. But regard

must be had not only to what the parties have said but to what they actually meant. It is incumbent on the syndicate to show that all the facts and circumstances affecting the liability of the instrument as to duty and the amount of duty chargeable thereon, are fully and truly set forth therein, and if from the facts made known to the commissioners the proper inference is that the real bargain was a bargain for the sale of the equitable interest only, then the instrument ought to be charged with the amount assessed by the commissioners.

Now, in my judgment, the facts do lead to this inference. Bearing in mind that the syndicate had an opportunity of explaining any circumstances which might affect the liability to duty, let us see what the facts are which alone were before the commissioners. First, for four months the hotel had been in the possession of the syndicate, and the business had been carried on by them by means of money, to the amount of £2,000, supplied by the vendor. This sum could not be recovered as a debt but only satisfied by an issue of debentures to the same amount by the syndicate unless the syndicate purchased the hotel. Such debentures as were required by the contract could not be issued, for they were to be a first charge on the undertaking which, independently of the hotel, had no property. Apparently no shares had been issued except the seven, the minimum number required to be subscribed by the subscribers to the memorandum of association. During the four months it is clear that the lessor had not been approached with reference to giving assent to an assignment, and yet four days only were allowed for obtaining that assent and enabling the syndicate to obtain the option purported to be given by clause 6. It is a plain inference from the facts appearing that the syndicate had no cash wherewith to pay in cash the consideration of £3,000 which they had an option of paying in cash. During the same four days therefore the debentures for £5,000 and the shares for £1,250 would have to be issued, and it would have been a very unbusinesslike arrangement to go to the expense of preparing those debentures whilst there could be any reasonable doubt as to the contract going through.

From these circumstances alone an inference might arise that there was no real intention on either side to follow out the requirements of clause 6, but, as I have said, I do not on the question of construction feel that such an inference could be acted upon.

But the matter by no means ends there. Within two days after the 19th of March the contract had been completed on the basis of the syndicate accepting an equitable title. The recital in the declaration of trust shows that it was not then expedient to apply for the consent of the lessor. When was this conclusion arrived at? If it arose from any change of circumstances or change of intention happening after the execution of the instrument of the 19th of March it would have been easy for the syndicate to show such change, but nothing of the kind was suggested. It is not difficult to see why the limited company without capital should hesitate to ask a lessor to accept them as tenants, but this state of things had not arisen suddenly, and was not likely to be altered in a couple of days. I have said that the contract was completed by the 21st of March. According to any reasonable or business-like method of procedure that must have been so, for a vendor who had not been paid or satisfied his purchase-money would never have executed the unqualified declaration of trust actually executed on the 21st of March, the clear effect of which is to represent him as a bare trustee only of the legal estate. Some notice surely would have been taken of the obligation to pay or satisfy purchase-money if any such obligation existed, and the obligation to satisfy the advance, amounting to £2,000, which could be satisfied in no other way than by issuing debentures, would certainly, I should infer, have been mentioned if it had not been already satisfied. The fair inference, again, is that all the debentures had already been issued before the execution of the declaration of trust. To be issued they must have been prepared, and it seems to me to be unreasonable to suppose that all that would have been done in a period of two days. The inevitable inference appears to me to be that it was agreed before or simultaneously with the execution of the 19th of March instrument that an equitable interest should be taken in place of a legal assignment of the leases, and that the declaration of trust of the 21st of March must be taken as part of one transaction with the contract of the 19th of March. If in any way the inference arising from the facts before the commissioners is inconsistent with the true facts, that is the fault of the syndicate for leaving matters to be dealt with on a partial and imperfect statement. If the above conclusion is correct, it is unnecessary to go into the question as to the goodwill; but in my judgment the commissioners were right in their view in regard to this. The question is one of considerable importance as to the meaning and operation of the 59th section. The policy of that section is to charge immediately with duty an agreement for the sale of any property except land. If this can be evaded by joining in one agreement for sale, at a lump sum, property not land with land, and throwing upon the commissioners the difficulty, which may be well-nigh insoluble by them, of determining what shall be apportioned to each sort of property, a serious blow will be struck at the operation of the section.

As to the particular case before us, where the goodwill of the business and the lease of the premises on which it is carried on are the two items which are sold at a lump sum, it will be convenient to deal first with the question whether any part of the lump sum is to be attributable to the goodwill, and in the second place with the amount, if any, to be so attributed. Goodwill is certainly properly within the meaning of section 59, and any interest in goodwill must equally be property. It is to me exceedingly difficult to see how in any case goodwill can be lands, tenements, or hereditaments within the meaning of the exception, even if inseparably connected with land. Supposing such a case possible, it is not like fixtures attached to the soil so as to be part of the land; but some part, at any rate, must be severable. Upon that I refer to the definition of goodwill given by Wood, V.C., in *Churton* v. *Douglas*, 7 W. R. 365, 1 Joh. 174, approved apparently by Lord Herschell in *Trego* v. *Hunt*, 44 W. R. 225. [1896] A. C. 7. In this particular case a great part of the goodwill might, and probably did, arise from the name—some part of it certainly did. A West-end hotel does not depend for its customers upon chance passers-by, but to a great extent upon visitors to London, who engage their rooms beforehand. Many of them choose their hotel upon the recommendation of friends who have stayed in the hotel, and it would be by the name "Fischer's Hotel" that it would be recommended. Such a goodwill cannot be said to be in law inseparable from the house where the business is for the time being carried on, whatever the practical difficulty of separation in a given case. A great part of it would last on if the business were transferred to next door. It would be as unlikely that customers would attach importance to the question whether the hotel were at 11 or 12, Clifford-street, as in the case of

Churton v. *Douglas* it would have been to say that the customers would have had a preference for Fleet-street over the Strand as the place where the wholesale business was carried on. Then I refer to the observations of Wood, V.C., in *Churton* v. *Douglas*, and Lord Herschell's comment thereon in *Trego* v. *Hunt*, [1896] A. C. at p. 17. It is not sufficient to say that in the particular case the business could not be removed without the consent of the lessor. His consent might be purchased, and the transfer of the goodwill of the existing business during twenty-one years might be a good step towards the removal of the business. But there is in any transfer of goodwill a personal element involved, and for anything that is shown to the contrary the personal connection of the vendor in this case may have been very great and must be assumed to have been of some value. If the lease alone had been dealt with the vendor might after the sale have solicited the customers who had been in the habit of staying at the hotel to transfer to him their custom at another hotel. The goodwill having been agreed to be transferred the vendor could not do this: *Trego* v. *Hunt*. This seems to be conclusive on the question whether there is not some independent value to be attributed to the goodwill. Additional rights bargained for, must be supposed worth bargaining for. The part of the goodwill now being dealt with is not only separable from, but has no connection with, the lease of the hotel. It depends upon an implied contract and cannot, as I think, in any concievable way be treated as land within the meaning of the exception. It is of the same nature as the supposed covenant not to carry on business elsewhere mentioned in the cases, the absence of which, by the admission of the syndicate's solicitor, would reduce the value of the lease itself by £400 to £500.

It seems to me, therefore, that it is impossible to say that the agreement to transfer the goodwill does not include something over and beyond the lease itself. What the value of that something may be is a very different and very difficult question, but the difficulty is created by the parties to the instrument who have not chosen to apportion in the instrument itself the total consideration. I do not think the commissioners could properly have come to a different conclusion from that which they actually arrived at. The only suggestion made by the syndicate is that nothing is to be apportioned to the goodwill. It is upon that that they take their stand. That contention, for reasons above appearing, I think untenable. Assuming that contention to be ruled out, they in fact leave the commissioners to find out for themselves the proper amount to be apportioned. I think that the commissioners had no information furnished to them which would have enabled them to apportion the consideration between lease and goodwill according to their values. I think that they were entitled to say: It is for you, the syndicate, to show what part of the whole consideration is to be thrown upon the lease.

But are there not *primâ facie* grounds for the c nclusion even if no presumption arises? Under the circumstances we find that the goodwill of the business is not only dealt with separately from the lease but is put in the forefront — that is to say, before the lease—in the order of enumeration of the parcels. This might be a small matter if there were not other considerations tending to enhance the importance of the goodwill; but such considerations are not wanting. The business had really been carried on for the syndicate during four months and the sum of £2,000 invested in it through the vendor. Where the goodwill and business and the lease for twenty-one years of an hotel in the West End of London, carried on at a house rented at £964, are only treated as worth together a little over £4,000, it is not an unfair inference that the lease of the house without the goodwill of the business would hardly be worth the rent. But what seems to me an important consideration is that the parties themselves, by the declaration of trust, have so treated and dealt with the leases as to affirm in substance that no *ad valorem* duty was to be paid in respect thereof, and therefore no part of the consideration is specifically appropriated to them. If my inference of facts set forth in the discussion as to the first point is well founded, then the declaration of trust is an actually contemporaneous document in the sense of being part of one and the same transaction; but, apart from that, I think the commissioners had a right to infer from it, and from the fact that for nearly two years no other conveyance had been executed, that the intention of the parties, or, at least, the effect of what they did, was to concentrate. as it were, the whole *ad valorem* duty upon the goodwill and book debts and attribute no part to the leases. In this way the parties have solved the difficulty which they themselves have raised.

Some point has been made of the alleged stamping, after the assessment by the commissioners, of an assignment of the lease with the full *ad valorem* duty. This was an entirely voluntary act of the syndicate, and can have no effect upon the question whether the commissioners were right or wrong upon the facts as they existed when they made their assessment. The court below has held them wrong, and given costs against them on that ground. It is now our duty to review that decision, and to determine whether the assessment was not right.

In my judgment we ought to say that the commissioners were right; that the opinion of the court below ought to be reversed; the assessment of the commissioners supported; the costs paid by the commissioners under the order of the court below returned; and the costs of the commissioners here and below ordered to be paid by the syndicate.

I should like to add one word on a possible misconception of the Act. Any apportionment to affect the question of duty under section 59, must be a *bonâ fide* one. I do not think that an arbitrary apportionment would avail anyone under this section. If so the section would be absolutely worthless. It must be a genuine, *bonâ fide* apportionment.

VAUGHAN WILLIAMS, L.J.—I have the misfortune to differ from the other members of the court, A. L. Smith and Rigby, L.JJ. I agree with the decision of the Divisional Court, and adopt entirely the reasoning of Channell, J.

With regard to the question whether the instrument in question was a contract or agreement for the sale of any equitable estate or interest in any property whatsoever, I am of opinion that it was not. I think that it was plainly only a contract for the sale of a legal interest, and that the option given to the purchasers, which they were not bound to exercise, to call for a declaration of trust in the event of the landlord's consent to a legal assignment not being obtained, does not convert the instrument into a contract for the sale of an equitable estate or interest. The purchasers, in the event of the vendor's failing to obtain the landlord's assent, and being unable to convey a legal estate, could, if they had chosen, have treated the contract to purchase as at an end. As I understand, both my brothers take this view if only the words of the instrument are looked at; but Rigby, L.J., is of opinion that, if the facts made known to the commissioners are looked at, the proper inference is that the real bargain made, was a bargain for the sale of the equitable interest only, and A. L. Smith, L.J.,

although he does not base his judgment on this inference, is not prepared to say that the inference may not properly be drawn. I think that we have no right to draw any such inference. I do not understand Rigby, L.J., to infer that the instrument was drawn in the shape in which it was drawn for the purpose of concealing the true nature of the transaction and thus evading the duty, nor do I see any fact communicated to the commissioners justifying such an inference. I rather understand Rigby, L.J., merely to infer as a fact that notwithstanding the form and words of the instrument, the parties to the instrument must be taken to have meant a bargain different from that which they have expressed, and he draws this inference from the conduct of the parties antecedent and subsequent to the execution of the instrument, and from the relative dates of the execution of the instrument and the declaration of trust, and all the various acts done or omitted to be done by the parties.

Is this inference as to the true meaning of the parties such that it would follow that the vendor could have compelled the purchasers to accept the declaration of trust as a performance of the contract contained in the instrument? It seems to me impossible to draw such an inference as between the parties; and if such an inference cannot be drawn as between the parties, I do not see what right the commissioners have to treat the instrument otherwise than in accordance with its meaning *inter* parties.

The fact that the purchasers had embarked a large sum of money in the business which they might probably lose if they did not exercise the option to take a declaration of trust, and the fact that they did take the declaration of trust within four days of the execution of the instrument, may lead to the inference that it was extremely improbable that the purchasers would refrain from taking the declaration of trust in case the landlord's consent to the assignment of the lease could not be obtained immediately; but I cannot see how these facts can justify the inference that the purchasers meant by the bargain to bind themselves to take a declaration of trust as performance of the contract, in case the vendor being unable to get the landlord's consent, should call on them so to do.

As to the second question which arises in this case—viz., whether the instrument was a contract or agreement for the sale of any estate or interest in any property except lands, tenements, or heritages, this depends on whether the goodwill, which was, by a separate clause, included in that which was agreed to be sold and purchased by this instrument, was sold and purchased as land — that is, as something merely enhancing the value of the land and inseparable from it, or whether it was sold and purchased as property other than land. There can be no doubt that the goodwill may be so inseparably connected with land—*e.g.*, with a particular house, as to pass under a conveyance of land, or be a subject of agreement for the sale of land. Lindley, L.J., on p. 441 in his book on Partnership, 6th ed., says: "It" (goodwill) "may have no value except in connection with a particular house, and may be so inseparably connected with it as to pass with it under a will or deed without being specially mentioned." It seems to me that the goodwill which was the subject of this contract was of that nature, for the goodwill in question was the goodwill of an hotel, and the hotel was leased to the vendor, and the lease was included in the sale, and by the terms of the lease the business could not be removed from the house demised without the consent of the landlord. At the time of the sale, therefore, the vendor could not so sell the goodwill as to be enjoyed apart from the hotel, the subject of the lease. The goodwill was made inseparable by the very terms of the lease, the subject of the sale. The goodwill did not belong to the vendor, so that he could sell it apart from the lease. It was part of the reversion of the landlord: see *Edwards* v. *Edwards*, 1 Jurist, 654. This is the fact in the present case; and, moreover, the goodwill of a leasehold public-house has generally been treated as part and parcel of the demised premises. Thus, in *Ex parte Punnett, In re Kitchen*, the Master of the Rolls (Sir George Jessel), speaking of leasehold premises comprising the Pelican Hotel, Southwark, says: "It is quite plain that the goodwill of a public-house passes with the public-house," and in *Potter* v. *The Commissioners of Inland Revenue*, in which case the court held that the assignment by deed by a retiring partner in a paper-making business of his share of the goodwill for the sum of £13,778 was an assignment of property liable to *ad valorem* duty under 13 & 14 Vict., c. 97, Pollock, C.B., in delivering judgment, says "the trade or goodwill of a trade sometimes enhances the value of real property, as a well-accustomed tavern or shop will, on account of the habit of persons to frequent it, sell for much more, and the duty on the conveyance of the place where the business is carried on ought *pro tanto* to be augmented; and very frequently the goodwill of a business or position, without any interest in land connected with it, is made the subject of sale though there is nothing tangible in it. It is merely the advantage of the recommendation of the vendor to his connections and his agreeing to abstain from all competition with the vendee." This case shows that although a goodwill may for the purpose of conveyance be separated from realty—for instance, where the outgoing partner sells his interest or share in the goodwill to the continuing partners who continue owners of the house to which the goodwill is attached, and if it is so separated it would be liable under 13 & 14 Vict. to duty as property—yet if it is not so separated it will be treated, on a sale of the premises where the business is carried on, as something enhancing the value of the realty, and *pro tanto* augmenting the duty on a conveyance of the place where the business is carried on. Lindley, L.J., in the case of *The Commissioners of Inland Revenue* v. *Angus and Lewis*, 38 W. R. 3, 23, Q. B. D. 579, says: "Upon a conveyance of a goodwill of a business the instrument should be stamped with an *ad valorem* stamp" (*i.e.*, as a conveyance of property under 13 & 14 Vict.). I understand *Potter* v. *The Commissioners of Inland Revenue* to mean that where real estate and the goodwill connected with it are conveyed by separate deeds, they are both liable to *ad valorem* duty. Cotton, L.J., in *Cooper* v. *The Metropolitan Board of Works*, 32 W. R. 709, 25 Ch. D. 472, at p. 729, says: "But really goodwill is a word of which few people understand the meaning. It is obvious that there are certain kinds of goodwill to which a mortgagee will be entitled. The goodwill which attaches to a particular house increases the value of that house, and therefore the mortgagee is entitled to that. If, for instance, there is a well-known public-house, and, from its position being well known, people frequent it, the goodwill attaches to the house and adds to its value. But there may be other kinds of goodwill attaching to personal reputation which a man has made for himself. Of course that does not go to the mortgagee of the house, but is a thing personal to the man whose skill and whose name have acquired that goodwill." These authorities seem to me to show that, while a goodwill may be conveyed, or subject to an agreement for sale, as land, a goodwill may be sold separately from the land; and no doubt the goodwill in many cases can be and is separately sold, and

no doubt in such a case the sale would be treated under section 59 of 54 & 55 Vict. c. 39, as a contract for sale of an interest in property except lands; but I do not think one ought so to treat a contract for the sale of the goodwill of a business carried on in a leasehold hotel under a lease which makes the business inseparable from the demised premises, where the sale includes an assignment of the lease, unless you can find in the contract a clear intention to separate the goodwill from the leasehold premises, and to treat it otherwise than as something attached to the leasehold hotel enhancing its value. I do not say that it is impossible to infer such an intention in the case of the goodwill of such a leasehold with a covenant not to carry on the business elsewhere, but I do say that in such a case you ought not to draw such an inference without very strong words and something much stronger than merely cataloguing the items of sale; and especially is this so in a case where there is only one single agreement and one undivided consideration for the purchase of hotel and goodwill, and a separate consideration for the chattels. At all events you must construe the contract for sale and ascertain, having regard to the words and to the subject-matter of the sale, what the intention of the instrument is, and whether or not the parties thereto must be taken to have intended a separate sale of the goodwill.

Now, looking at this instrument, was it the intention to agree to sell the goodwill as something separate from the hotel? It is urged on behalf of the Crown that the agreement is to sell—"Firstly, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor upon the premises thereinafter mentioned, and the full benefit of the victualler's and other licences and of all contracts, engagements, and privileges to which the vendor is entitled in relation thereto," and it is said that this is a separate agreement for the sale of the goodwill, just as much as if it had been a sale by a separate instrument. But, on the other side, it is urged that there is, in fact, only one instrument, and that that instrument includes the sale of the lease of the premises in which the business is carried on, the goodwill of which is sold, and that, by the terms of the lease the business cannot be carried on elsewhere than on the demised premises, and that inasmuch as the goodwill cannot be enjoyed separately from the demised premises, and the goodwill of an hotel is in its nature a mere enhancement of the value of the demised realty, it could not have been the intention of the parties to the instrument to sell and buy respectively the goodwill separately from the hotel, and that one must not, for the purpose of the revenue laws, construe the instrument in a manner manifestly inconsistent with the intention of the parties. It seems to me that there is force in this argument. Suppose a lease of a factory and a covenant that at the termination of the tenancy the tenant shall give up the premises and all fixed machinery whether affixed to freehold by landlord or tenant, and a sale by the tenant which specified (*a*) the fixed machinery, (*b*) the lease—could it be said that because of the form of sale the machinery affixed to the freehold ceased to be land or part of the freehold? Suppose again this very purchaser had died after making a will leaving his leasehold to A. B., and the residue of his property to C. D., could it have been held that the goodwill of this property passed to the residuary legatee? Can one find in this instrument any indication anywhere that the parties intended to sever the goodwill from the hotel? If not, for what possible purpose can it be said that the parties intended a separate sale of the goodwill? The purchaser, who, it is said, must be taken to have agreed to purchase the goodwill separately from the hotel, could not deal with or enjoy the goodwill separately from the hotel. The vendor, who, it is said, must be taken to have sold the goodwill separately from the hotel, had no power to sever the business from the hotel.

It is further to be observed that one finds in the contract of sale no separate prices of the hotel and the goodwill of the business carried on on the demised premises, and the goodwill sold is in terms the goodwill of the business carried on by the vendor on the demised premises. The same thing is true of the licences, for a mortgage of a leasehold public-house with the goodwill of the business there carried on gives the mortgagee a right to the transfer of the licences: see *Rutter* v. *Daniel*, 30 W. R. 724, 46 L. T. Rep. 684, in the Court of Appeal, affirming the same case, 30 W. R. 801.

Many cases have arisen with reference to the question whether a sale of fixtures comprised in an instrument, including the sale of a house or the lease of a house, is to be treated as a separate assurance of the fixtures, and the test applied has always been, Did the instrument show the intention to sever the fixtures—an intention, that is, that the mortgagee should have the power of selling or otherwise dealing with the fixtures separately from the house: see *Ex parte Barclay. In re Joyce*, 22 W. R. 608, L. R. 9 Ch. App. 576; *Ex parte Daglish, In re Wilde*, 21 W. R. 893, L. R. 8 Ch. App. 1072; *Bachellor* v. *Yates*, 36 W. R. 563, 38 Ch. 112. In that last case in the judgment of Bowen, L.J., some observations are made which are worth looking at, because he speculates upon the case of separate subject-matters, mentioning chimneys in a conveyance of realty: *Brooke* v. *Brooke*, [1894] 2 Ch. 600, 43 W. R. Dig. 67, 121; *Small* v. *The National Provincial Bank*, 42 W. R. 378, [1894] 1 Ch. 686. The present case is not a mortgage, but a sale, which, of course, is very different from a mortgage, but the ultimate question to be answered in each case is the same—does the instrument show that there is an intention that there should be a separate assurance? and the answer is Yes or No, according as the conclusion in each case is that the parties to the instrument did or did not intend that the goodwill or the share of the goodwill should in fact be dealt with separately. In *Potter's case* this test is not applied because the fact was that the outgoing partner was assigning to the continuing partners, the owners of the house to which the goodwill attached, and it was unnecessary therefore to find other evidence of the intention to separately convey the goodwill. But in the present case I can find no fact from which one can infer an intention to deal with the goodwill separately from the hotel, and no reason why the parties should wish to deal with the goodwill separately from the hotel, and every reason why they should wish not to do so.

Finally, I do not see how one can adopt the view of the Crown either on the first question or on the second question without imputing to the parties to the instrument intentions quite inconsistent with the whole tenor of the instrument and the intention of the parties to be drawn from the instrument itself and the subject-matter of the agreement.

I wish to add that, looking at the words of clause 6 at the end of the case, "that without a covenant restricting the vendor from carrying on business the lease would be of less value by £400 or £500," I thought that, if this meant that there was a restricting covenant of this sort between the vendor and purchaser, this would show that there was a right of property distinct from the leasehold interest assigned, and that in such case the contention of the Crown, apart from the question of the value to be assessed, would be established; but on examination I can find

no such covenant, and as to any right to restrain the purchaser carrying on the business of the lease off the demised premises, which would be implied from the acceptance of the assignment of the lease, this implied covenant could be enforced by the landlord as owner of the reversion—that is, could be enforced by the landlord by virtue of the covenants in the original lease against any assignee of that lease.

Appeal allowed, with costs.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitor for the respondents, *A. E. Griffiths.*

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 18.

In re RAILWAY TIME TABLES PUBLISHING CO. WELTON'S CLAIM. (a.)

Company—Contract to issue fully paid shares in satisfaction of debt—Issue of shares not fully paid—Failure of consideration—Right of shareholder, as assignee of the debt, to prove in winding-up—Interest—3 & 4 Will. 4, c. 42, s. 29.

Where a company contracts to issue to a creditor a certain number of fully paid shares in satisfaction of a debt due by it to him, and some of the shares are in fact issued as unpaid, there is pro tanto *a failure of consideration, and the creditor can, notwithstanding that he has become a member of the company, prove in its winding-up for such part of his debt as is represented by the unpaid shares.*

Interest cannot be claimed upon such a debt, except either by contract or by way of damages under section 29 of the 3 & 4 Will. 4, c. 42.

Appeal from Kekewich J.

In 1890 the Railway Time Tables Publishing Co. (Limited), was indebted to one Henry Hoare in the sum of £13,400, which was secured as to £1,600 by 6 per cent. debentures, and as to £6,240 by 10 per cent. debentures granted by the company. In 1890 the appellant, Thomas Abercrombie Welton, agreed, at the request of Hoare, for whom he acted in matters of business, to allow (amongst other shares) 1,680 preference shares of £5 each in the company to be registered in his name, and the shares were so registered accordingly. Welton had no beneficial interest in those shares, or in the company, his sole connection with it being as nominee of Hoare. The shares, which were issued pursuant to an agreement between the company and Hoare, in part satisfaction of Hoare's debt, were supposed to be issued as fully paid. Debentures to the nominal amount of £5,000 were issued to Hoare in satisfaction of the balance of his debt, and the debentures for £1,600 and £6,240 were surrendered to the company. At that time no part of the principal sums secured by those debentures was due and payable by the company.

In March, 1892, the company went into voluntary liquidation. On the 14th of June, 1893, by an order made in the winding-up, Kekewich, J., settled Welton upon the list of contributories in respect of the 1,680 preference shares. The learned judge proceeded upon the ground that the debentures surrendered to the company were not due and payable by the company at the time of the surrender, and he held that 1,112 of the shares were fully paid, 567 wholly unpaid, and one paid to the extent of £2 10s. In the practical working out of this order it was treated as deciding that 568 shares were wholly unpaid, the liability thus amounting to £2,840. Calls were afterwards made upon the shares, and Welton paid £1,560 upon them. Hoare had become bankrupt, and was unable to indemnify Welton, who applied by summons for leave to prove in the winding up of the company for a sum of £2,840, with interest at 10 per cent. The assets of the company were sufficient to pay all its debts and the cost of the winding-up, and to leave a balance. With reference to Welton's delay in putting forward his claim, it was explained at the bar that it was only after the decision of the House of Lords in the case of *Welton* v. *Saffery*, 45 W. R. 508, [1897] A. C. 299, that his liability on the shares registered in his name was finally ascertained. On the 3rd of November, 1897, Hoare's trustee in bankruptcy assigned to Welton the benefit of all claims which Hoare might have against the company, for the amount of the debentures surrendered to the company or otherwise, together with the interest thereon.

Kekewich, J., holding that the question was covered by *In re Addlestone Linoleum Co., Benson's case*, 36 W. R. 227, 37 Ch. D. 191, dismissed Welton's summons with costs.

Welton appealed.

Eve, Q.C., and *Martelli*, for the appeal.—*In re Government Security Fire Insurance Co., Mudford's Claim*, 28 W. R. 670, 14 Ch. D. 634, and *In re Great Australian Gold Mining Co., Ex parte Appleyard*, 30 W. R. 147, 18 Ch. D. 587, govern this case. Those cases are not inconsistent with *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317, and *In re Addlestone Linoleum Co., Benson's case*, 36 W. R. 227, 37 Ch. D. 191, 203, except so far as they decide that a member of a company as such can sue the company; and that is not what Welton is here claiming to do.

Renshaw, Q.C. (*F. Whinney* with him), for the liquidator.—There was not a total failure of consideration for the surrender of the debentures, and therefore the case cannot be treated as one of failure of consideration: *Harris* v. *Venables*, 20 W. R. 974, L. R. 7 Ex. 235, 240. The claim is altogether out of time.

Eve, Q.C., in reply.—[He was asked to address himself only to the question of interest.] Kekewich, J., left the surrendered debentures quite out of account because they were not payable at once. We claim interest at 10 per cent., or at least at 6 per cent., because those were the rates of interest payable on the debentures which we surrendered.

LINDLEY, M.R.—I do not think that, when the facts of this case are really understood, there is much difficulty in seeing what the rights of the parties are. I do not wish to make any further observations on *Mudford's Claim* and *Ex parte Appleyard* than I have made before, in *In re Addlestone Linoleum Co., Benson's case*, and I do not think that there is any difficulty in applying the law to the facts of the present case. Let us see what the law is. Here is a company being wound up—I am going to state the facts in my own way—and here is a claimant, Mr. Hoare, who was a creditor for £13,400. Of that sum of £13,400 there was a professed payment, which, if really a payment in full, was a satisfaction of the debt. It was not a payment in money, but what we may call an accord and satisfaction; and part of what was given in satisfaction was a certain number of fully paid up preference shares. I say fully paid shares because that is obviously what the transaction was intended to be. Now, it so happens that instead of really getting 1,680 fully paid preference shares

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

he got only 1,112. What, then, is the consequence of that fact? In my opinion the consequence is that, to the extent of £2,840 he has really never been paid at all. The question which we have now to consider is, Is there any reason why he should not prove against this company for that unpaid balance? Supposing that Hoare had not become bankrupt, and that there had been no assignment by him to Welton, so that Welton would have been altogether out of the case; then, subject to the question what is the effect of the fact that Hoare's claim is made after the 20th of July, 1892, the day fixed for sending in claims, and after the master's certificate of debts has been made—subject to that, I should have thought that there was no answer at all to his claim to prove against the existing assets in the liquidator's hands. I do not see any answer at all to it. Let us look at the answer suggested on behalf of the liquidator. The answer given is this: that Mr. Welton is the assignee of Mr. Hoare's claim; and that therefore, by reason of the provisions in the Companies Act, 1862, which prevent people from proving against a company in competition with their own creditors, Mr. Welton, as a member of the company, has no right to prove in respect of Hoare's claim. Now, is that true? Where is the statutory enactment, or the principle of law, which compels us to ignore the facts of this case and to hold that because Mr. Welton is a member of this company he cannot be regarded and treated as the transferee of Hoare's claim? He takes the present proceedings in a totally different capacity from that of a member of the company. He is not suing the company or claiming to prove against it in respect of anything due to him as a member of it. That is not the nature of his claim at all. On the contrary, he alleges that he is the assignee of Mr. Hoare's debt, and he claims simply in respect of that. As I have said I do not see any answer at all to that.

Here is a man who was a creditor for £13,400. He has not been paid in full, so that there has been a failure of consideration, and Mr. Welton is now suing as his assignee.

Mr. Welton has made a claim for interest at 10 per cent. How he is to get that I cannot conceive, unless it is by calculating interest at the rate which was payable on some of the debentures surrendered to the company in 1890, which does not appear to me to be admissible. The case simply stands thus: Mr. Hoare was a creditor of the company for a sum of £13,400. There was no bargain that he should receive interest at the rate of 10 per cent., or at the rate of 6 per cent., or indeed that he should receive any interest at all. Therefore if he is to get interest he must bring himself within the statute which enables juries in certain cases to give interest by way of damages. That, as it seems to me, he cannot do: the statute (3 & 4 Will. 4, c. 42, s. 29) does not apply to his case, and he is not entitled to any interest at all. What would have been the result, if he had been entitled to interest, of his long delay in bringing in his claim, it is, therefore, not necessary to say. My view is that in point of law he is not entitled to claim any interest

CHITTY, L.J.—I agree. The case seems to me quite simple, and I base my judgment on this, that Welton is not claiming in his own right, but as assign of Hoare. He cannot, I think, be in either a better or a worse position because he happens to be at the same time a shareholder in the company. Of the sum of £13,400 due to Hoare £2,840 has, in the result, never been paid to him in any shape or form whatever. Hoare, therefore, having been a creditor for that amount, is entitled, as an ordinary creditor, to have that amount paid to him by the company. It is for that sum, as it appears to me, that Welton is suing as Hoare's assign, under an assignment which assigns not only the debentures but also the claim generally. Under that assignment Welton is entitled to succeed in this case. With regard to interest I have nothing to add. Hoare could not have claimed interest, nor can Welton, on the sum of £2,840.

VAUGHAN WILLIAMS, L.J.—I agree. I have nothing to add.

Appeal allowed.

Solicitors, *Slaughter & May; C. T. Whinney.*

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 17.

REG. v. JUSTICES OF WORCESTERSHIRE.

REG. v. JUSTICES OF WARWICKSHIRE. (a.)

Licensing law — Jurisdiction — County — Transfer of district from one county to another for police purposes —2 & 3 Vict. c. 82—County Police Act, 1839 (2 & 3 *Vict. c.* 93), *s.* 27—*County Police Act,* 1840 (3 & 4 *Vict. c.* 88), *s.* 2.

A transfer of a part of a county to another county by agreement between the justices of the two counties in pursuance of section 2 of the County Police Act, 1840, *does not affect the jurisdiction to administer the licensing laws within the transferred district.*

Appeals from the judgment of a Divisional Court (Mathew and Kennedy, JJ.), making absolute a rule *nisi* for a writ of prohibition obtained by the justices of Warwickshire against the justices of Worcestershire, and discharging a cross rule *nisi* obtained by the justices of Worcestershire against the justices of Warwickshire.

The question was whether the justices of Worcestershire or the justices of Warwickshire had jurisdiction to grant licences under the Licensing Acts in and for the parish of Yardley.

The parish of Yardley was a triangular area, about seven miles in length, and with a greatest width of three miles, situate in Worcestershire, but forming, as it were, a promontory or peninsula jutting into Warwickshire, and surrounded almost entirely by the Solihull division of Warwickshire and by the city of Birmingham. In 1829 Yardley was assigned to the Northfield petty sessional division of the county of Worcester under 9 Geo. 4, c. 43. In 1857 Yardley was transferred from the county of Worcester to the county of Warwick for the purposes of the County Police Acts, 1839 and 1840. This transfer was effected by an agreement of transfer made in pursuance of section 2 of the County Police Act, 1840, between the justices of Worcestershire and the justices of Warwickshire, as evidenced by resolutions passed by the courts of quarter sessions of the two counties on the 29th of June, 1857. From 1857 to 1874 the justices of Warwickshire exercised within Yardley all the ordinary jurisdiction of justices sitting in petty sessional divisions, including the granting of licences. From 1875 to 1894 the justices of Worcestershire exercised such jurisdiction in Yardley. In April, 1890, the Worcestershire Quarter Sessions made an order in pursuance of 9 Geo. 4, c. 43, purporting to create the parish of Yardley a new petty sessional division of itself. Since 1894 there had been a dispute between

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the two counties, the justices of each county claiming the jurisdiction to grant licences in and for the parish of Yardley. The result was that applicants for licences were obliged to apply to both sets of justices, and in some cases a licence which had been granted by one bench was refused by the other.

The justices of Warwickshire obtained a rule *nisi* to prohibit the justices of Worcestershire from holding a general annual licensing meeting for the Yardley petty sessional division in accordance with a notice issued by them on the 6th of July, 1898.

The justices of Worcestershire obtained a cross rule *nisi* to prohibit the justices of Warwickshire from exercising any licensing jurisdiction in and for the parish of Yardley at the general annual licensing meeting to be holden for the Solihull petty sessional division in accordance with a notice issued by them on the 7th of July, 1898.

By an Act passed in 1839 for the better administration of justice in detached parts of counties (2 & 3 Vict. c. 82), it was enacted that it should be lawful for justices of the peace acting for any county to act as justices in all things relating to any detached part of any other county surrounded by the county for which such justices acted.

By section 27 of the County Police Act, 1839, it was enacted that "for the purposes of this Act all detached parts of counties . . . shall be considered as forming part of that county by which they are surrounded, or if partly surrounded by two or more counties then as forming part of that county with which they have the longest common boundary; and so much of every such detached part of any county . . . which is not of itself an entire hundred, wapentake, ward, rape, lathe, or other such division of a county, shall be considered as forming part of that hundred, ward, wapentake, rape, lathe, or such other division whereby it shall be surrounded in the county of which it shall be considered a part for the purposes of this Act, or if partly surrounded by two or more hundreds, &c., then as forming part of that one with which it shall have the longest common boundary."

By section 2 of the County Police Act, 1840, which was passed to amend the County Police Act, 1839, it was provided as follows: "It shall be lawful for the justices of any two or more neighbouring counties, in their several general or quarter sessions assembled, from time to time to agree that such parts of their several counties as to them shall seem fit shall, for the purposes of the said Act, be considered as forming part of any other of the said counties; and whenever any such district shall be so transferred, for the purposes of the said Act, from one county to another, with the consent of the justices of both the last-mentioned counties, such district shall be considered, for the purposes of the said Act, as if it were detached from the county to which it belongs, and wholly surrounded by the county to which it is so transferred; and all the provisions contained herein or in the said Act, or in an Act passed in the last session of Parliament, intituled *An Act for the better administration of justice in detached parts of counties*, respecting detached parts of counties, shall be taken to apply to such transferred districts."

The Divisional Court, on the hearing of argument on the rules *nisi*, decided in favour of the justices of Warwickshire, making absolute the original rule and discharging the cross rule.

The justices of Worcestershire appealed.

Asquith, Q.C., and *Roskill*, for the justices of Worcestershire.—The statute of 1839 (2 & 3 Vict. c. 82), and section 27 of the County Police Act of the same year deal with what may be called islands—*i.e.*, detached parts of counties. The effect of those enactments is that all detached parts of counties are to be considered as forming part of that county by which they are surrounded. But this is only so for certain limited purposes—viz., the purposes of ordinary petty sessional division work, and the purposes of the County Police Act. Section 2 of the County Police Act, 1840, deals with what may be called peninsulas; it provides in effect that where a part of a county is nearly surrounded by another county, the justices of the two counties may agree that it shall be treated as forming part of that county by which it is nearly surrounded. That is to say, it allows the application to peninsulas of the enactments passed in 1839 with respect to islands. This legislation does not in any way deal with the administration of the licensing laws, and the jurisdiction of administering those laws remains unaffected thereby.

Bosanquet, Q.C., and *P. Bagnall Evans*, for the justices of Warwickshire.—Section 2 of the Act of 1840 expressly enacts that the provisions of 2 & 3 Vict. c. 82 are to apply to transferred districts. It is admitted that this operates a transfer of all ordinary petty sessional jurisdiction. Licensing jurisdiction is, by the Licensing Acts, attached to petty sessional divisions: see sections 1, 2, and 4 of the Alehouse Act (9 Geo. 4, c. 61), and section 1 of the Licensing Act, 1842 (5 & 6 Vict. c. 44). Jurisdiction to administer the licensing laws is therefore included in the jurisdiction which is transferred.

Cur. adv. vult.

Nov. 17.—A. L. SMITH, L.J., read the following judgment: The question raised between the counties of Worcester and Warwick in these two appeals is whether the justices of Worcestershire or the justices of Warwickshire have jurisdiction to administer the licensing laws in an outskirt of Birmingham, called Yardley, which is geographically situated in Worcestershire and is bordered on two of its sides by Warwickshire and on its third side by Worcestershire. In the year 1829 Yardley, under the provisions of 9 Geo. 4, c. 43, was made part of the Northfield petty sessional division, which is a petty sessional division of the county of Worcester. It is not disputed that from the year 1829 until the year 1857 the justices of Worcestershire were the persons to administer as regards Yardley the jurisdictions appertaining to justices in petty sessions and also the licensing laws therein, and that they did so. In the year 1857 an agreement was come to between the justices of Worcestershire and the justices of Warwickshire, which is evidenced by joint-resolutions passed at their respective quarter sessions holden in June, 1857, whereby it was agreed to consider the parish of Yardley, situated in the county of Worcester, as part of the county of Warwick for the purposes of the several Acts relating to county and district constables, and that their respective chief constables should immediately proceed to carry the same into effect. The first point to be determined is, assuming that this agreement of 1857 was an agreement to transfer the jurisdiction of the administration of the licensing laws in Yardley from the justices of Worcestershire to the justices of Warwickshire, was there power to make such an agreement? I may here state, as part of the history of the case, that, after this agreement was come to in 1857, from that year down to the year 1874 the justices of Warwickshire exercised all jurisdictions excepting administrative jurisdiction over Yardley, as forming part of the petty sessional division of Solihull, in that county, including the jurisdiction

of administering the licensing laws therein. From 1875 to 1894 the justices of Worcestershire exercised all jurisdictions, including licensing jurisdiction, over Yardley. How this change came about, we are told, is not known. In 1890 the Worcestershire justices created Yardley a petty sessional division of itself under 9 Geo. 4, c. 43, and since 1894 matters have been in dispute between the two counties. It is argued on behalf of Warwickshire, and this argument has prevailed in the Queen's Bench Division, that, as by the Licensing Act of 1828 (9 Geo. 4, c. 61) and other Acts licensing jurisdiction is attached to petty sessional divisions, on the transfer by agreement of Yardley, which formed part of the petty sessional division of Northfield, in Worcestershire, to form part of Warwickshire, and thus become part of the petty sessional division of Solihull, in Warwickshire, there were thereby transferred to the Warwickshire justices the jurisdictions ordinarily appertaining to justices sitting in petty sessional divisions, and that the administration of the licensing laws was one of these jurisdictions, and the justices of Warwickshire could, therefore, exercise licensing jurisdiction over Yardley. This argument and the judgment founded thereon ignore a difficulty which remains and which is not taken notice of by the Queen's Bench Divison. The difficulty in the way of this argument is that by the Act of 1840 (3 & 4 Vict. c. 88), by which a transfer by agreement of one part of a county to another county can alone take place, no general transfer of jurisdiction is authorized, but, on the contrary, the transfer of a limited jurisdiction is alone provided for—viz., a transfer "for the purposes of the said Act," "an Act for the establishment of county and district constables" (2 & 3 Vict. c. 93)—and this Act has nothing to do with the exercise of licensing jurisdiction. A transfer by agreement of one part of a county to form a part of another county, except for the purposes of the County Police Act (2 & 3 Vict. c. 93), is nowhere authorized. It is true that by the Act of 1840 (3 & 4 Vict. c. 88) its provisions and also the provisions of the Act of 1839 (2 & 3 Vict. c. 82), "An Act for the better administration of justice in detached parts of counties," are to apply to the transferred districts; but, in my judgment, neither in the Act of 1840 nor in the Act of 1839 (2 & 3 Vict. c. 82) for the better administration of justice in detached parts of counties can it be found that licensing jurisdiction is dealt with or included. I am alive to the inconvenience of the justices of Warwickshire having police jurisdiction in Yardley and not licensing jurisdiction, though they have not administrative jurisdiction; and, as to summary jurisdiction and ministerial matters, see Jervis's Act (11 & 12 Vict. c. 42), s. 7. If I could I would come to the same conclusion as the Queen's Bench Division, but I am unable to construe the statutes so as to effect what the Queen's Bench Division has held to be effected thereby—viz., that the justices of Warwickshire are the justices to administer the licensing laws in Yardley. There is another ground which appears fatal to Warwickshire, which is that, by the terms of the agreement of 1857, the licensing jurisdiction in Yardley was not, in fact, agreed to be transferred to the justices of Warwickshire, but that Yardley was transferred to Warwickshire for the purposes only of the several Acts relating to county and district constables, which have no relation to the administration of the licensing laws; but it is unnecessary to say anything as to this. In my judgment Worcestershire is right, and its appeal must be allowed.

RIGBY and COLLINS, L.JJ., concurred.

Appeal allowed.

Solicitors for the justices of Worcestershire, *Clarke & Blundell*, for *S. Thornely*, Worcester.

Solicitors for the justices of Warwickshire, *Field, Roscoe, & Co.*, for *A. S. Field*, Leamington.

From Chan. Div.
(Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) Nov. 3.

ECCLESIASTICAL COMMISSIONERS *v.* PINNEY. (*a.*)

Ecclesiastical Commissioners—Glebe lands—Contract for sale—Non-payment of purchase-money—Specific performance—Right to sue—Ecclesiastical Leasing Acts, 1842 (5 & 6 *Vict.* c. 108), *and* 1858 (21 & 22 *Vict.* c. 57).

By an agreement made in July, 1873, *D., a vicar, agreed to sell to trustees of settled estates, with the consent of the tenant for life and also of the Ecclesiastical Commissioners and the patron of the living, certain glebe lands for the sum of £24,963. The Ecclesiastical Commissioners were parties to and executed the contract. The title was accepted, and the tenant for life went into possession. Interest on the unpaid purchase-money (which was more than an investment would have produced) was paid regularly to the vicar and his successors in office until* 1896, *when the Ecclesiastical Commissioners brought an action claiming specific performance of the contract, or damages, or, in the alternative, the enforcement of a vendor's lien.*

Held, that the Ecclesiastical Commissioners, by virtue of their statutory powers, were bound to see that the purchase-money was paid and secured, and that, therefore, they had a good cause of action.

Appeal of the plaintiffs from Bigham, J., sitting as an additional judge of the Chancery Division.

By an agreement made in July, 1873, the Rev. John Digby Wingfield Digby, the then incumbent of Coleshill, Warwickshire, contracted with the trustees of the will of the then late Earl Digby, with the consent of the tenant for life under the same will, to sell to them certain glebe lands for the sum of £24,963. As the contract was made by virtue of the powers contained in the Ecclesiastical Leasing Acts, 1842 and 1858, the consents of the Ecclesiastical Commissioners and the patron of the living were necessary; and they were accordingly made parties to the agreement.

The rate of interest on the unpaid purchase-money was fixed by the contract at 4 per cent. The contract had never been completed, but interest at the rate of 3½ per cent. had been regularly paid to the incumbent of the living. In the meantime the value of the land had materially decreased, and was said to be worth now not more than £10,000. It was stated that the income paid to the incumbent was considerably more than it would have been had the contract been completed and the money re-invested by the Ecclesiastical Commissioners.

The Commissioners ultimately brought this action, claiming specific performance of the contract or damages in lieu of specific performance, or, in the alternative, a vendor's lien on the property. The defendants were the then incumbent of the living, the tenant for life of the Digby estates, the trustees under the settlement of the Digby estates, and the legal personal representatives of one Baker, the trustee who was a party to the contract.

At the trial Bigham, J., dismissed the action,

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

holding that the Ecclesiastical Commissioners were merely consenting parties to the sale and had no other interest under the contract, and that they were wrong in making the incumbent a defendant: he should have been a plaintiff, as the promise was to pay him and the commissioners.

The Ecclesiastical Commissioners appealed.

Cozens-Hardy, Q.C., *Astbury, Q.C.*, and *Pochin*, for the appellants.—Under the statute 22 & 23 Vict. c. 57 there is a legal power to sell with the consent of the Ecclesiastical Commissioners, and the purchase-money must be paid to them as vendors. [LINDLEY, M.R.—Your right to receive the money does not depend on the contract, but on the statute. I do not see why you have not a statutory right to enforce payment of the purchase-money.] Under the contract itself the purchaser covenanted to pay the money to us, and under the statute we are entitled to enforce payment. Bigham, J., said that as there was a promise to pay two parties, the vicar and the commissioners, both should have been plaintiffs, and we were wrong in having made the vicar a defendant.

They referred to *Ecclesiastical Commissioners* v. *Wodehouse*, 43 W. R. 395, [1895] 1 Ch. 552.

Eve, Q.C., and *R. F. Norton*, for the second defendant, the tenant for life.—The action is bound to be dismissed as against me, because I am not a party to the contract. I only have the land subject to the vendor's lien. The commissioners are only parties for the purpose of giving their consent if it is necessary. If the present vicar and the purchaser choose, they can put an end to the contract now, and leave the commissioners out. The provisions of the Act as to consent are similar to those of the Settled Land Act. The tenant for life cannot handle the purchase-money; it must be paid into court or to the trustees. [CHITTY, L.J.—The cases are not analogous, because the trustees under the Settled Land Act have no discretion. They need not approve or disapprove of the sale.] *Ecclesiastical Commissioners* v. *Wodehouse*, relied upon by the other side, is an entirely different case. Here the land remains exactly as it was; there is no waste. The fact that the commissioners have a right to prevent anyone else receiving the money does not give them a right to sue for it.

T. H. Carson, for the present vicar.

Brinton, for the legal personal representative of Baker.

Sargant, for the trustees.

Hardy, Q.C., replied.

LINDLEY, M.R.—I think this action has been disposed of a little too summarily, and it appears to me that, having regard to the facts stated in the statement of claim, and particularly having regard to the Act of Parliament 21 & 22 Vict. c. 57, it is not right to say that the plaintiffs cannot recover anything in the action as framed. I do not propose to say anything about the particular form of relief which would have to be given. We have not gone into the defences, and we know nothing whatever about them; but Bigham, J., has taken the summary view that the plaintiffs are not entitled to any relief in this action. Now, there I differ. Of course I know nothing whatever about the facts in the defence, and I say nothing to prejudice that; but the position of the Ecclesiastical Commissioners is not the position of a person who consents to something being done by third parties in an ordinary contract. The Ecclesiastical Commissioners have, by statute, very important duties to perform, and for the performance of those duties they have rights conferred upon them; and, as I read the statute 21 & 22 Vict. c. 57, it is the duty of the Commissioners rather than their right to see that this money is properly obtained and secured. I say nothing about the technical form of pleading, but I cannot possibly construe this Act of Parliament and treat them as persons having nothing whatever to do with the money except to prove their consent to the sale. The contract is one of the circumstances which brings into existence the necessity for them to perform their duties and to exercise their rights which are incidental to that performance. I do not look upon this as an ordinary action for specific performance at all; it is something far more than that. It is an action brought by the Ecclesiastical Commissioners in performance of their statutory duties, and, of course, the contract is important to be set out, because it is the existence of that contract which gives rise to those duties and gives rise to their rights. Whether they will succeed in getting a decree for specific performance in the narrow technical sense, or whether they will not, I do not know; or whether they will be compelled to fall back upon their lien I do not know; but it strikes me that their statutory right is to get this money if they can, and I am not at all satisfied that they cannot.

I think, therefore, that the appeal must be allowed, and that the matter must go back to be tried. As regards the costs, considering we know nothing about the merits, I think that the costs below and here ought to be costs in the action.

CHITTY, L.J.—I agree.

VAUGHAN WILLIAMS, L.J.—I also agree.

Appeal allowed.

Solicitors, *Milles, Jennings-White, & Foster; Hulberts, Hussey, & Metcalfe; Dawson, Bennett, & Ryde.*

High Court of Justice.

Chan. Div. North, J. } July 28; Aug. 4, 5, 1898.

In re GUNDRY.
MILLS *v.* MILLS. (*a.*)

Settlement—Covenant to settle after-acquired property—Second settlement.

By an ante-nuptial settlement, dated the 15th of March, 1879, the wife covenanted to settle after-acquired property on trust for herself for life, with remainder to her children. By another settlement, dated the 7th of May, 1879, the wife covenanted to settle after-acquired property on herself for life, with remainder to the husband for life, and, after the death of the survivor, with remainder to such persons as the wife should appoint. The marriage was solemnized on the 10th of May, 1879.

Held (in the absence of evidence), that the covenant contained in the first deed was not revoked by the second deed.

Adjourned summons.

By an indenture dated the 15th of March, 1879 (being an ante-nuptial settlement in consideration of a then contemplated marriage between William Gundry Mills and Anna Ellen Gundry), the proceeds of sale of certain real estate were settled on trust for the intended wife for her life for her separate use,

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

and after her death for her issue as she should appoint, and in default of appointment, for her children equally; and this settlement contained a covenant on the part of the intended wife to settle on the same trusts any property which she, the said wife, or she or the said William Gundry Mills in her right, should become entitled to at any time during coverture, exceeding £200 acquired at any one time. This settlement was executed in London.

By another indenture of ante-nuptial settlement made in consideration of the said intended marriage, and dated the 7th of May, 1879, certain furniture and property of small value was settled on trust for the said intended wife for life for her separate use, and after her death for the intended husband, the said William Gundry Mills, for life, and after the death of the survivor for such persons as the said intended wife should appoint, with certain remainders over in default of appointment. This settlement also contained a covenant by the intended wife to settle all property (except jewels, trinkets, and property not exceeding £50 in value acquired at any one time) to which she should be entitled at the time of her intended marriage, or to which she or the said William Gundry Mills in her right should at any time during the coverture become entitled, upon the trusts declared concerning the furniture.

This second settlement was executed at Fowey, and was prepared by different solicitors from those who prepared the first settlement, to which it did not refer. There was no evidence as to the circumstances which led to its preparation.

The marriage between William Gundry Mills and Anna Ellen Gundry was solemnized on the 10th of May, 1879.

William Gundry, the father of the wife, died in 1897, leaving a will under which the said wife, Anna Ellen Mills was his residuary legatee, and his residuary estate exceeded £100,000. This summons was taken out to determine upon the trusts of which settlement this sum should be held.

H. Terrell, Q.C., and *Freeman*, for Mrs. Mills.—A covenant to settle after-acquired property can be altered before marriage, it resembles marriage articles: *Legg* v. *Goldwise*, Cas. *temp.* Talbot 20; Fearne's Contingent Remainders, 10th ed., p. 107. The execution of the second settlement revoked the first so far as the two settlements were inconsistent.

Ingle Joyce and *Waggett*, for other parties.

Vernon Smith, Q.C., and *Buckmaster*, for issue of the marriage.—If a marriage takes place an executed settlement cannot be altered. [They cited *Page* v. *Horne*, 9 Beav. 570; *Bond* v. *Walford*, 34 W. R. 165, 32 Ch. D. 238; *Thomas* v. *Brennan*, 15 L. J. Ch. 420.] No intention to revoke the covenant in the first deed to settle after-acquired property, is shown.

Terrell, Q.C., in reply, cited *Tweddle* v. *Atkinson*, 9 W. R. 781, 1 B. & S. 393; *Price* v. *Easton*, 4 B. & Ad. 433; *In re Anstis*, 34 W. R. 483, 31 Ch. D. 596.

NORTH, J.—It is said that the mere fact that the second deed was executed after the first, both being before marriage, supersedes the first. I do not decide whether, under any circumstances, it would do so, but on the evidence before me I decline to say that it does so in this case. I have no evidence of the circumstances under which the two documents were prepared, or of any intention of the parties to the second document to supersede the first. I know, however, that if the second deed prevails, the wife will have power to appoint £100,000 away from her children. What the history of the matter is I do not know, but I decline, as a matter of law, to say that the mere fact that one deed is dated after the other makes the second deed a revocation of the first so far as they are inconsistent. Further, in the first deed considerable property of the father was settled; in the second deed only some furniture was settled, and there is no reference to the first deed. Under the circumstances I decline to say that the second covenant is to supersede the first. I do not say what conclusion ought to be arrived at if no evidence were obtainable, but in this case many parties are able to give me information, and do not condescend to do so.

Solicitors, *Carthew & Wheeler*, for *Graham & Graham*, St. Austell.

Chan. Div.
Kekewich, J. } Oct. 28.

CUMMINS v. PERKINS. (*a*.)

Practice—Married woman—Plaintiff—Action dismissed — Costs — Taxation — Certificate not yet issued — Receiver of separate estate—Equitable execution.

Where an action by a married woman suing in respect of her separate estate had been dismissed, with costs to be taxed "and payable out of her separate estate, and not otherwise," and her only separate estate consisted of her share in her deceased sister's estate which the trustees were about to distribute, and it appeared that, if she received her share, the defendants would not be paid their costs, the court, on motion by the defendants, and notwithstanding the fact that the taxing-master had not yet issued his certificate, appointed a receiver of the share to the extent of the amount of the bill of costs delivered by the defendants, to hold the same as a security for the costs when taxed.

Motion.

In 1897 Elizabeth Cummins, a married woman, suing in respect of her separate estate, brought an action against her former solicitors for damages by reason of a sale alleged to have been made by them at an undervalue of her reversionary share under the will of her sister, Sarah Ann Ellis, deceased.

The action came on for trial on the 22nd of July, 1898, and judgment was pronounced dismissing the action and ordering the plaintiff to pay to the defendants their taxed costs of the action, such costs to be payable out of the plaintiff's separate estate, but not otherwise, and directing that the defendants' taxed costs should be paid within twenty-one days after service of the present order and the taxing-master's certificate in pursuance thereof.

The judgment had been passed and entered, and the defendants carried in a bill of costs for £270, but owing to delay arising partly on account of the Long Vacation, and partly, as was alleged, from the plaintiff's non-attendance at the proceedings, the taxation had not yet been completed nor the taxing-master's certificate issued.

The only separate property of which the plaintiff was possessed consisted of her share in her sister's estate. The share had recently fallen into possession; and having regard to the fact that the trustees were about to distribute the estate, the defendants now moved for the appointment of a receiver of the plaintiff's share on the ground that, unless a receiver were appointed, they would in all probability lose the benefit of the judgment.

Warrington, Q.C., and *Waggett*, for the motion.—

(*a*.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

The defendants ask for a receiver of so much of the plaintiff's share as is sufficient to satisfy the costs ordered to be paid to the defendants. The court has jurisdiction to make the order: *In re Peace & Waller*, 31 W. R. 899, 24 Ch. D. 405. In that case there was a certificate, whereas here there is none, but that difference is not material. Unless the defendants get the protection they seek they will not get their costs.

Renshaw, Q.C., and *Peterson*, for Mrs. Cummins.—This application is wrong. The defendants cannot get equitable execution when they cannot get legal execution, and here they cannot get legal execution because there is no certificate: *In re Shephard*, 38 W. R. 133, 43 Ch. D. 131, *Waddell* v. *Waddell*, [1892] P. 226.

KEKEWICH, J.—It seems to me that I must dismiss from my mind the difference between legal and equitable execution. I think the introduction of the words "equitable execution" only confuses the position. The facts are these. This lady has been ordered to pay these costs, the full amount of which cannot be ascertained until taxation. But there is a judgment against her to pay these costs, when ascertained, out of her separate estate. It has been proved that she has no separate estate except her share under the will of Sarah Ann Ellis. Therefore the order is that these costs shall be paid out of her share. The suggestion has been made that she will get her share paid to her, and then snap her fingers at the defendants, telling them to get their costs as and when they can. I am disposed to take the view that the court ought to interfere if it can, but I am told that such a course is against all the rules of court. I am not satisfied of that. I think that the plaintiff ought not to receive her share in full while these costs are unpaid. I shall, therefore, appoint the defendant, Mr. Perkins, who is a solicitor, receiver without salary of the share of the plaintiff in the estate of Sarah Ann Ellis to the extent of £270, but it is only to stand as a security for the amount actually found due to the defendants on their bill of costs.

Solicitors, *Chester & Co.; A. W. Mills.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills and Lawrance, JJ.) Nov. 10, 11.

PRESCOTT *v.* LEE. (*a.*)

Election law — Registration — Parliament — Notice of objection — Place of abode of objector — Mistake — Amendment — Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 2—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 18—*Statute Law Revision Act*, 1898 (61 & 62 *Vict. c.* 22)—*Registration Order*, 1895, *Schedule III., Form (I.) No.* 2.

A notice of objection to the party objected to (a person on the occupiers' list of voters for the borough of the Strand) was thus signed by the objector: "Francis Hunt, of 106, *Drury-lane . . ." The party objected to contended that the notice of objection was invalid, because* 106, *Drury-lane was not the objector's place of abode. It was found by the revising barrister that the objector's true place of abode was* 50, *Nelson-road, Wimbledon; that* 106, *Drury-lane was the objector's qualifying property (a shop) within the said borough; that the address,* 106, *Drury-lane, was inserted in the notice by a "mistake" on the part of the objector, who thought he ought to give his address within the borough, and not his place of abode outside it; and that neither the party objected to nor anyone else was misled by the inaccurate statement of the objector's place of abode in the notice of objection.*

The revising barrister held that the insertion of 106, *Drury-lane in the notice of objection as the objector's place of abode was, in the circumstances, a "mistake" within the meaning of sub-section* 2 *of section* 28 *of the Registration Act*, 1878, *and, in the exercise of his discretion, he amended the notice by inserting therein the objector's true place of abode.*

The Court (Lord Russell of Killowen, C.J., *and* Lawrance, J.; Wills, J., *dissenting*) *affirmed the decision of the revising barrister.*

Case stated by the revising barrister for the borough the Strand.

The form of a notice of objection served upon the appellant Thomas Prescott was as follows:

"To Thomas Prescott:

"I hereby give you notice that I object to your name being retained on Division I. of the occupiers' list of electors for the parish of St. Martin-in-the-Fields as a Parliamentary elector for the Parliamentary borough of the Strand and as a county elector for the administrative county of London, on the following grounds: [The grounds of objection were then stated.] Dated the 20th day of August, 1898.

"(Signed) Francis C. Hunt, of 106, Drury-lane, on Division I. of the occupiers' list of Parliamentary electors and county electors for the parish of St. Martin-in-the-Fields."

The appellant contended that this notice of objection was invalid by reason of the fact that "106, Drury-lane" was not the place of abode of the objector Hunt.

It was proved to the revising barrister, and found by him as facts, that the true place of abode of the objector Hunt was "50, Nelson-road, Wimbledon"; that the address 106, Drury-lane was inserted in the notice of objection by a mistake on the part of the objector, who thought he ought to give his address within the borough of the Strand and not his place of abode outside the borough; that 106, Drury-lane was the objector's qualifying property (a shop) in the borough where he could be found during the greater part of any week-day; and that, in the entry of the objector's name in the list of voters, the objector's true place of abode, "50, Nelson-road, Wimbledon," was correctly given in the second column (place of abode) of such entry.

The revising barrister upon these facts—holding that the insertion in the notice of objection of 106, Drury-lane (instead of 50, Nelson-road, Wimbledon) as the place of abode of the objector was a mistake within the meaning of sub-section 2 of section 28 of the Parliamentary Registration Act, 1878, and that neither the appellant nor anyone else was affected in any way by the inaccurate statement in the notice of objection of the objector's place of abode—amended the notice of objection by substituting therein the true place of abode of the objector; and the grounds of objection to the appellant being proved good, the appellant's name was struck off the list of voters.

Upon the request of the appellant Prescott the barrister stated this case for the opinion of the court—the question being whether, in the circumstances of the case, the barrister had power to amend the notice of objection.

Sub-section 2 of section 28 of the Parliamentary Registration Act, 1878, enacts that a revising barrister "may correct any mistake which is proved to him to have been made in any claim or notice of objection."

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Section 18 of the Registration Act, 1885 (48 & 49 Vict. c. 15), enacted that "the forms and instructions contained in the 2nd and 3rd schedules to this Act shall be used and observed in all cases to which they apply . . . but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing."

By the Registration Order of the 25th of March, 1895 (made by the Queen in Council under the provisions of section 76, sub-section 7, of the Local Government Act, 1888), it is ordered that "the former instructions, precepts, notices, and forms under the Registration Acts shall be altered . . . and the instructions, precepts, notices, and forms in the schedules to this order shall be observed and be valid in law." Form (I.) No. 2 in that order is the form of notice of objection to the party objected to; and it prescribes that such notice shall be thus signed by the objector: "(Signed) A. B. of [place of abode] on the list of Parliamentary electors and county electors for the parish of . . ."

Section 18 of the Registration Act, 1885, is repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), which came into force on the 25th of July, 1898.

W. Graham, for the appellant. — The revising barrister had no power to make such an amendment as he made in this case, for his power to amend is limited to the correction of "mistakes," and the intentional filling in of one address for another is not a "mistake" at all. Moreover, this is not a case in which the court is asked to order a revising barrister to amend a misstatement or inaccuracy in the notice of objection, but to uphold an amendment by the revising barrister which he had no power under the Act to make: *Barlow* v. *Smith*, 1 Fox & Smith 293; *Smith* v. *Chandler*, 37 W. R. 351, 22 Q. B. D. 208. By the omission of the objector's true place of abode the notice was bad for want of description: *Humphrey* v. *Earle*, 36 W. R. 510, 20 Q. B. D. 294; and, being bad in form, ought not to have been acted upon as against the appellant.

H. H. Lawless, for the respondent. — Since the irregularity in the notice is one that arose from a "mistake," the revising barrister had discretionary power to amend it under sub-section 2 of section 28 of the Registration Act, 1878; and having decided that the alteration should be made, the court has no power to interfere: *Adams* v. *Bostock*, 30 W. R. 460, 8 Q. B. D. 259; *Bollen* v. *Southall*, 34 W. R. 44, 15 Q. B. D. 461; *Hicks* v. *Stokes*, 41 W. R. 123, [1893] 1 Q. B. 124.

W. Graham replied.

Lord RUSSELL OF KILLOWEN, C.J.—In this case my brother Lawrance, J., and myself have the misfortune to differ with the view taken by Wills, J., as we have come to the conclusion that the revising barrister had power to make the amendment. It seems to me that the Legislature intended to lay down rules which would ensure substantial uniformity in claims, notices of objection, and the like, under the Registration Acts; but these rules were never intended to defeat claims and objections (which would otherwise be valid) by reason of their not following with strictness the prescribed form in the schedule. Of course, however, the line must be drawn somewhere, as too great a degree of laxity could never be permitted. I think the line may safely be drawn at cases where, although there has not been a literal compliance with the forms, there has yet been substantial compliance, unaccompanied by any attempt to deceive or do any injury to others. It is obviously not desirable that words dealing with the popular franchise—claims on the one hand, and notices of objection on the other—should be construed with such special pleading nicety as to make it incumbent that paid experts should be necessarily called in for the purpose of giving effect to the rights which the Legislature intended to confer. Under section 18 of the Registration Act, 1885, it is provided as follows: [His lordship read the section, and proceeded:] That meant that substantial uniformity should be secured as to the forms of claims and notices, but it did not mean to deprive claimants and objectors of their rights, if their notices were otherwise valid, by reason of the fact only that the notices did not quite strictly adhere to the forms given in the schedules. In other words, no slavish adherence to these forms was required. If substantial compliance existed and all the information required was given, then the form was admissible. There must be substantial compliance with the form, and all information required to be given must be given. So much for the law as it stood under the Act of 1885. But section 18 of that Act has been repealed by the Statute Law Revision Act, 1898. The Order in Council of March, 1895, orders that the instructions, notices, and forms in the schedules to that order shall be observed and be valid in law; but the proviso contained in the repealed section 18 that a disregard of any form or instruction shall not of itself invalidate any notice is omitted. What is the effect of that omission? Does it make any practical difference? I do not think so. The same construction can be given to the Order as was given to the repealed section, and, if I am right in that view, then non-compliance with the letter of the form, if all the substantial requirements are fulfilled, will not of itself invalidate a notice.

The question, therefore, is narrowed to this—namely, what is the revising barrister's power to amend? That depends on 41 & 42 Vict. c. 26, s. 28, sub-section 2, which enacts that a revising barrister "may correct any mistake which is proved to him to have been made in any claim or notice of objection." It follows that if there is a mistake the revising barrister has jurisdiction to correct it. Was there a "mistake" in the present case? If not, then the revising barrister had no power to amend the notice as he has done, and the appeal must succeed. But I think the revising barrister had power to make this amendment, for, apart from the authorities, the law is perfectly clear that any person who is a voter may give notice of objection. The objector here was on the register; what did that involve? His name appeared on the list with his place of abode, and, also, the description of his qualifying property in the borough. The facts about the notice of objection are thus set out in the case. [His lordship then read certain paragraphs of the case.] The revising barrister says that the wrong address was given by the objector by mistake. During the argument counsel for the appellants contended that a restricted meaning ought to be given to the word "mistake"—restricted, namely, to a mistake of fact—as if, for instance, the objector had accidentally, in a fit of hallucination, written down an address which was not his at all. But I see nothing in the Act requiring us to limit the word in that way. It is clear that the objector, under an erroneous impression of his duty, had entered intentionally in the notice of objection his business address instead of his residential address. That appears to me to be a "mistake" which the revising barrister has jurisdiction to set right. I must now deal with the authorities in their order of date. [His lordship then referred at length to the cases of *Adams* v. *Bostock*, *Bollen* v. *Southall*, *Smith* v. *Chandler*, and *Hicks* v. *Stokes*.] I see nothing in these authorities

which militate against the opinion I have already expressed—namely, that in this instance there was a mistake which the revising barrister had power to amend if he thought fit. In my judgment, therefore, the appeal fails.

WILLS, J.—It is with great reluctance that I have come to a conclusion in this case that obliges me to differ in my judgment from the other members of the court. The point is a narrow one, but important. The simple question is, What is the true meaning of the words in sub-section 2 of section 28 of the Act of 1878, "The revising barrister may correct any mistake." The kind of mistake I think the Act contemplated was such a mistake, for example, as where a man said one thing and meant to say another. When a man, as in the present case, puts on his notice of objection the very address he intended should appear there, I fail to see how his intentionally doing so can be said to have been a "mistake" on his part. It cannot be said that a man has made a mistake if he has done or said the very thing he all the time meant to do or say, because he had been induced to do what he in fact did by a process of reasoning which proceeded on a mistaken view of what the law required. It is true that the revising barrister in the case he stated mentions the word "mistake," but that does not, for the reason I have given, help the court to decide in his favour. He does not explain how the particular address came to be inserted by "mistake." The "mistake" made by the objector was the premises on which he based his conclusion that it was necessary to give an address in the borough. The statute only gives the revising barrister power to correct anything he finds wrong, when it appears to him to have been caused by a "mistake." There is no power given him to set right the erroneous conclusion which induced the objector to make a particular entry. The authorities that have been cited to us are cases where a mistake, in the true sense of the word, has come before the revising barrister; and where such is the case the statute authorizes the revising barrister to use his discretion and to amend or correct if he thinks fit. On this ground I fail to see that the revising barrister had jurisdiction in the matter; and therefore he amended this particular notice of objection without any right to do so.

LAWRANCE, J.—I concur in the view of the learned Lord Chief Justice, as in my judgment this was an error or mistake which by the statute the revising barrister had jurisdiction given him to correct, if he so thought fit. That discretion he has exercised, and in my opinion his amendment ought to be upheld. I do not myself think that the Legislature intended that the word "mistake" should be restricted to its purely literal and technical meaning, but that it must be read as having been used in its commonly-accepted sense. I am content to put my decision in the words of Lord Coleridge in the case of *Bollen* v. *Southall*, where he said: "With regard to the power of amendment I am much indisposed to construe it so as to encourage laxity; but I think it would make it almost nugatory to hold that the revising barrister had not the power to amend or correct mistakes in these notices, if the information they are intended to convey is really given, but given in an informal or inaccurate manner. I think the amendment made here was well within his power. I shall always be inclined to hold the exercise of the power of amendment within reasonable limits, because I am well aware of the very strong feelings which are excited in matters of this sort. Unless kept under proper restraint the agents on both sides will be apt to fall into a degree of laxity which I for one do not feel inclined to encourage." That is the view I take of the present case, and in my judgment the appeal should be dismissed.

Appeal dismissed with costs; leave to appeal given.

Solicitors for the appellant, *Ayrton, Biscoe, & Barclay.*

Solicitors for the respondent, *Troutbeck & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills and Lawrance, JJ.) Nov. 10.

LINFORTH v. BUTLER.. (a)

Election law — Registration — Parliament — Notice of objection—Omission in body of notice of place of abode of person objected to—Validity—Parliamentary Registration Act. 1885 (48 & 49 *Vict.* c. 15), *s* 18—*Statute Law Revision Act*, 1898 (61 & 62 *Vict.* c. 22)—*Local Government Act*, 1888 (51 & 52 *Vict.* c. 41), *s.* 76, *sub-section* 7—*Registration Order*, 1895, *Schedule I., Form* 5 (a).

Notwithstanding the repeal of section 18 *of the Parliamentary Registration Act*, 1885, *an immaterial deviation —even though intentional—from any form prescribed in the Registration Order*, 1895, *will not of itself invalidate a claim or notice of objection; but if a claim or notice of objection fails in any substantial respect to give the information required to be given to the person who is to receive it, then it is invalid.*

A notice of objection sent by post to a person whose name was entered on the register of ownership electors omitted to give (as prescribed in Form 5 (a), *Schedule I., of the Registration Order*, 1895), *in the body of the notice itself, the place of abode, as described in the register, of the person objected to; but on the back of the notice of objection there was written, for postal purposes, the name of the person objected to and his place of abode as described in the register. The omission to give in the body of the notice the place of abode of the party objected to was intentional.*

Held (reversing the revising barrister) that the notice of objection was not invalid on account of such omission.

Case stated by the revising barrister for the Pudsey Division of the West Riding of Yorkshire.

The name of the respondent appeared upon the ownership list for the Pudsey Division of the township of Leeds. A notice of objection was sent by the appellant to the respondent through the post in accordance with section 100 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18). The form of notice of objection applicable, was Form 5 (*a*) in Schedule I. of the Registration Order, 1895.

In filling up the form of notice, the appellant had omitted to insert—as prescribed in Form 5 (*a*)—in the body of the notice itself the place of abode of the respondent as described in the register; but on back of the notice the name and place of abode of the respondent were, for postal purposes, correctly written. The appellant intentionally omitted to insert in the body of the notice the respondent's place of abode, in order to avoid having to pay the extra halfpenny postage (which, as alleged, would have been in such case) required by the postal regulations.

The respondent contended that the notice of objection was invalid by reason of this omission.

The revising barrister held that the notice of objection was bad by reason of this omission, and allowed the vote.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Section 18 of the Registration Act, 1885 (48 Vict. c. 15), provided as follows: "The forms and instructions contained in the second and third schedules to this Act shall be used and observed in all cases to which they apply . . . but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." This section was repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), which came into force on the 25th of July, 1898.

Section 76 (7) of the Local Government Act, 1888 (51 & 52 Vict. c. 41), provides as follows: "It shall be lawful for Her Majesty the Queen, by Order in Council, from time to time to alter the instructions, precepts, notices, and forms under the Registration of Electors Acts . . . and the instructions, precepts, notices, and forms specified in any such Order in Council shall be observed and be valid in law . . ."

The material parts of the form of notice of objection, Form 5 (*a*) prescribed by the Registration Order, 1895, is as follows: "To C. D., of [here insert the name and place of abode of the person objected to as described in the register]. Take notice that I object to your name . . ."

The revising barrister, at the request of the objector the appellant, stated the present case.

Lewis Thomas, for the appellant.—The notice is good. Section 18 of the Registration Act of 1885 shows that a disregard of mere form is not material.

W. Graham, for the respondent.—Section 18 was repealed by the Statute Law Revision Act, 1898, a month before the notice was given. The provision now in force, section 76 (7) of the Local Government Act, 1888, says that the forms specified by the Order in Council for the time being in force shall be observed. The Queen in Council seems to have considered it desirable that the address of the person objected to as it appeared on the register should appear on the face of the notice. The registration agents ought not to disregard this requirement in order to save a halfpenny postage. If the omission had been made by accident no doubt there would be power to amend. But that was not the case here, so that the revising barrister had no power to amend: *Smith* v. *Chandler*, 37 W. R. 351, 22 Q. B. D. 208.

Lord RUSSELL OF KILLOWEN, C.J.—I think that the revising barrister was wrong. Assuming that section 18 of the Registration Act, 1885, had been in force, I think that the notice would have sufficiently complied with the law. Has any alteration in the law been effected by the repeal of that section and by the subsequent Order in Council? The vote of respondent was being objected to on the ground that his qualification was not a good one, and a notice of objection was sent to him by post. The notice is as follows; I read only part of it: "To the Rev. Alexander Henry Butler: Take notice that I object to your name being retained in the Parliamentary list of ownership electors for the township of Leeds." As this notice was to go through the post there was written on the back of it, "The Rev. Alexander Henry Butler, 17, Virginia-road, Leeds."

The machinery prescribed by the law is that one notice shall be sent to the person objected to, and a similar notice shall be sent to the overseers. Both the person objected to and the overseers, in this case had ample notice; but it is said that the notice sent to the person objected to does not comply with the law. What is the object of the provision that the notice shall be in the form prescribed? The object is to ensure that the person objected to is properly described in the notice, and that the notice shall reach him. If there had been added to the notice the words "See address on the other side" it is almost impossible to argue that that would not have been a sufficient compliance with the law. It is said that the appellant's object in not complying strictly with the form prescribed was to save postage. If the notice, however, is in legal form, there is no objection to his saving his halfpence.

Now, under section 18 of the Registration Act, 1885, "a disregard of any form shall not of itself invalidate any notice." If, therefore, when that Act was in force there was a substantial compliance with the law, this notice would have been good. There could not then be any answer to the argument that there has in this case been a substantial compliance with the law. But it is said that the law is altered, that that section has been repealed, that it has been superseded by an Order in Council. Are we called upon to say that, under the present law, any deviation from the form invalidates the notice? I do not think so. The line can only properly be drawn at the point, that if the notice fails in any substantial respect to give the information required to be given to the person who is to receive it, the notice is bad.

WILLS and LAWRANCE, JJ., concurred.

Solicitors for the appellant, *Ward, Bowie, & Co.*, for *Walter & E. A. Foster*, Leeds.

Solicitors for the respondent, *Ayrton, Biscoe, & Co.*, *Ford & Warren*, Leeds.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.) — Oct. 26.

PARKER v. ALDER. (*a*.)

Adulteration — Milk — Act of stranger — Liability of innocent vendor — Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6; *Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

A vendor of milk under a contract, consigned milk to a railway company for carriage to Paddington Station, where it was to be delivered to purchasers. On arrival at that station the milk was found to be adulterated by the addition of 9 per cent. of water. The adulteration took place without the knowledge of the vendor during the railway transit.

Held, that the vendor was liable to be convicted, under section 6 of the Sale of Food and Drugs Act, 1875, for selling, to the prejudice of the purchaser, milk which was not of the nature, substance, and quality demanded; but that the vendor's personal innocence of the adulteration was a fact to be taken into account in mitigation of punishment.

Special case stated by a metropolitan magistrate.

An information was preferred by the appellant against the respondent under section 6 of the Sale of Food and Drugs Act, 1875, as amended by section 3 of the Sale of Food and Drugs Act Amendment Act, 1879, charging the respondent that on the 1st of January, 1898, at Paddington Station, being under a contract with the Metropolitan and Surburban Milk Supply Association for the sale and delivery to them of pure unskimmed milk at Paddington Station, he sold to the prejudice of the purchaser, in pursuance of such contract, milk which was not of the nature, substance, and quality demanded. The respondent was a dairy farmer carrying on business at Wantage. By the terms of a contract entered into by him with the association he undertook to sell to the association

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

pure unskimmed new milk in specified quantities and at specified prices to be delivered carriage paid in churns morning and evening from the 27th of March, 1897, to the 26th of March, 1898, to Paddington or any other railway station served by the Great Western Railway Co. near London, in such condition as to keep good and sweet a reasonable time after delivery. The course of business was for the churns consigned by the respondent to the association to be delivered by the respondent to the Great Western Railway Co. at Challow for transmission to Paddington, where the association took possession of them. It was proved that the particular consignment of milk in question was, when delivered to the railway company at Challow, pure, and in all respects in accordance with the provisions of the contract. The appellant, who was an inspector under the Act, took a sample of the milk on its arrival at Paddington, and it was found to contain 9 per cent. of added water. The magistrate found as a fact that the water was unlawfully added by some person a stranger to the respondent during the transit from Challow to Paddington.

The magistrate dismissed the information, being of opinion that, although the place of the delivery of the milk was Paddington, the property in the milk passed to the association at Challow, and therefore no sale within section 6 of the Act of 1875 took place at Paddington. The magistrate further held that even if there was a sale at Paddington the respondent was in law only liable for the acts and defaults of himself, his servants, and employees.

Section 6 of the Sale of Food and Drugs Act, 1875, is as follows: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser." Section 3 of the amending Act of 1879 provides that any inspector may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee.

R. C. Glen, for the appellant.—The property in the milk did not pass to the buyer till its arrival at Paddington. It is not necessary under section 6 to prove knowledge of the adulteration on the part of the seller, although the absence of knowledge may be material on the question of the amount of the penalty. In *Brown* v. *Foot*, 66 L. T. Rep. 649, 40 W. R. Dig. 6, the master was held liable for the act of his servant in adulterating milk, and no valid distinction can be drawn between the wrongful act of a servant and the wrongful act of some other person.

The respondent did not appear.

Lord RUSSELL OF KILLOWEN, C.J.—In my judgment the magistrate was wrong in holding that no offence had been committed by the respondent. I think that it is clear that, upon the proper construction of the contract between the respondent and the association, the risk of the buyers only began when the milk was delivered to them at Paddington Station. Delivery to the association was not completed by putting the milk in the train at Challow and leaving it to be carried by the railway company as agent for the buyers, and in my opinion the magistrate rightly construed the contract in saying that the place of delivery was Paddington; but I do not agree with his conclusion that, as between the buyer and the seller, the property passed at Challow. I think the property passed to the buyer on delivery at Paddington.

The inspector took a sample from the milk at Paddington, and it was found to be adulterated by the addition of 9 per cent. of water. The magistrate came to the conclusion, and we have no reason to find fault with his decision on this point, that the milk was pure when delivered by the respondent to the railway company at Challow, and that the respondent was no party, directly or indirectly, to the adulteration, which must have taken place in course of transit by the act either of a servant of the railway company or of some other person who had access to the churns.

The question is whether, under these circumstances, the respondent has committed the offence with which he is charged. That depends on the proper construction to be placed on the two sections which have been referred to. It is not unimportant to notice that section 5 of the Act of 1875, the section immediately preceding one of those in question, deals with certain offences as to which the person charged may meet the accusation made against him by showing that he did not know, and could not with reasonable diligence have obtained the knowledge, that the article in question had been dealt with in the manner prohibited. It is important to bear in mind the provisions of that section when one has to consider the construction to be placed on section 6. [His lordship read section 6 of the Act of 1875, and section 3 of the Act of 1879.] The only question which we have to consider is whether the respondent is brought within these sections, taking it, as we must, that he was no party to the adulteration, and had no means of protecting himself against it. I think he is. If one considers the scope of this Act, I think that to hold the respondent not responsible would be to open a very wide door towards defeating the Act, especially when one considers that it has been decided that an innocent vendor has been held liable for the unauthorized act of his servant committed beyond the scope of his employment, and even in defiance of direct instructions. There seems to me to be no difference between such a case as that, and this one. Looking at the scope of the Act and to the absence of reference to the necessity of proving *scienter*, I am of opinion that an offence is committed if in the course of carrying out a contract of sale an adulterated article is delivered.

I only wish to add that if the vendor is himself personally innocent, and that fact is known to the inspector, he ought not to institute proceedings; and if he does the magistrate should only inflict a nominal fine.

WILLS, J.—I am of the same opinion. I was a party to the decision of *Brown* v. *Foot*, and that case has always been regarded as sound law and has been acted on. There does not appear to me to be any material distinction between the case of a man innocently selling an adulterated article owing to the fault of his servant, and the case of a man selling an adulterated article through the fraudulent act of a stranger. The Legislature, in dealing with the question, has intended to enforce drastic remedies, and it is not as if this was a solitary instance of the Legislature creating an offence independently of the moral character of the act.

I agree that if the magistrate is satisfied that the fraud which has been committed is one which it was it was impossible to guard against, a nominal penalty only should be imposed. Under section 16 of the Summary Jurisdiction Act, 1879, the magistrate has power, if he thinks the case a trivial one, to dismiss the summons.

Appeal allowed. Case remitted to magistrate.

Solicitor for the appellant, *J. H. Hortin.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) June 20; July 18; Aug. 12, 1898.

In re ATHLUMNEY.
Ex parte WILSON. (*a.*)

Bankruptcy—Scheme of arrangement—Debt carrying interest exceeding 5 per cent.—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 23—*Construction—Retrospective effect.*

The Bankruptcy Act, 1890, *was passed upon the* 18*th of August*, 1890, *but did not come into operation until the* 1*st of January*, 1891.

Section 23 *of that Act provides: "Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved on the estate have been paid in full."*

Held, that the above section was not retrospective in its effect, and did not apply to a scheme of arrangement approved by the court upon the 25*th of June*, 1890.

Motion by the assignee of a creditor to determine the amount of dividend to which he was entitled under a scheme of arrangement approved by the court upon the 25th of June, 1890.

Upon the 31st of January, 1890, a receiving order was made against the debtor, and at the first meeting of creditors he proposed, and the creditors accepted, a scheme by which the property of the debtor divisible among his creditors should vest in a trustee, who was to distribute the net proceeds thereof among the creditors "in accordance with the law of bankruptcy." This scheme was approved by the court and the receiving order rescinded upon the 25th of June, 1890.

Upon the 18th of August, 1890, the Bankruptcy Act, 1890, was passed, section 23 whereof provides that a creditor proving in a bankruptcy under the Bankruptcy Act, 1883, cannot obtain a dividend upon interest at a rate higher than 5 per cent. until all other claims upon the estate have been paid in full. This Act came into operation upon the 1st of January, 1891. Among the proofs tendered against the debtor's estate was one for £10,153 1s. 8d. made by a money-lender named Robert Morris, and consisting largely of interest at a higher rate than 5 per cent. This claim was assigned for value by Morris to C. H. Wilson, the applicant in this case, upon the 30th of June, 1893.

In 1897 funds became available for the payment of a dividend out of the estate, but the trustee refused to pay Wilson any dividend upon such part of Morris's proof as consisted of interest at a higher rate than 5 per cent.

Wilson thereupon applied to the court for a declaration that he was entitled to dividends upon the full amount of the proof.

Reed, Q.C., and *Frank Mellor*, for the motion.—This scheme was approved by the court before the passing of the Bankruptcy Act, 1890, and no section of an Act of Parliament should be interpreted as having a retrospective effect unless such an intention is plainly expressed in the Act.

They cited *Young* v. *Adams*, [1898] A. C. 469, 46 W. R. Dig. 121; *In re Joseph Suche & Co.* (*Limited*), 24 W. R. 184, 1 Ch. D. 48; *Hough* v. *Windus*, 32 W. R. 452, 12 Q. B. D. 224; *In re Home*, 54 L. T. Rep. 301, 34 W. R. Dig. 170; *In re Waverley Typewriter*, 46 W. R. 685, [1898] 1 Ch. 699.

Tindal Atkinson, Q.C., and *Herbert Jacobs*, for the trustee.—The words of the section "Where a debt has been proved . . . under the principal Act" show plainly that the section was intended to have a retrospective effect. It would have been otherwise if the words had been "Shall be proved": *Bourke* v. *Nutt*, 42 W. R. 388, [1894] 1 Q. B. 725, *per* Esher, M.R., at p. 733. In *Ex parte Pélly*, 32 W. R. 748, 50 L. T. Rep. 754, it was held that section 4 of the Companies Act, 1883, had a retrospective effect.

Reed, Q.C., in reply.

Cur. adv. vult.

Aug. 12.—WRIGHT, J. (after stating the facts).—The question here is whether section 23 of the Bankruptcy Act, 1890, operates so as to govern the distribution of dividend under a contract made under a scheme which had taken effect before the Act was passed or came into operation.

For the applicant it is argued that the section operates only on bankruptcies occurring or schemes taking effect after the commencement of the Act; and, further, that in any case the scheme ought to be construed as a contract for distribution of the estate according to the Act which was in force at the time when the scheme was adopted and took effect. The latter of these contentions ought not, in my opinion, to prevail if it stood alone. In the absence of any express provision in the scheme for this particular matter, I think that the scheme must be construed as applying the bankruptcy law for the time being in force in so far as such law may not be inconsistent with the express provisions of the scheme, or excluded by any rule of law or rule of construction; and if this view is correct, the only question is whether there is a rule of construction which prevents the section from being interpreted as operating retrospectively. Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. Some of the many authorities for this proposition are *Main* v. *Stark*, 15 App. Cas. 384, 39 W. R. Dig. 252; *Gilmore* v. *Shooter*, 2 Mod. 310, on the Statute of Frauds; *Moon* v. *Durden*, 2 Ex. Ch. 22, on the Gaming Acts; *Hickson* v. *Darlow*, 31 W. R. 417, 23 Ch. D. 690, on the Bills of Sale Acts; *Waugh* v. *Middleton*, 8 Ex. Ch. 352, an extreme case, but not disapproved of in *Larpent* v. *Bibby*, 5 H. L. C. 481; *Williams* v. *Harding*, 14 W. R. 503, L. R. 1 H. L. 9; *Hough* v. *Windus*; and *Ellis* v. *McCormick*, 17 W. R. 500, L. R. 4 Q. B. 271, on the Bankruptcy Acts; and *In re Joseph Suche & Co.* (*Limited*), on section 10 of the Judicature Act, 1875. In the last-mentioned case Jessel, M.R., said: "Since this question came last before me I have consulted several of the other judges"; and referring to section 10 of the Judicature Act, 1875, he said: "I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any case of a winding-up which had been commenced before the Act came into operation. I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

there is one exception to that rule—namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within the exception. I am of opinion that it is not. This is an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt against a company in liquidation." One exception to the general rule has sometimes been suggested—namely, that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended. But this exception seems never to have been suggested except in relation to statutes affecting procedure, such as Statutes of Limitation, and even in relation to them it is questioned in *Moon* v. *Durden*. Moreover, sections 6 and 8 of this Act have been held not to be retrospective, notwithstanding, though without reference to, this suspensory clause: see *Ex parte Raison, In re Raison*, 39 W. R. 271, and *Reg.* v. *Griffiths*, 39 W. R. 719, [1891] 2 Q. B. 145.

In the present case the enactment does not merely affect procedure. If the section is construed retrospectively, it will postpone the creditors' right to dividend beyond five per cent., and will *pro tanto* deprive him of the vested right of action which he possessed at the commencement of the Act and when the bankruptcy occurred. Then is the section so expressed as to be plainly retrospective? No doubt the words "where a debt has been proved under the principal Act" are capable of such a meaning. But this form of words is often used to refer, not to a past time which preceded the enactment, but to a time which is made past by anticipation—a time which will have become a past time only when the event occurs on which the statute is to operate. In former times draftsmen would have used the words "where a debt shall have been proved," but in modern Acts the past tense is frequently used where no retrospective operation can be intended. In *Moon* v. *Durden* even the phrase last mentioned was held not retrospective. It seems to me that the case for the trustee cannot be put higher than this—that either construction is possible; but if so, the authorities to which I have referred show that retrospective force ought not to be given to the section.

It is not necessary in the present case to decide whether the section would apply where the original contract was made before the passing or commencement of the Act, but a scheme is adopted and approved after the commencement of the Act. In such a case the question would probably depend on the provisions of the scheme as approved, and if a creditor in such a case assented without qualification to a scheme which according to its ordinary construction attracts the existing bankruptcy law, he might probably be held to have waived any right which he might otherwise have to stand upon his original contract.

It should be observed that by section 31 of the Act of 1890 that Act and the Act of 1883 are to be construed as one Act. This enactment, however, cannot have the effect of making the provisions of the Act of 1890 operative as from 1883; nor could it be so held consistently with the cases above cited of *Ex parte Raison* and *Reg.* v. *Griffiths*. The motion, therefore, must be allowed with costs.

Solicitors for applicant, *Collyer-Bristow, Russell, & Co.*

Solicitors for trustee, *Cross & Guedalla.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 26.

POWELL v. BROWN. (*a*.)

Master and servant—Employers' liability—Accidental injuries—Employment on or in or about a factory—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

In an arbitration under the Workmen's Compensation Act, 1897, *it was proved that the deceased was a carter in the employment of the defendants, who were the occupiers of a timber yard, and that he was accidentally killed while engaged in stowing timber on a cart belonging to the defendants, which was standing immediately outside the defendants' premises.*

The county court judge held that the deceased was employed "on or in or about" a factory within section 7, *sub-section* 1, *of the Workmen's Compensation Act*, 1897, *and made an award in favour of the widow of the deceased.*

Held, that the decision of the county court judge must be affirmed.

Appeal from the decision of the judge of the Liverpool County Court in an arbitration under the Workmen's Compensation Act, 1897.

The claim to compensation was made by the widow of a workman who had died in consequence of accidental injuries suffered by him in the course of his employment.

The deceased was a carter in the employment of the defendants, Brown & Backhouse, who were builders and contractors carrying on business in premises in Chatham-street, Liverpool, part of which they used for the purpose of sawing and stacking timber. At the time of the accident the deceased was engaged in stowing a load of timber from the defendants' works on a cart belonging to the defendants, which was standing in the street adjoining the defendants' premises, and close to the entrance to the premises. While he was standing on the timber in the cart, a piece of timber accidentally tilted and threw him on to the road, and he received injuries from which he died.

The county court judge held that the defendants' premises were a factory within section 7, sub-section 1, of the Workmen's Compensation Act, and that the deceased was employed "on or in or about a factory" within that sub-section. He also found that the accident arose out of and in the course of the deceased's employment. He made an award in favour of the plaintiffs for £243 12s. 7d. By section 7, sub-section 1, "This Act shall apply only to employment . . . on or in or about a railway, factory," &c.

The defendants appealed.

Joseph Walton, Q.C. (*Tobin* with him), for the defendants.—The deceased's employment was not employment "on or in or about a factory." It cannot be contended that he was employed on or in a factory. Neither, according to the true meaning of the section, was he employed about a factory. The word "about" is here used in a double sense. It is generally capable of two meanings—viz., first, "near" with regard to place; and secondly, "in relation to," or "ancillary to." Here it cannot simply mean "near" without any limitation; nearness alone is not sufficient. Neither can it be sufficient that the employment is ancillary to or incidental

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

to the factory. The word "about" here must mean near to the factory and in connection with the business of the factory. The business of this factory was the work of sawing and shaping timber; and the deceased was not an employee of the factory, but was a carter in the general employment of the defendants.

Ruegg, Q.C., and *A. P. Thomas*, for the plaintiff.

A. L. SMITH, L.J.—I am of opinion that the judgment of the county court judge was correct. The deceased was at the time of the accident employed in stowing the defendants' timber on a cart in a place immediately outside the defendants' factory, where their goods were usually loaded. He was employed in close proximity to the factory, and he was employed in the factory business, for the stowing of timber was part of the business of the factory. It is said that he was not employed "on or in or about" the factory within the meaning of section 7 of the Workmen's Compensation Act. I am of opinion that the case is within the Act. The Legislature thought the word "on" would not include all that they intended to include, nor would the word "in," so they added the word "about," which is an enlarging word. The question is really a question of fact, and the county court judge has found that the deceased was employed on or in or about a factory. The appeal must therefore be dismissed.

RIGBY and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *J. H. Glover.*

Solicitors for the defendants, *Weightman, Pedder, & Weightman*, Liverpool.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 26.

SMITH v. LANCASHIRE AND YORKSHIRE RAILWAY CO. (a.)

Master and servant—Employers' liability—Accidental injuries—Accident arising out of, and in the course of, employment—Questions of law—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

In an arbitration under the Workmen's Compensation Act, 1897, *in respect of the death of a railway servant, who was killed in consequence of getting on to the footboard of a train in motion to speak to a passenger, the county court judge found as facts that the deceased was, on the day of the accident, in the employment of the defendants, and that his day's duty was not finished at the time of the accident, but that he did not get on to the footboard for any object of the defendants, but only for his own pleasure.*

Held, that, by section 1, *sub-section* 1, *the Act only applied to accidents arising both out of the employment and in the course of the employment; and that, on the findings of the county court judge, the accident did not arise out of the employment of the deceased.*

In cases under the Workmen's Compensation Act, 1897, *the Court of Appeal has jurisdiction to entertain questions of law only.*

Appeal from the decision of the judge of the Colne County Court in an arbitration under the Workmen's Compensation Act, 1897.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The claim to compensation was made by the widow and step-daughter of a workman who had died in consequence of accidental injuries suffered by him in the course of his employment.

The deceased was a platelayer in the employment of the defendant railway company, and he was occasionally employed to collect tickets.

On the night of the 3rd of September, 1898, he helped in collecting tickets at Nelson Station from a train which was travelling to Colne. Having collected the tickets he remained standing on the platform until the train began to move on its forward journey, when he got on to the footboard and said to an acquaintance of his who was travelling in the train, "I wish I was going with you to Colne." In getting off the footboard he in some way caught his foot and fell and was crushed between the platform and the train, and was killed.

The county court judge found as facts: That the deceased was, on the day in question, in the employment of the defendants, and his day's duty was not finished at the time of the accident; that he did not get on to the footboard for any object of the defendants, but only for his own pleasure; and that this was not obviously dangerous, and did not amount to wilful and serious misconduct on his part.

The county court judge held that the accident arose in the course of the deceased's employment, because it happened during the time he was being paid for attendance at the station, and while he was not neglecting in any way his duty for purposes of his own. He also held, with doubt, that the accident arose out of the deceased's employment, because it was an accident happening to him from the train about which his duties were concerned, and that, though the danger was increased by the mode in which he was behaving, this in the absence of wilful and serious misconduct did not prevent it arising out of his employment.

The county court judge made an award in favour of the plaintiffs for £160.

Section 1, sub-section 1, of the Workmen's Compensation Act, 1897, is as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

The defendants appealed.

C. A. Russell, Q.C., and *Acton*, for the defendants.

A. T. Lawrence, Q.C., and *F. H. Mellor*, for the plaintiffs.

A. L. SMITH, L.J.—The appeal must be allowed. I am of opinion that in cases under the Workmen's Compensation Act, 1897, this court has jurisdiction to entertain questions of law only. I take that to be the effect of section 4 of the Second Schedule, which says that the decision of the county court judge on any question of law shall be final, unless within the prescribed time either party appeals to the Court of Appeal. We have no jurisdiction to review any finding of fact arrived at by the county court judge, or other arbitrator. Here the county court judge has found certain facts, and the defendant company appeal on the ground that on those facts the plaintiffs have not brought their case within the Act. One of those findings of fact is that the deceased did not get on to the footboard for any object of the defendants, but only for his own pleasure. The substance of the Act is that masters are made insurers against accidents happening to their work-

men, but only in the case of certain events mentioned in the Act. Section 1, sub-section 1, says, "If in any employment to which this Act applies"—that takes us to section 7, which makes the Act apply to employment on or in or about a railway, so that the deceased was in an employment to which the Act applies—"personal injury by accident arising out of and in the course of the employment is caused to a workman," then the master shall be liable to pay compensation. It must be shown that the accident arose both out of the employment and in the course of the employment. The county court judge awarded compensation, holding that the case came within the Act. I do not decide whether the accident arose in the course of the employment, but, having regard to the finding of the county court judge that the deceased got on to the footboard not for any object of the defendants, but only for his own pleasure, it seems to me impossible to say that the accident arose out of his employment. It arose out of his getting on to the footboard for his own pleasure. I therefore think the award was wrong.

RIGBY and COLLINS, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiffs, *Ridsdale & Son.*

Solicitor for the defendants, *Moorhouse*, Manchester.

High Court of Justice.

Chan. Div. Kekewich, J. — Aug. 4, 5, 1898.

In re PARKER-JERVIS.
SALT *v.* LOCKER. (*a.*)

Inland revenue—Estate duty—Settlement—Jointure payable "without any deduction whatever, except income tax"—Incidence of duty on jointures—Assessment of duty—Capital value of jointure—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (b); *s.* 4; *s.* 7, *sub-section* 7 (b); *s.* 8, *sub-section* 4; *s.* 9, *sub-sections* 1, 5, 6, 7; *s.* 14, *sub-section* 1.

For the purposes of the Finance Act, 1894, *a jointress who is entitled to her jointure "free from any deduction whatever, except income tax," is not liable to bear any burden in respect of estate duty. A jointress who is not so entitled must be charged with estate duty upon so much of the estate as is represented by the jointure, but is entitled to throw the duty so charged upon the whole estate, she keeping down the interest on the duty during her life. The better way to ascertain the capital value of the jointure is to assess it at a sum equivalent to the capitalized value of the jointure at the same number of years' purchase as the estate as a whole is capitalized for the purposes of duty, rather than to adopt the actuarial value of the jointure.*

Adjourned summons.

By an indenture of settlement dated the 10th of December, 1861, executed on the marriage of Edward John Parker-Jervis with the defendant Grace Catherine Locker (then Grace Catherine Jervis, spinster), Edward Swinfen Parker-Jervis and E. J. Parker-Jervis, in exercise of a joint power of appointment given to them by a previous disentailing deed and resettlement dated the 27th of March, 1861, conveyed a certain estate called the Stone Aston estate to the use of trustees for eighty years to secure the defendant Grace G. Locker in the event of her surviving E. J. Parker-Jervis an annuity of £800 during the joint lives of herself and the said E. S. Parker-Jervis, with remainder to the use of E. S. Parker-Jervis for life, with remainder to the use that the said Grace C. Locker in case she should survive both E. S. Parker-Jervis and E. J. Parker-Jervis (which event happened) should thenceforth during her life receive a jointure of £1,000 per annum "without any deduction whatsoever, except in respect of income tax," with remainder to trustees for 200 years for securing such jointure, with remainder to trustees (who were also appointed general trustees of the settlement) for 500 years upon trust for raising £10,000 for portions for the younger children of the marriage of E. J. Parker-Jervis and Grace C. Locker his wife, with remainder to the use of the first son of the said marriage in tail male with divers remainders over. The settlement also contained powers for E. S. Parker-Jervis to appoint a jointure to a future wife, and to charge certain portions for his younger children.

The plaintiffs were the present trustees of the said term of 500 years and generally of the last-mentioned resettlement.

E. J. Parker-Jervis died on the 31st of July, 1868, in the lifetime of his father, leaving the defendant Grace C. Locker, one son Edward St. Vincent Parker-Jervis, and four daughters surviving him.

The defendant Grace C. Locker subsequently married William Thomas Locker, who died on the 21st of June, 1885.

Edward St. Vincent Parker-Jervis attained twenty-one on the 29th of September, 1884, and by a disentailing deed and resettlement dated the 14th of November, 1884, the Stone Aston estate and another estate called the Little Aston estate were settled (subject as to the Stone Aston estate to the limitations relating to the annuity and jointure in favour of the defendant Grace C. Locker and the portions for her daughters contained in the resettlement of the 10th of December, 1861) to certain uses in strict settlement not material to this report, with remainder to the use of E. St. V. Parker-Jervis for life, with remainder to the use of his first, second, third, and every other son successively in tail male with divers remainders over; and power was thereby given to E. S. Parker-Jervis to appoint to a future wife (his first wife having died on the 24th of June, 1884) a jointure of £500 per annum, and to charge the estates thereby settled with £10,000 as portions for his then present or future children, and to secure such jointure and portions by limiting a term or terms in the said settled estates, and it was thereby declared that these last-mentioned powers of jointuring and charging portions were to be substituted for the original powers contained in the resettlement of the 10th of December, 1861, which powers were thereby released by E. S. Parker-Jervis. A sum of £3 per cent. consols was thereby assigned to the plaintiffs to be held upon the trusts applicable thereto as if the same was capital money under the Settled Land Act, 1882, and the plaintiffs were thereby appointed trustees thereof for the purposes of the Settled Land Acts and generally.

On or about the 15th of July, 1886, E. S. Parker-Jervis married the defendant Maude Parker-Jervis, and by the settlement dated the 10th of July, 1886, made upon such marriage, he appointed a jointure of £500 per annum to the said defendant in case she should survive him, and secured the same upon the whole of the estates settled by the settlement of the 14th of November, 1884, and charged them with £10,000 as portions for the children. There was no issue of the said marriage, and by his will (dated the

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

1st of July, 1892) E. S. Parker-Jervis charged the said last-mentioned estates with £10,000 as portions for two of his children by his first marriage, securing the same by a term of 600 years.

E. St. V. Parker-Jervis was only once married—namely, to Winifred Maria Parker-Jervis, to whom he was married on the 11th of March, 1889, and the defendant St. Vincent John Parker-Jervis, born on the 21st of July, 1891, was the eldest son of such marriage.

By an indenture dated the 20th of February, 1896, and made between the Reversionary and General Securities Co. (Limited) of the one part, and the defendant John Saltren Willett of the other part, the company, as mortgagees of the life estate of E. St. V. Parker-Jervis, granted and assigned the manors, lands, and hereditaments, moneys and investments subject to the uses or trusts of the resettlement of the 14th of November, 1884, to the defendant J. S. Willett, his executors, administrators, or assigns, for the term of 100 years from the day next before the day of the death of E. S. Parker-Jervis, if E. St. V. Parker-Jervis should so long live, freed from all right or equity of redemption by E. St. V. Parker-Jervis. The defendant J. S. Willett subsequently mortgaged his interest in the said settled estates to the defendants the University Life Assurance Society.

Upon the death of Edward S. Parker-Jervis on the 3rd of January, 1896, the Commissioners of Inland Revenue claimed estate duty under the Finance Act, 1894, in respect of all the property comprised in the resettlement of the 14th of November, 1884, as passing upon the death of E. S. Parker-Jervis without allowing any deductions.

The two sets of portions of £10,000 each had been raised and paid, less estate duty, and no question had been raised concerning them.

An estate duty account had also been rendered to the commissioners comprising the whole of the estates and property subject to the uses and trusts of the resettlement of the 14th of November, 1884—namely, the Stone Aston and Little Aston estates and the sum of consols.

Inasmuch as the defendant Grace C. Locker's jointure arose under a disposition not made by E. S. Parker-Jervis—that is under the resettlement of the 10th of December, 1861—the amount of capital required to produce such jointure was treated by the commissioners as an estate by itself and was assessed by them at the sum of £24,670, on which duty at £4 per cent. together with interest on such duty was assessed at £1,022 17s. 4d. The figure of £24,670 was arrived at by capitalizing the jointure at the same number of years' purchase (between 24 and 25 years' purchase) at which the rental of the Stone Aston estate had been capitalized for the purpose of duty. The estate duty upon the whole of the rest of the estate was assessed at £7 per cent.

The plaintiffs proposed to negotiate a loan on mortgage of the Little Aston estate of £5,000, at £3 2s. 6d. per cent., to be applied together with a sufficient sum by sale of consols in payment of the duty as assessed by the commissioners, including that separately assessed on the defendant Grace C. Locker's jointure.

Various questions having arisen relating to the raising and incidence of the duty, the plaintiffs took out the present summons for the determination of the following questions:

(1) Whether the plaintiffs, as such trustees as aforesaid, had power under section 9, sub-section 5, of the Finance Act, 1894, to raise the amount of the estate duty payable on the death of the said Edward S. Parker-Jervis in respect of the said jointure of £1,000 charged in favour of the defendant Grace Catherine Locker upon the Stone Aston estates and any interest and expenses properly paid or incurred by them in respect thereof, by a mortgage of the said estates (*i.e.*, all the settled estates) or a part thereof, notwithstanding that such jointure had been treated by the Commissioners of Inland Revenue for the purposes of estate duty as an estate by itself, and had not been aggregated with any other property passing on the death of the said Edward S. Parker-Jervis.

(2) How the estate duty payable in respect of the said jointure of £1,000 was to be borne as between the persons interested in the Stone Aston estates, and in particular, whether such estate duty ought to be repaid by the defendant Grace C. Locker to the plaintiffs or other person or persons paying the same, or whether she ought to pay interest upon the amount of such duty to the defendant John Saltren Willett and the defendant society, and if so, at what rate.

(3) How the proportion of the estate duty payable on the death of the said Edward S. Parker-Jervis in respect of the estates comprised in the said indenture of resettlement of the 14th of November, 1884, to be borne by the defendant Maude Parker-Jervis, as being entitled to the said jointure of £500 charged thereon, was to be determined, and

(4) Whether the defendant Maude Parker-Jervis would be entitled to charge the proportion of estate duty to be borne by her as aforesaid upon the *corpus* of the said estates, and if so, upon what terms as to interest and otherwise.

Upon the first question raised by the summons a discussion arose at the hearing as to whether the trustees were properly accountable for the duty on the whole estates, and had power to raise the same, or whether the payment of the duty and the power of raising the same devolved upon the defendant J. S. Willett, who was the assignee of the legal tenant for life. The defendant Willett, however, by his counsel, consented to concur in the proposed mortgage, and his lordship thereupon, without determining the question whether the plaintiffs as such trustees as aforesaid had power to raise such duty, declared that the defendant J. S. Willett, as tenant for life, had power to raise the amount of the estate duty payable in respect of the whole of the estates (including Mrs. Locker's jointure) and any interest and expenses properly paid or incurred in respect thereof by a mortgage of the said estates or a part thereof, and directed the plaintiffs to raise so much of the estate duty on the whole estates (including Mrs. Locker's jointure) as they should think fit out of the consols, and the residue of the duty to be raised by the defendant J. S. Willett by mortgage of the Little Aston estate on the request of the plaintiffs.

The court then proceeded to consider the remaining questions raised by the summons.

Austen-Cartmell, for the trustees.—Assuming that the defendant Willett pays the duty, then he will be entitled under section 14 of the Finance Act, 1894, to recover the rateable part of the estate duty from the annuitants. Mrs. Locker may escape payment of duty, as her annuity is given to her free from any deduction except income tax; but it is not so in the case of Mrs. Parker-Jervis's annuity. There are two views regarding the valuation of the annuity for the purposes of duty. One is, that the duty is leviable on the actuarial value of the annuity; the other is, that the jointress ought to be treated as life tenant of so much of the estate as produces the annuity; and in the latter case she would get the benefit of the charge under either sub-section 1 or sub-section 6 of section 9, the result being that she would pay interest on the rateable part of the

duty with which she is charged. Inasmuch as the tenant for life does not in effect pay the duty out of his own pocket, and is merely charged with interest on the duty, so an annuitant ought to be put in the same position *pro tanto*. Section 2, sub-section 1, and section 7, sub-section 7 (*b*), seem to bear out the latter view.

Reginald Hughes, for the defendants Mrs. Locker and Mrs. Parker-Jervis.—Mrs. Locker is not liable to pay any duty at all; she is entitled to her annuity free from any deduction whatsoever, except income tax. There could have been no possible deduction except for duty, that could have been in the settlor's mind. In *In re Saunders*, 46 W. R. 180, [1898] 1 Ch. 17, a gift of the net sum of £2,000 was held to be a gift free from succession duty. There are express words in this gift that no deduction shall be made. The jointress cannot in any event be required to do more than pay interest on the sum charged for duty. If the trustees do not pay the duty, the jointress is bound to pay it, and if she does, she is entitled to a first charge on the property under section 9, sub-section 1, and under section 6 she is entitled to the like charge as if the estate duty had been raised by means of a mortgage to her. The principle of the Act is that the duty is charged on the estate, and the limited owners have to support the burden of the charge so long as they get the income, and the person who gets the *corpus* bears the duty when he gets the *corpus* and not before. The actuarial method of valuation is a hazardous arrangement, and might not work with fairness. The sum to be charged will be ascertained on a similar basis to that on which the estate is capitalized. The commissioners have capitalized the estate at twenty-four and a-half years' purchase.

Jessell, for the defendant J. S. Willett, the assignee of the tenant for life.—This estate duty is not a deduction within the meaning of the clause in the settlement; it can be recovered under section 14, sub-section 1, from the jointress, for there is no "express provision to the contrary" within the meaning of that sub-section. The words are not wide enough to escape the principle of this Act. *In re Saunders* does not apply, because there the words were "net sum." The jointress ought to pay this duty. The commissioners have treated it as a separate estate, therefore she only has to pay £4 per cent. instead of £7 per cent., which would have been the rate had it been aggregated with the rest of the estate, so that she derives an advantage in that respect.

S. R. Earle, for the infant tenant in tail in remainder.—The general policy of this Act is that the estate duty shall fall upon the beneficiaries: *In re The Countess of Orford*, 44 W. R. 383, [1896] 1 Ch. 257. It could not have been the intention of the settlor in 1861 to exempt the jointress from this duty, and there are no words which would justify such exemption: *In re Meyrick*, 45 W. R. 120, [1897] 1 Ch. 99. She ought, therefore, to bear the burden of the duty.

He also referred to Vaizey on Settlements, pp. 923 and 925, and to the cases there cited, and also to *Gleadow* v. *Leetham*, 31 W. R. 269, 22 Ch. D. 269; *Festing* v. *Taylor*, 11 W. R. 70; *Lord Lovat* v. *Duchess of Leeds*, 10 W. R. 397, 2 Dr. & Sm. 62; and *In re Bannerman's Estate*, 21 Ch. D. 105, 30 W. R. Dig. 223.

Stallard, for the mortgagees of the life estate.

KEKEWICH, J.—There are two questions to be decided now, both arising under the Finance Act, but otherwise of an entirely different character, even though they both concern annuities, and both those annuities are jointure rent-charges. I will deal first with the question of whether Mrs. Locker is entitled to be paid her annuity or jointure, free from any deduction in respect of the estate duty leviable on the property out of which that annuity is payable, and on which it is charged. That stands entirely alone, and, assuming for the moment that she is bound to contribute to the estate duty, the question which will arise—namely, in what proportion she ought to pay—equally arises as regards the other annuity, so that that may be considered as completely distinct.

Without looking for the moment at any authorities; without, for the moment, referring to the Finance Act, let me consider the contract between the parties, because this is a contract. This is a settlement whereby an annuity is charged in the proper form on the estate for the benefit of Mrs. Locker, who is a contracting party. If the parties in so many words said that the annuity is to be paid free of any charge whatever—that is to say, if the owner of the property who charges that property with the annuity has contracted that so many hundred pounds—say, £100—shall come to the hands of the person in whose favour he makes the charge, it is rather startling to be told that that contract shall not take effect, and that some deduction shall nevertheless be made, and that the person entitled to the charge shall not receive £100, but something less. Many persons, no doubt, think that they are going to receive certain sums annually or quarterly, and do not receive it because the revenue makes certain deductions. I suppose that any member of the bar on receiving an appointment to the bench might think he was going to receive a salary of a certain amount, but he would soon find out his mistake, because the revenue takes care that he does not. The money is retained as against him and as against everybody else for income tax, and all the decisions as regards income tax have gone on this footing, that although it is possible to provide for the payment of an annuity clear of income tax, it has to be done by somewhat cumbrous machinery, and really you have to provide that in addition to the annuity which was necessarily chargeable with the income tax, there shall be raised a further annuity equivalent to the income tax, but, of course, a varying annuity according as the income tax rises or falls. You must get a contract to that effect, although perhaps not in those words, if you wish to free the annuity from income tax—that is to say, to enable the annuitant to receive an annuity without any deduction for income tax; but that, so far as I am aware, has never been extended to any other tax of any kind whatever, and it has never been said, so far as I know, and no counsel has ever suggested that it has been said, that other taxes are not deductions. By some legal interpretation it has been held again and again that income tax is not a deduction. To take one example. Wood, V.C., says in the case of *Turner* v. *Mullineux*, 9 W. R. 252, 1 J. & H. 334, quoted by Kay, L.J., in *Gleadow* v. *Leetham*: "This court always holds that income tax is not a deduction." It really is not in one sense, because it is a sum paid by the person entitled to the annuity, paid in respect of the income which he receives. It is not really chargeable until he receives the income. In that sense it is logically and technically not a deduction. Every other tax that prevents the annuity coming into the hands of the annuitant clear has always been held, so far as I am aware, to be a deduction.

Turning to this settlement, I find that the parties have contracted that Mrs. Locker shall be paid the £1,000 a year without any deduction whatever, except in respect of income tax. There is no attempt to make it

clear of income tax; and not only that, there not being any desire to make any other exemption, the usual words are put in the settlement. Then it is said that that does not refer to the estate duty because that is not a deduction. It is unnecessary to say more on that point than I have already said. But then something more was said, that this was a settlement made in the year 1861, and it was impossible that the contracting parties should have contemplated such a charge as this estate duty, which is imposed more than thirty years afterwards. It is a sufficient answer to say that the parties did not contemplate that or any other duty; what they did contemplate was that the annuity should be paid without any deduction whatever. I think it is only fair to say that they must be taken to have contemplated some possible deduction for tax, because they have excepted deductions in respect of income tax, which shows that some deductions for tax were in their minds. But one need not dwell much on that, because they have contracted for it to be paid without any deduction whatever, and if the argument prevails that Mrs. Locker is to take £1,000 a year less some sum to be ascertained for the estate duty, she will not get £1,000 a year, she will get £1,000 a year with a deduction—that is, less some sum in respect of the estate duty. That seems to me not to be in accordance with the contract. Here I have these simple words, "without any deduction whatever," and I think that means on the contract that there was to be no deduction in the events which have happened in respect of the estate duty.

But then I am told that, apart from the contract, the Act is against my interpretation; and that depends upon section 14, which I will not read at length, but which provides that where the person who pays the duty, pays the whole, then he may recover from the person entitled to any sum charged on the property a rateable proportion—that is, a proper proportion which the owner of the charge ought to provide; but that must be under a disposition not containing any express provision to the contrary. It is argued that the clause in the settlement "without any deduction whatsoever," is not an "express provision to the contrary." It is not express, no doubt, in the sense which I mentioned, and which was argued as the right one, that there is no express mention of the estate duty, and there could not be, because of the date. I see no difficulty myself in saying that an express provision is that which expressly provides against any deduction, fairly including the one in question; and it is not necessary to say that there must be an express provision as regards estate duty. One observation probably will be sufficient to deal with that. If that argument is sound, no settlement dated before the passing of the Act, or at any rate before it was known to the public that this estate duty was contemplated by Parliament, could possibly contain an express provision, because it would have been impossible before it was passed by Parliament for anyone, even the most ingenious conveyancer, to frame words which would expressly mention the estate duty which was afterwards imposed.

Now, the other point is a very much more difficult one. We are dealing now with the question how the duty chargeable to the jointress is to be ascertained—a question which has not been dealt with, and probably did not occur to the framers of the Act in its full difficulty, and therefore we have no provision directly dealing with it. All one can do is to see what was the intention of the Legislature, having regard to the general scheme of the Act and to those special provisions which at all bear upon it. The question is this—I am not now dealing with Mrs. Locker—With what duty Mrs. Maude Parker-Jervis, who is entitled also to a jointure, is to be charged. She must be charged with some—that is to say, she must pay some; some deduction must be made in respect of her duty. It is practically immaterial for this purpose whether the duty is charged on the whole or any part of the estate. I do not wish to encumber my view of the case with any distinction on that ground.

The first point which occurs to me as a guide is this: that the estate duty is by the Act charged on the property. It is quite unnecessary to go through the Act for the purpose of showing that it is the property which, as a whole, passes by the death which is charged with the estate duty. The Legislature does not concern itself as between the owner of the estate, the taxpayer, or the property paying—if I may use that expression—that is, the taxed property. It does not concern itself with any question arising between the taxed property and the different persons interested in that property for the purpose of ascertaining what is to be paid to the revenue. The Legislature takes the estate as a whole passing on the death, and says that property, whatever it is, shall be charged with duty at a certain rate. On that principle the duty is ascertained, and it has to be paid by some person. It is immaterial whether it has to be paid by the tenant for life. Then, not for the sake of the revenue at all, which is already thoroughly protected, but for the sake of assisting different persons to bear their own burdens in the proper rateable proportions, the Act contains several provisions distributing those burdens, and the question is how those burdens are to be distributed. Mrs. Maude Parker-Jervis is entitled to a jointure of so much, chargeable on the estate, the whole of which is chargeable with the duty. One very ready way of ascertaining her proportion is to say: "You are entitled to a jointure of £1,000 a year, payable, it may be, out of property which realizes more than that, and you must bear the burden in exact proportion to the capital value of your jointure. The duty is charged on the capital value of of the whole. You are entitled to something, which, though it is an annual charge, and an annual charge of a limited duration, yet is capable of valuation by the simplest possible means—that is to say, by an actuarial assessment, and you must pay the duty on that." Of course, for many purposes, the actuarial assessment is the very best possible way, and if you apply it to a very large number of cases so as to strike an average, it would, on that average, work with very great fairness. There is no doubt about that. There is nothing which modern experience has proved more satisfactory than if an average is struck upon proper principles applied to a large number of cases it comes out absolutely true. I will not waste time by going into them, but many cases have come before me to illustrate that. It would work fairly enough in that way, but the question is whether that ought to be applied to a case which is one of a large number of cases where neither party can possibly have the benefit of the average. It is all very well to say that if you take a score, or fifty, or 100 jointresses and assess their jointures on that principle, they would not between them pay too much or too little, but would pay really exactly what they ought to pay; but it is another thing to say Mrs. Maude Parker-Jervis will or will not pay too much. It is quite possible that she may pay a great deal too much—I mean much more than is fair and much more than is a reasonable proportion attributable to her interest. On the other hand, if she live to an old age, it is quite possible that she may have an advantage and pay too little; but it seems to me it is so problematical, so speculative, that I ought

not to adopt that view if there is any other possible view. Now, I think there is another possible view, and I think it is, on the whole, a reasonable one and one which I ought to adopt. I do not propose to go through the different sections of the Act. They, no doubt, will have again and again to be construed before we get to an exact interpretation of them; but it seems to me tolerably clear that this lady is entitled to a charge on the estate for the duty which she pays, and that whatever part of the duty she, or anybody else, pays is by the Act imposed on the estate, and is paid out of the inheritance. If she is liable to pay the duty in the first instance on the whole, she would be entitled to a charge for what she pays. That seems to me to be so, applying this 9th section, to which Mr. Cartmell has referred me. She is in the position of a person having a charge on the estate. In respect of that charge, duty will have to be paid. She is entitled, so it seems to me, to say, "You charge that duty on the whole estate, and so far as I am a mortgagee, though of a limited character, I must keep down the interest on that charge. I shall only do it during my life, it may be a short time or a long time." Then the answer to that is, "Yes, but on your death there will be nobody left to pay that interest, and the result will be that it will have to be borne by the inheritance, it may be by a tenant for life in possession or by a tenant in tail; but practically in legal language it will have to be borne by the inheritance." That is quite fair. I think that is exactly what is the scheme of the Act. The scheme of the Act is that it shall be levied on the inheritance, and the inheritance shall bear it. I think it would be going contrary to the general scheme of the Act if I were to say that any part of the duty as a whole on the capital sum ought to be borne by any person having a limited interest. No doubt, in one sense, every person having a limited interest bears a proportion of the duty. He bears it in proportion to his limited interest. The tenant for life unfortunately is perfectly aware he bears a heavy burden. He bears it in this way, that instead of having the clear income which his predecessor had—I am speaking, of course, of estates free from incumbrances—he has it less a charge on the property which has to be raised by mortgage or otherwise; and the result is he has to pay his £4 per cent., or whatever it is, on that charge during his life. If the property is sold he has less income from the property. If it is paid out of capital money there is a cesser of interest arising from that capital money, but in either case the burden of the duty is cast upon the inheritance. If the view which I take is the right one, and this lady has to bear her proportion of the duty during her life, the same thing will follow. The inheritance for this purpose may be taken to be the tenant for life in possession and the jointress, both of them being limited owners. The jointress is a limited owner, and she will pay interest on the sum ascertained according to her rateable proportion of the entire property. The rest will be that of which the tenant for life remains in possession, and he will have to pay interest on the sum charged on that proportion, and so during the joint lives they will divide the charge in a fair way. If she dies first he will pay the interest on the whole. That seems to me to be the scheme of the Act, and having gone through these different clauses, which I do not propose to go through again in detail, they all seem to me to point that way, and I have not seen any clause which in the slightest degree contradicts it. I repeat, there is is no provision in the Act to that effect. It seems to me to have been left very much at large. I have to consider how best to ascertain that which is undoubtedly true—namely, that the jointress must bear a fair proportion of the duty. I think that is the way to do it. We know here (there is no doubt about it) what the value is. The parties have ascertained that. But if you do not know it, you will have to ascertain what is the proportion of the inheritance of the whole estate which is required to pay the duty on the jointure—that is to say, so much of the estate as is represented by the jointure. That sum will be actually, or will be supposed to be, raised by mortgage. It may be paid by appropriation of capital money, and she must pay interest on that sum at a fair rate. There being no provision of the kind, that difficulty also arises, but I suppose the proper way would be that she should pay £4 per cent. on the charge. In the present case Mrs. Maude Parker-Jervis will pay interest at the rate of £3 2s. 6d. per cent., as that is the rate at which, as I understand, the money can be raised.

Solicitors, *Stuart & Tull; Waltons, Johnson, Bubb, & Whatton; Pitman & Sons; J. E. Lickfold.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) } Oct. 25, 31.

In re NORDMANN.
Ex parte HASLUCK. (*a.*)

Bankruptcy — Practice — Costs — Taxation — Retaining fees—Discretion of master—Bankruptcy Rules, 1886 *and* 1890, *r.* 353, *and Scale of Solicitors' Costs, General Regulations, rr.* 1, 2.

On the taxation in bankruptcy of the bill of costs of a solicitor of the trustee in bankruptcy, the taxing-master has a discretion to allow retainers to counsel; but, unless under very exceptional circumstances, such retainers will not be allowed.

Ex parte application to reverse the decision of the taxing-master of the High Court in bankruptcy who had disallowed a retaining fee paid to counsel by the solicitor of the trustee in the bankruptcy of Nordmann.

The taxing-master had disallowed the retaining fee on the ground that it was the almost universal practice of his office not to allow such fees.

George Castle (solicitor), for the application.—The taxing-master in bankruptcy has the same discretion as the other taxing-masters of the High Court to allow retaining fees: see The Annual Practice, 1898, p. 200; and the Bankruptcy Rules, 1886 and 1890, Scale of Solicitors' Costs, General Regulations, rr. 1 and 2, which provide:

1. "All costs save as in this scale provided which shall be properly incurred under the provisions of the Act or Rules shall be allowed on the 'Lower Scale' in Appendix N. to the Rules of the Supreme Court 1883."

2. "All court fees and other proper disbursements shall be allowed in addition to the remuneration in this scale provided."

[Mr. Registrar HOPE referred the court to rule 353 of the Bankruptcy Rules, 1886 and 1890: "When no provision is made by the Act or these rules, the present law procedure and practice in bankruptcy matters shall, in so far as applicable, remain in force. And, save as provided by these rules or rules amending them, the Rules of the Supreme Court shall not apply to any proceeding in bankruptcy."]

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

[WRIGHT, J.—I think I had better see the taxing-master and find out what his reasons are for disallowing these fees.]

Oct 31.—WRIGHT, J.—In this case I have seen the taxing-master, and, it seems to me, looking at the rules to which I have been referred, I cannot properly say that the taxing-master would not have a discretion to allow retaining fees, but, having regard to the long-established practice in the taxing-master's office, I think it a discretion which ought only to be exercised in very exceptional cases.

Upon the facts, however, in the present case, I see no reason to interfere with the decision of the taxing-master; but as the applicant desires it, the case must go back to the master for review. There will be no costs of this application.

Solicitor for the trustee, *George Castle*.

House of Lords.

From C. A. (England). July 15, 1898.

EASTMAN PHOTOGRAPHIC MATERIALS CO. *v.* COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE-MARKS. (*a*.)

Trade-mark — Registration — "Solio" — "Invented word" — Patents, Designs, and Trade-Marks Act, 1883 (46 *&* 47 *Vict. c.* 5), *s.* 64, *Patents, Designs and Trade Marks Act,* 1888 (51 *&* 52 *Vict. c.* 10), *s.* 10, *sub-section* 1 (d) (e).

The word "Solio" is an invented word, within the Patents, Desings, and Trade-Marks Acts, 1883, *s.* 64, *as amended by s.* 10 *of the Act of* 1888, *and may be registered as a trade-mark in respect of photographic paper. It does not indicate the character or quality of the goods.*

Sub-section 1 (d) *and* (e) *of section* 10 *of the Patents, Designs, and Trade-Marks Act,* 1888 (*which is substituted for s.* 64 *of the Act of* 1883), *are not to be read together, and therefore "an invented word" may be registered though it has reference to the character or quality of the goods.*

In re Farbenfabriken Application (42 *W. R.* 408 [1894], 1 *Ch.* 645) overruled.

Decision of the Court of Appeal (45 *W. R. Dig.* 163) *reversed.*

This was an appeal from a judgment of the Court of Appeal affirming an order of Kekewich, J., refusing an application by the present appellants for an order directing the Comptroller-General of Patents, Designs, and Trade-Marks to proceed with the registration of the trade-mark.

The facts are set out in some of their lordships' judgments.

Moulton, Q.C., and *D. M. Kerly*, for the appellants. —"Solio" is an "invented" word within the meaning of clauses (*d*) and (*e*) in section 64, subsection 1 of the Patents, Designs, and Trade-Marks Act, 1883, as amended by section 10 subsection 1 of the 1888 Act. Sections (*d*) and (*e*) must be read separately. *In re Meyerstein's Trade-Mark*, 38 W. R. 440, 43 Ch. D. 604; *In re Farbenfabriken Vormals, &c., Application*, 42 W. R. 488, [1894] 1 Ch. 645, were referred to.

Sir R. E. Webster, A.G., and *Sir R. B. Finlay, S.G.* (*Ingle Joyce* with them), for the respondent.

No reply was called for.

The House took time for consideration.

Earl of HALSBURY, L.C.—This is an appeal from the Comptroller-General of Patents, Designs, and Trade-Marks, who has refused to the appellants to permit the word "Solio" to be registered as applicable to their photographic paper. Before dealing with the decision itself, I think it desirable, from what occurred in the course of the argument, to say something as to what sources of construction we are entitled to appeal to in order to construe a statute. Among the things which have passed into canons of construction, as recorded in *Heydon's case*, 3 Co. Rep. 7B, we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided—what remedy Parliament appointed, and the reason of the remedy.

Now, the law before the Act now in question was passed was one which had given rise to considerable litigation, and is contained in section 64 of the Patents, Designs, and Trade-Marks Act, 1883. Section 64 of that Act provided that a trade-mark must consist of or contain at least one of the following essential particulars—sub-section (*c*): "A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." That was the law passed in 1883, and on the 24th of February, 1887, a commission was appointed to inquire into the duties, organization, and arrangements under the Trade-Marks Act so far as related to trade-marks and designs. It appeared by the report of the commissioners that complaints had been made as to the working of the Act of 1883, and in that part of the report relevant to the present controversy it is stated that "the most difficult question which has arisen upon the enactment under consideration is to determine what may be properly regarded as 'fancy words.' Words are, undoubtedly, a most popular form of trade-mark, but some limit must obviously be put upon the words which an individual may be permitted to register and claim the exclusive use of. The expression 'fancy words' is certainly not a happy one, and has naturally given rise to considerable differences of opinion as to its meaning." The report proceeds: "It is manifest that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolise them and exclude others from their use. Again, geographical words, which can be regarded as descriptive of the place of manufacture or sale of the goods, are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all his competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first who had manufactured or sold the goods in the place the name of which he seeks to appropriate as a trade-mark. But there are objections to giving a monopoly even in that case; and to attempt to draw any such distinction would be likely to lead to difficulty and litigation. We think, therefore, that geographical names ought only to be permitted where they clearly could not be regarded as indicative of the place of manufacture or sale. We would add upon this point that we think that where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though differently spelt and with a different meaning, should be registered. The question in such a

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

case would seem to be whether the resemblance between the old mark and that applied for was such as to be calculated to deceive; if it were it ought, of course, to be rejected."

I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission. Turner, L.J., in *Hawkins* v. *Gathercole*, 3 W. R. 194, 6 De G. M. & G. 1, and adding his own high authority to that of the judges in *Stradling* v. *Morgan*, Plow. 199, after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case, that the judges must collect what that intention is "sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances" (thereby meaning extraneous circumstances), "so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion;" and he adds: "We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject." Lord Blackburn, in *River Wear Commissioners* v. *Adamson*, 26 W. R. 217, at p. 220, says: "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view."

It appears to me that to construe the statute now in question, it is not only legitimate, but highly convenient, to refer both to the former Act, and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three things being compared, I cannot doubt the conclusion.

Now, the objection pointed out by the commissioners was that a particular individual should not be permitted to take exclusive possession of any part of our language; and this objection appears to have been in the mind of the framers of the earlier statute when they made the phrase "fancy word" part of the definition of what might be registered as a trade-mark. It was the use of that phrase and its accompanying qualification which gave rise to much litigation, and I am certainly not disposed to hold that cases decided under that Act can have any bearing upon the construction of that part of the Act now under construction, which was obviously intended as an alteration and amendment of the former Act. The present Act provides, among other things, by section 10, that a trade-mark must consist of or contain at least certain particulars, one of which is "an invented word or invented words." This word "Solio" is claimed to be an invented word; and it has been adjudged not to be an invented word, and apparently (though I think the association of the two things involves an incorrect construction of the statute) because it is a word which has reference to the character or quality of the goods. I think it is an invented word within the meaning of this statute. I know of no such word as "Solio" in any sense which would make it intelligible here, although it is an Italian word meaning a throne, and although it is a Latin word in the ablative case with the same meaning.

Not much reliance, however, is placed upon the word having some meaning in a foreign tongue; but what is put is that it may have extracted from it some meaning in relation to the character or quality of the goods, because the letters S O L may be understood to mean the sun. And it is true that Shakespeare in "Troilus and Cressida" speaks of our planet "Sol," and that inasmuch as the goods in question are photographic papers and sunlight is operative in producing impressions on photographic paper, it comes within the prohibition against using words which are descriptive of the character and quality of the goods in respect of which the word is sought to be registered. My answer is that "Solio" is not "Sol," and "Sol" is not "Solio." It certainly is a very strange thing that you should take three letters out of a word, and by the somewhat circuitous process that has been adopted here, arrive at the conclusion that it is not an invented word, and that it does describe the character and quality of the goods. I desire to give my opinion with reference to the particular word, and not to go behind it. I can quite understand suggesting other words—compound words or foreign words—as to which it would be impossible to say that they were invented words, although perhaps never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before. Suppose a person were to attempt to register as a single English word "Cheapandgood" or even, without taking so gross an example, using a word so slightly differing from an ordinary and recognised word as to be neither an invented word nor, avoiding the prohibited choice of a word, indicating character or quality. The line must be sometimes difficult to draw; but, to my mind, the substance of the enactment is intelligible enough, and the Comptroller has to make up his mind whether in substance there has been an infringement of the rule. Of course, also, words which were merely misspelt, but which are nevertheless in sound ordinary English words, and the use of which may tend to deceive, ought not to be permitted.

I am satisfied in this case to say that the word "Solio" is an invented word, that it does not indicate the character or quality of the goods, and that the decision of the Court of Appeal ought to be reversed.

LORD HERSCHELL.—The Comptroller-General of Patents, Designs, and Trade-Marks having refused to register "Solio" as a trade-mark in respect of photographic paper, the applicants, who are the appellants at your lordships' bar, appealed to the Board of Trade, who referred the appeal to the court. Kekewich, J., held that the application had been rightly refused, and his judgment was upheld by the Court of Appeal. The ground upon which the court proceeded was that the word "Solio" had reference to the character or quality of the goods, and was therefore incapable of registration. The court of Appeal held itself bound by a previous decision of the same court in the case of *In re Farbenfabriken Application*, to hold that an invented word could not be registered if it had any reference to the character or quality of the goods. The question turns upon the construction of the section which, by section 10 of the Act of 1888, is substituted for section 64 of the Patents, Designs, and Trade-Marks Act of 1883.

The section to be construed provides that a trade-mark "must consist of or contain at least one of the following essential particulars." Then follow several particulars distinguished by the letters (*a*) to (*e*).

The last two of these are as follows: "(*d*) An invented word or invented words; or (*e*) a word or words having no reference to the character or quality of the goods, and not being a geographical name."

Before considering the effect of this legislation, I think it is well to refer to the fact that these two particulars of which a trade-mark may consist were not to be found in the Act of 1883. On the other hand, "fancy word or words not in common use," which were amongst the essential particulars in section 64 of the Act of 1883, are not to be found in the substituted section. It had been held that they did not cover words that were descriptive, and the section had given rise to much litigation and some divergence of judicial opinion. I cannot doubt that this was the origin of the legislation by which the words appearing in the principal Act were omitted, and the provision found in the later Act substituted.

In *In re Farbenfabriken Application*, North, J., said he did not see how he could hold "Somatose" to be an invented word under sub-section (*d*), having regard to the decisions with respect to such words as "Herbalin," "Washerine," and "Valvoline." All these decisions had reference to the provisions of section 64 of the Act of 1883 with regard to fancy words. In my opinion, none of the decisions upon that part of the original section have any bearing on the new provisions to be found in the substituted section, the purpose of which was, I think, to get rid of the expressions which had occasioned much embarrassment, and of all the distinctions and decisions which had been founded upon them. Those decisions, so far from affording any guide to the true interpretation of the particulars designated (*d*) and (*e*), are likely to lead to error if applied to these new provisions.

Addressing myself, then, to the terms of the substituted section, I am unable to find any justification for qualifying the provision "(*d*) an invented word or words" by the condition that they shall have no reference to the character or quality of the goods. By the words which introduce the section, the particulars designated under the headings (*a*) to (*e*) are treated as separate and distinct. "A trade-mark must consist of at least one of the following essential particulars." What warrant is there, then, for transferring words found in any one of these particulars to any other of them? With all deference to the learned judges who have thought otherwise, I can see none. It seems to involve an interpretation of the language used which is not its natural grammatical construction. In *In re Farbenfabriken Application* A. L. Smith, L.J., said: "It is impossible, I think, to hold that the Legislature intended that an invented word might be a word having reference to the character or quality of the goods, whereas a non-invented word might not. There would be no sense in so holding." I am unable to agree with this view. There seems to me to be the broadest distinction between the two cases. Under (*e*) any word in the English language may serve as a trade-mark; the commonest word in the language might be employed. In these circumstances it would obviously have been out of the question to permit a person, by registering a trade-mark in respect of a particular class of goods, to obtain a monopoly of the use of a word having reference to the character or quality of those goods. The vocabulary of the English language is common property; it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using, for purposes of description, a word which has reference to the character or quality of the goods.

If, then, the use of every word in the language was to be permitted as a trade-mark, it was surely essential to prevent its use as a trade-mark where such use would deprive the rest of the community of the right which they possessed to employ that word for the purpose of describing the character or quality of goods. But with regard to words which are truly invented words—words newly coined, which have never theretofore been used—the case is, as it seems to me, altogether different; and the reasons which required the insertion of the condition are altogether wanting. If a man has rightly invented a word to serve as his trade-mark, what harm is done, what wrong is inflicted, if others be prevented from employing it, and its use is limited in relation to any class or classes of goods to the inventor? So far, then, from seeing no reason for a distinction between the particulars designated in (*d*) and (*e*), there seems to me abundant reasons for not interpolating in (*d*) words which the Legislature has used only in relation to (*e*). In a later part of the judgment to which I have already referred, A. L. Smith, L.J., says that to constitute an invented word within the meaning of the section it must be a word coined for the first time. "Such a word," he says, "is, of necessity, incapable of having reference to the character or quality of goods, because, *ex hypothesi*, it is an entirely new, unknown word incapable of conveying anything." With this—subject to a qualification to which I will refer in a moment—I entirely agree. An invented word has of itself no meaning until one has been attached to it. But this circumstance does not seem to me to be any ground for qualifying with a condition not applied to them the terms "an invented word or words."

In considering the case of an application to register a trade-mark under (*d*), the only question which in my opinion has to be determined is whether the word sought to be registered is an invented word. In *In re Meyerstein's Trade-Mark* Kay, L.J., said: "There is extremely little invention in the matter." It may be that the word "Satinine," which was there in question, was objectionable on other grounds; but if the word be an "invented" one I do not think the *quantum* of invention is at all material. An invented word is allowed to be registered as a trade-mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases. It may no doubt sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form. Again, I do not think that a foreign word is an invented word simply because it has not been current in our language. At the same time, I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning except to a few scholars, might not be regarded as an invented word. It is in this respect that I desire to qualify my assent to A. L. Smith, L.J.'s, proposition that an invented word can never have a meaning.

Coming now to the particular case under discussion, I cannot doubt that the word "Solio" is an invented word, unless it is to be regarded as the Italian word *solio*, which means a throne, in which case it has certainly no reference to the character or quality of photographic paper. If it is not to be so regarded, it has of itself no meaning. As I have said, I think it unimportant, if it be an invented word, whether it has reference to the character or quality of the good

or not; but if this were the test of the validity of the word as a trade-mark, I must say that I think there is no such reference. I daresay that it might occur to some minds given to etymology that *sol*, the Latin word for sun, was a component part of it when they found it connected with photographic paper, but the same minds would equally find other root bases for the word if they found it connected with boots or agricultural implements. It seems to me to have no reference to the character or quality of the goods in the sense in which those words must have been used by the Legislature. I think the judgment appealed from ought to be reversed.

Lord MACNAGHTEN.—I am of the same opinion. In 1883 the Legislature for the first time allowed persons to register as trade-marks words not used as trade-marks before August, 1875. The privilege was conferred by adding to the words "a distinctive device, mark, brand, heading, label, ticket," which were substantially taken from the Act of 1875, the words, "or fancy word or words not in common use." To be capable of registration as a new trade-mark, it was therefore required by the Act of 1883 that the word proposed to be registered should be a "fancy word," "distinctive," and "not in common use." Everybody knows the trouble which that enactment gave. In trying to construe it the courts were almost driven to despair, until at last in the Court of Appeal the learned judges declared that, to be a fancy word, a word must be "obviously meaningless," though one of those two learned judges seems to have retracted or qualified his opinion before the next case was called on.

For these very troublesome words in the Act of 1883 the Act of 1888 substituted the expression "an invented word or words." It made the substituted expression a separate, independent, and sufficient condition of registration. And now, if a proposed trade-mark consists of or contains an invented word or invented words, it is capable of registration. But the word must be really an invented word: nothing short of invention will do. On the other hand, nothing more seems to be required. If it is an invented word—if it is "new and freshly coined" (to adapt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods—I do not think that it is necessary that it should be wholly meaningless. To give an illustration, everybody will remember that in a book of striking humour and fancy, which was in everybody's hands when it was first published, there is a collection of strange words where "there are" (to use the language of the author) "two meanings packed up into one word." No one would say that those were not invented words. Still, they contain a meaning—a meaning is wrapped up in them if you can only find it out. The object of putting a restriction on words capable of being registered as trade-marks was, of course, to prevent persons appropriating to themselves that which ought to be open to all. There is a "perpetual struggle" going on, as Fry, L.J., has observed in *In re Dunn's Trade-Marks* (41 Ch. D. 439, 37 W. R. Dig. 186), "to enclose and appropriate as private property certain little strips of the great open common of the English language. That," he added, "is a kind of trespass against which I think the courts ought to set their faces." And I think the Legislature has set its face against it both in the Act of 1883 and in the Act of 1888. There is little danger of the apprehended mischief if invention is required as a condition of registration. After all, invention is not so very common. Turning to the present case, I think the word "Solio" may pass for an invented word, and not the less so because it was hit upon by a lucky accident. I should think so even if I thought that it contained in itself an obscure reference to the great source of light. The goods were intended to be used for photographic purposes; but speaking for myself I must confess that, without explanation from others—better scholars, it may be, or worse—it never would have occurred to me to connect "Solio" with the Latin word for the sun. I therefore agree in the motion proposed.

Lord MORRIS.—I am of opinion that, upon the true construction of section 10 of the Act of 1888, sub-sections (*d*) and (*e*) of section 10 are independent of each other, and that no portion of sub-section (*e*) can be introduced into sub-section (*d*). The two sub-sections represent different heads, which entitle the trade-mark to be registered. Sub-section (*d*) refers to an invented word *simpliciter*; sub-section (*e*) refers to a word or words having no reference to the character or quality of the goods.

In this case "Solio" is, so far as the English language is concerned, an invented word; indeed, Lindley, L.J., in his judgment in the Court of Appeal says, "Nobody ever heard of it before, and in that sense it is an invented word;" but he proceeds to hold that it had some reference to the character or quality of the goods, and consequently could not be registered. I find no such restriction in sub-section (*d*); the restriction on the use of such words is in sub-section (*e*); and I cannot see how a limitation or restriction found in sub-section (*e*) can be introduced into sub-section (*d*). Therefore, given an invented word, in my opinion it is capable of registration. I therefore concur in the judgment which has been moved.

Lord SHAND.—I am of the same opinion. The separation of the clauses in the section of the statutes in question by the letters "*d*" and "*e*" and the alternative particle "or," satisfy me that the two clauses are independent, and to be construed as independent provisions, so that the terms of section (*e*) do not control or affect the terms of section (*d*). At the same time I agree with your lordships, and particularly with what has been said by Lord Macnaghten, in thinking, especially after the decision to be given in this case, that the Comptroller-General will be fully warranted in taking care that there shall not be admitted, under the guise or cover of words called "invented" by the applicant, words really in ordinary use, which might, in a disguised form, have reference to the character or quality of the goods. There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required, but the words I think should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be "invented" which, with some trifling addition or very trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word.

Appeal allowed.

Solicitors for appellants, *Bird, Moore, & Strode.*

Solicitor for respondent, *W. Murton*, Solicitor of Board of Trade.

From C. A. (England). July 4, 1898.

PRESTON (MAYOR, &c.) v. BIORNSTAD.
THE "RATATA." (a.)

Ship — Harbour authority — Collision — Damage — Efficient tugs.

The appellants were the port and harbour authority of Preston, and were entitled to make contracts for towage of vessels using that port. The respondent's ship, under the directions of the harbour authority, was towed up the river on the flood tide towards Preston, preceded by two other vessels, also in tow. These tugs were hired by the appellants. Owing to the delay of the foremost tug the respondent's ship grounded and received considerable damage.

Held, that the appellant corporation were liable for the damage caused.

Decision of the Court of Appeal (The Ratata, [1897] *P.* 118, 45 *W. R. Dig.* 118, 152) *affirmed.*

This was an appeal by the Mayor and Corporation of Preston from an order of the Court of Appeal (Lord Esher, M.R., Lopes and Chitty, L.JJ.) reversing the decree of the President (Sir F. H. Jeune), who had dismissed the action.

The facts were given in the Lord Chancellor's judgment.

Joseph Walton, Q.C., and *F. Laing*, for the appellants, referred to *Cuthbertson* v. *Parsons*, 12 C. B. 304, and to *Dalyell* v. *Tyrer*, E. B. & E. 899.

Robson, Q.C., and *H. Stokes*, for the respondents, cited *Donovan* v. *Laing*, 41 W. R. 455, [1893] 1 Q. B. 629.

Joseph Walton, Q.C., in reply.

The House took time for consideration.

Earl of HALSBURY, L.C.—The plaintiffs in this case are the owners of a Norwegian barque called *The Ratata*, and they sue the mayor, aldermen, and burgesses of the borough of Preston for damage caused to that vessel by the grounding of it in the River Ribble on the 24th of July, 1895.

The corporation of Preston are the port and harbour authority, and, besides filling that character, they have the right to make contracts for towage of vessels using the port of Preston, and to licence other persons to exercise the same business. It is important to bear in mind the two capacities filled by the corporation. It appears that the port of Preston is a considerable distance from the sea, and the ordinary course of business is that the harbour-master, who appears to act in a double capacity, arranges the time when vessels shall be towed up the river during the time that the state of the tide allows them to reach their destination in safety. The width of the river is such that only one vessel can occupy its width at the same time; when, therefore, there are more vessels to be towed up in the same tide they must go in line one after the other.

On the occasion on which the accident arose the directions as to the time of departure were given in ordinary course by the harbour-master. *The Ratata* was towed by a steam-tug, and two other vessels started to accomplish the same end—namely, the arrival at Preston during the same tide, before the ebb should create any danger of grounding. The vessel now in question was placed last of the line of ships, and according to the evidence there should have been no difficulty in arriving at the port before the tide should ebb. *The Vixen* was the name of the steamer which was towing the foremost vessel, and for some reason *The Vixen* was unable to proceed at the ordinary rate at which it was expected and intended to proceed. The result was that *The Ratata* grounded before arriving at her destination, and received considerable damage in so doing. The action was brought to recover the damage incident to this misfortune.

The contract of towage was preceded by a correspondence, which in substance invited the owners of *The Ratata* to come to the port, but undertaking to lighten the ship, if it should be proved to be necessary, at the expense of the corporation. No written contract between the parties has been put in evidence, but your lordships are invited to infer what the contract was from the ordinary course pursued between shipowners and contractors for towage. Looking at the facts, I should infer that while on the one hand there is no warranty by the contracting towers that the vessel shall arrive in time to avoid grounding, on the other hand I think it is clear that they undertook to exercise reasonable care and skill in the performance of the obligation which they took upon themselves for hire and reward in conducting the business of the towage to its consummation. Looking at the nature of the thing to be done, I should say they were bound to have reasonable knowledge of the state of the tide, inasmuch as they are to give the signal for the starting of the operations; reasonable care and skill in conducting the operation itself, where, as in this case, a number of vessels have to be brought up during the same tide; and reasonable care in providing adequate steam power to accomplish the object in question. It appears to me that in this case it is made out that they failed in the contract obligation which they undertook, and I think the plaintiffs were entitled to complain that in the combined operations the defendants were conducting either—first, they did not lighten the ship sufficiently; or secondly, that they did not place *The Ratata*, considering her draught, as lightened by them, as first in the line; or thirdly—and on this matter most reliance was placed at the trial—that they supplied an inefficient steamer to the leading vessel, the necessary effect of which was to delay *The Ratata*, which could not pass or go abreast of the vessel thus made to proceed too slowly, and the catastrophe undoubtedly did arise from the unusual and abnormal slowness of *The Vixen*.

It is said that *The Vixen* was not the property of the corporation, but was only hired by it for the occasion. It appears to me that that consideration is immaterial. *The Vixen* was engaged in what I have called the "combined operation," an operation which is necessarily combined by reason of the circumstance that the river will not permit two vessels to go abreast. If the corporation put an inefficient tug at the head of the line it follows that the effect of that inefficiency of the leading tug will involve the consequences, not only to the vessel that that tug itself is drawing, but to all the other vessels that follow it. Indeed, it was but faintly contended that, if the vessel had belonged as property to the corporation, the corporation would not have been liable for the inefficiency of the tug which they provided. It was said that the corporation were not liable for a chartered tug; but this chartered tug was under the general direction and control of the corporation. It was performing corporation work for which the corporation was to be paid, and it appears to me that the ownership of the tug, in the sense of its ultimate ownership, is immaterial. For the time during which this contract business was being performed it was the tug of the corporation, and its inefficiency was an inefficiency for which the corporation, as

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

contractors for towage with reasonable care and skill, were responsible.

But it is then said that the plaintiffs should have given evidence to show that *The Vixen* on this occasion was inefficient, and should have proved the cause of its inefficiency, which might, peradventure, be some cause for which, upon the contract in question, the corporation would not have been responsible. I am of opinion that this is altogether erroneous. The fact that it was an inefficient tug on this occasion is proved by the defendants themselves when they show how on other occasions it had properly and efficiently performed its functions. If it was suggested that it was some extraordinary and unusual event—and as this was not a contract of warranty the defendants would have been entitled to insist on that as a defence—it was for the defendants to prove it. Two causes only are suggested in the course of the trial: one, the badness of the coal—itself supplied by the corporation; the other, the unskilfulness or neglect of the stokers. In either event, as it appears to me, the corporation cannot avail themselves, as against the owners of *The Ratata*, of the unskilfulness of their tug or the bad material, the use of which placed the obstruction in the way of *The Ratata* and was the cause of the calamity.

Under these circumstances I am of opinion that the judgment of the Court of Appeal was right, and that this appeal ought to be dismissed with costs, and I move your lordships accordingly.

Lord WATSON, Lord MACNAGHTEN, and Lord MORRIS concurred.

Appeal dismissed.

Solicitors for the appellants, *Bird & Hamer*, for *Henry Hamer*, Town Clerk, Preston.

Solicitors for the respondents, *Stokes & Stokes*.

Privy Council.

(*From the Supreme Court of New South Wales.*)

June 23, 1898.

KING *v.* HENDERSON. (*a.*)

False and maticious prosecution—Bankruptcy petition—Reasonable or probable cause—Motive—Abuse of remedy sought—Fraud upon court.

A plaintiff or petitioner who institutes and insists in a process before the bankruptcy or any other court, in circumstances which make it an abuse of the remedy sought, or a fraud upon the court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But to constitute an abuse of process or a fraud upon the court, mere motive, however reprehensible, will not be sufficient; it must be shown that the remedy would be unsuitable and would enable the persons obtaining it fraudulently to defeat the rights of others.

It is not the duty of a judge to submit any issue of fact to the jury which is not fairly raised by the evidence.

The jurisdiction of the Registrar in Bankruptcy is confined to a discretion to grant or refuse a receiving order. No question as to res judicata *arises thereon.*

Ex parte Vitoria, 42 *W. R.* 529, [1894] 2 *Q. B.* 387, *approved.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

This was an appeal from an order of the Supreme Court of New South Wales refusing a new trial.

The facts are given at length in their lordships' judgment.

C. A. Russell, Q.C., and *J. A. Hamilton*, for the appellant.

Herbert Reed, Q.C., Montague Shearman, and *J. M. Easton*, for respondent.

The judgment of their lordships (Lords WATSON, HOBHOUSE, and DAVEY, and Sir RICHARD COUCH) was delivered by

Lord WATSON.—The appellant, in August, 1896, brought the present action of damages against the respondent, before the Supreme Court of New South Wales. The declaration sets forth that the respondent falsely and maliciously, and without reasonable or probable cause, presented a petition to the judge in bankruptcy, praying that a sequestration order might be made in respect of the estate of the appellant, according to the provisions of the New South Wales Bankruptcy Act of 1887, upon the allegation that the appellant had committed an act of bankruptcy, inasmuch as he did not comply with the requirements of a bankruptcy notice procured at the instigation of the respondent to be issued by one Alexander Hallen against the appellant; that the appellant showed cause against the said petition, and disputed the commission of the said act of bankruptcy, and that the said petition was dismissed; that it was afterwards ordered by the judge in bankruptcy that the said bankruptcy notice should be set aside, and that it was thereupon declared by the judge that the said act of bankruptcy had not been committed by the appellant; that all proceedings in respect of the said petition were, upon such dismissal and order and declaration as aforesaid, determined; and that the appellant had, by reason of the premises, been damaged in his business and otherwise. The declaration was met by a note of pleas and demurrer for the respondent, the terms of which it is unnecessary to recite.

Upon these pleadings the parties joined issue, and the case went to trial before Cohen, J., and a jury, on the 14th of December, 1896, when three witnesses, including himself, were examined for the appellant. At the close of the appellant's evidence, the respondent moved for a nonsuit, which was allowed by the presiding judge. On the 29th of December, 1896, the appellant filed a rule *nisi*, calling upon the respondent to show cause why the nonsuit should not be set aside, and a new trial granted. After hearing counsel for the appellant, the court by a majority, consisting of Darley, C.J., and Owen, J., refused the rule. Stephen, J., was of opinion that the rule should be allowed to go on, in order that the points raised might be more fully argued.

It appears from the evidence that the appellant, who had previously carried on business as a stevedore and wool presser, on the 2nd of August, 1893, entered into partnership, for the term of five years, with one William Collins, under the firm name of H. J. King & Co., for the purpose of carrying on the business of wool pressers, stevedores, and shipping agents, at Sydney and elsewhere. By the contract of co-partnery it was stipulated that Collins should, if he thought fit, be at liberty to remain in his employment of shipping clerk in the office of the German Australian Steamship Co., and to accept any other similar position during the continuance of the partnership; and also that the appellant should have the active conduct of the business of the firm, and should receive a salary of £400 per annum, payable in equal monthly instalments. The respondent was the manager of

the German Australian Steamship Co. He was desirous of becoming a partner of the firm of H. J. King & Co., and it was in consequence of the refusal of his employers to allow him to accept that position that Collins became a partner. The respondent was also agent for one Ernest Wood, a merchant in London, who, on the 14th of August 1893, agreed to advance the sum of £500 to the appellant and Collins in loan, for behoof of the new firm. The advance was arranged by the respondent on Wood's behalf. It does not appear that any capital was contributed by the appellant; but Collins put into the business a sum of £200, which he borrowed from the respondent.

On the 17th of March, 1894, the sum of £500, which Wood had agreed to lend to the firm, was paid to the appellant and his partner, Collins; and, upon the same day, they executed a bill of sale to Wood of the plant, stock-in-trade, machinery, fixtures, and book-debts of the firm in security of the loan. The appellant requested that the bill of sale should not be registered; and to that the respondent, as representing Wood, consented. Further advances were subsequently made to the firm by Mr. Wood, through the respondent; the entire loan amounting, on the 26th of March, 1896, to £1,599 11s. 6d. On that date, the firm agreed that the bill of sale of the 17th of March, 1894, should extend to, and stand as security for the whole loan then due to Mr. Wood.

In July, 1894, Charles Taylor, who was recommended by the respondent, became a member of the firm, under an agreement with the appellant and Collins. He paid £1,000 into the firm, and in return received the right to one-eighth share, and to a salary of £350 per annum, payable by monthly instalments. During the following year there was some unpleasantness between the respondent and Mr. Collins, which resulted in the latter leaving the employment of the German Australian Co. Thereupon the respondent informed the appellant that Collins would have to leave the firm of H. J. King & Co., else he would not finance the business, and would "close down under his bill of sale." On the 5th of June, 1895, Collins retired from the firm, his interest having been purchased by the appellant and his partner Taylor for the sum of £250. In order to meet that payment the respondent advanced £100 in cash to the firm, who gave Collins their promissory note for the balance of £150. It was proposed at that time that, in consideration of his advance, the partners of the firm should hold, at the disposal of the respondent, part of the share in the business which they had purchased from Collins; but, although the matter was discussed between the appellant and the respondent, the arrangement does not appear to have been carried into effect.

In the beginning of the year 1896 the firm of H. J. King & Co. was evidently not in a prosperous condition. Hallen, one of their employees, who, in April, 1895, had been injured on board a German ship which they were loading, recovered judgment against the appellant and Taylor for £341 18s. 9d. on the 20th of February, 1896. The injured man had been insured by the firm, but the office with which the insurance was effected had gone into liquidation. After the judgment the appellant had interviews with the respondent, at some of which Taylor was present, the object and result of which are thus explained by the appellant in his evidence: "I wanted defendant to lend me more money, as he had done on many occasions. He declined. Defendant or Taylor proposed I should go out of H. King & Co. It was in the beginning of March. I had several interviews. I don't know anything was said about money. I was simply to go out of the business and get nothing. I declined. Defendant pressed me on many occasions to do this." On the 26th of March, 1896, the respondent, acting on behalf of his constituent Mr. Wood, gave formal notice to the firm that, in default of immediate payment of the sum of £1,599 11s. 6d. then due to Mr. Wood he would take possession of the chattels and things comprised in the indenture of the 17th of March. Default having been made, the respondent entered into possession. The appellant states in his evidence, "I did not consider the firm indebted to Wood in £1,599 odd;" but the statement can hardly be accepted, because the witness admits that the amount named stood in the books of the firm at the credit of Wood, and it is not disputed that on the 26th of March, 1896, his partner Taylor executed, on behalf of the firm, an acknowledgment which was indorsed upon the original bill of sale, to the effect that the debt then due to Wood amounted to £1,599 11s. 6d. On the 30th of March, 1896, the appellant sent a letter to the respondent, making an offer (which was declined on the same day) to pay a specified sum as in full discharge of the liabilities of his firm. In that letter the appellant wrote that, if the respondent could not see his way to accept the offer therein made to him "I shall feel constrained to sequestrate the estate for the protection of the creditors."

On the 7th of April, 1896, Hallen, under the provisions of the Bankruptcy Acts, 1887-1888, took out a bankruptcy notice against the appellant, requiring him to make payment of the sum of £341 18s. 9d., for which he, Hallen, held a joint and several decree against the appellant and his partner, Taylor, within seven days after service of the notice, excluding the day of notice. The notice was served on the appellant upon the following day, the 8th of April. Their lordships may observe that there is no evidence beyond the following facts, which are not conclusive, tending to support the averment made by the appellant in his declaration, to the effect that such notice by Hallen was procured or issued at the instigation of the respondent. The respondent on the 2nd of April, 1896, gave to Sly and Russell, who conducted the present suit on his behalf in the court below, his promissory note for £150, as an advance to Taylor, for whom they were then acting, in order to enable him to meet his liabilities under Hallen's decree. Sly and Russell, after correspondence with Hallen's solicitor in regard to the sum which would be accepted from their client, on the 8th of April, 1896, endorsed the promissory note to him, in satisfaction of Taylor's indebtedness.

No payment having been made by the appellant within the time prescribed by the notice, Hallen, on the 16th of April, 1896, presented a petition for sequestration of his estate to the judge in bankruptcy, in which he set forth that the appellant was indebted to him in the sum of £191 18s. 9d., being the balance of the sum of £341 18s. 9d. contained in the judgment aforesaid. On the 5th of May, 1896, the appellant paid to Hallen the sum of £218 4s. 2d., being in full of the balance of £195 due by him, together with interest and costs. On the 11th of May, 1896, Hallen, who had by that time received payment of his debt, with interest and costs, withdrew his petition for sequestration.

On the 8th of May, 1896, the respondent, who was a creditor of the appellant for the sum of £260 10s. due by promissory note of the 12th of February, 1896, filed, in that capacity, a petition for an order sequestrating the appellant's estate. The petition set forth that, within six months before the date of its presentation, the appellant had committed an act of bankruptcy, inasmuch as he had failed, within the period prescribed by the Act, after service of the bankruptcy order by Hallen on the 8th of April, to

comply with the requirements of the notice, or to satisfy the judge that he had a counter-claim, set-off, or cross-demand equal to or exceeding the amount of the judgment debt, which he could not set up in the action in which the judgment was obtained. The petition was opposed by the appellant; and, on the 3rd of July, 1896, the registrar in bankruptcy, after hearing evidence, made an order to the effect that the petition of the respondent "be and the same is hereby dismissed out of this court."

On the 7th of August, 1896, Manning, J., sitting as judge in bankruptcy, made an order in these terms: "Upon motion made to me this day on behalf of the above-named Hugh John King" (the present appellant) "and upon reading the bankruptcy notice herein dated the seventh day of April last, and the affidavits of the said Hugh John King and of Henry White sworn on the sixteenth and eighteenth days of May last, and there being no appearance for the judgment creditor, upon hearing Mr. Wise as counsel for the said Hugh John King: It is ordered that the said bankruptcy notice issued herein by the said Alexander Hallen on the said seventh day of April last past, be and the same is hereby set aside. And it is further declared that no act of bankruptcy has been committed by the said Hugh John King under the said notice of the said seventh day of April last past." From the terms of the foregoing order, it is obvious that the respondent was no party to these proceedings; and it is not wonderful that Hallen, the judgment creditor who took out the notice, should not have appeared in them, seeing that he had obtained full payment of his debt with costs more than two months previously. Independently of these considerations, their lordships are of opinion that the order of the learned judge, in so far as it declares that no act of bankruptcy had been committed by the appellant, went beyond his jurisdiction, and was unwarranted by the Bankruptcy Act of the Colony. These Acts define, with great minuteness, the various ways in which an act of bankruptcy may be constituted, one of them being by a bankruptcy notice under section 4 (2) of the principal Act. When an application is made for a sequestration order, which complies with the requirements of sections 6, 7, and 8 of the same Act, ample discretion is vested in the judge either to grant or refuse the petition; and, if a sequestration order be made, it may subsequently (section 5 (II.)) be discharged or annulled. But whilst the judge may, in his discretion, competently refuse to follow up an act of bankruptcy by issuing a sequestration order, the statutes give him no jurisdiction to annul an act of bankruptcy, or to declare that it never was committed. There is no authority to be found for the procedure of the learned judge, save in the fifty-first of the general rules framed by the court, which provides that "when the judge makes an order setting aside the bankruptcy notice, he may at the same time declare that no act of bankruptcy has been committed by the debtor under such notice." Now, the only power which the court has to frame rules is confirmed by section 119 of the principal Act, and it is strictly limited to rules "for the purpose of regulating any matter under this Act." In the opinion of their lordships, a rule empowering the judge to make a declaration that no act of bankruptcy had been committed under the notice is in no sense a regulation either framed or calculated to carry out the objects of the Act. It is, in their opinion, the new creation of a jurisdiction which the Legislature withheld, it is inconsistent with and so far repeals the plain enactments of the statute, and it takes away from creditors the absolute right which the statute gave them of founding a petition for a sequestration order upon the bankruptcy notice.

Upon the hearing of this appeal, it was maintained for the appellant that the orders of the court below ought to be reversed, and the action remitted for new trial, upon two separate grounds: the first of these being that certain documentary evidence had been unduly rejected by the presiding judge; and the second, that the learned judge, instead of directing a nonsuit, ought to have submitted to the jury certain issues which were only fitted for their consideration. Their lordships do not think that either of these objections, which they will notice in their order, is well-founded.

At the trial, the decision of the registrar, dated the 3rd of July, 1896, dismissing the respondent's petition for an order sequestrating the appellant's estate, was admitted without objection. But an objection was taken when the appellant's counsel tendered in evidence, "the full written judgment" delivered by the registrar on that occasion. The document thus tendered was, in their lordships' opinion, rightly rejected by the presiding judge. Section 8, sub-sections 2 and 4, of the New South Wales Act of 1887, give the registrar no jurisdiction, except to grant or to dismiss a creditor's petition for sequestration. The terms of that clause and of these sub-sections are substantially the same with those of section 7, sub-sections 2 and 3, of the English Bankruptcy Act, 1883; and it was held by the Court of Appeal, in *Ex parte Vitoria*, 42 W. R. 529, [1894] 2 Q. B. D. 387, that the decision of the registrar, affirming the insufficiency of the petitioning creditor's debt, did not constitute *res judicata*. Lord Esher, M.R., observed, "all that he (*i.e.*, the registrar) can do is, to refuse to make a receiving order in respect of the judgment debt. That is the limit of his discretion. That being so, the case does not come within the doctrine of *res judicata* at all." In their lordships' opinion, these observations are equally applicable to the statute of New South Wales. The order made by the registrar on the 3rd of July, 1896, is very properly confined to a simple dismissal of the respondent's petition. The reasons by which he was influenced, or which he may have thought fit to assign in delivering judgment, are immaterial, because they could not raise an estoppel against the respondent; and the document tendered, if it had been admitted, would have amounted to nothing more than hearsay evidence of the opinion of an individual upon points which he had no jurisdiction to determine.

In support of his other and more serious objection to the conduct and result of the trial, the appellant's counsel mainly relied upon the evidence, as showing or tending to show that, in presenting his petition for a sequestration order, the respondent was actuated, not by an honest wish to secure payment of the debt which the appellant owed him, but by a desire to effect the exclusion of the appellant from the firm of H. J. King & Co. He maintained that the respondent's resort to sequestration in bankruptcy, with that motive and with that object, constituted an abuse of the process of the court, and a fraud; and that the judge ought, in some form, to have remitted to the jury the question whether the respondent had been guilty of such abuse and fraud, with the direction that, in the event of their answering the question in the affirmative, they ought to return a verdict for the appellant.

Their lordships do not dispute the soundness of the proposition that a plaintiff or petitioner, who institutes and insists in a process before the bankruptcy or any other court, in circumstances which make it an abuse of the remedy sought, or a fraud

upon the court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the court. In the opinion of their lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shown that, in the circumstances in which the interposition of the court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable.

In *Ex parte Gallimore*, 2 Rose 424, a tenant moved to set aside a commission of bankruptcy, issued at the instance of his landlord upon two grounds, (1) that he was not a trader within the meaning of the statutes then in force, and (2) that the commission had been taken out by his landlord, contrary to the good faith of their mutual contract, with the object of determining his mineral lease. The Lord Chancellor (Lord Eldon) directed issues to try the question whether the applicant was a trader. With regard to the second ground upon which the motion was based, the noble and learned lord, in giving judgment, observed, "I see no reason why the process in bankruptcy should not be affected by the same species of fraud which would affect and set aside any other process in any other court." In the subsequent case of *Ex parte Wilbran*, 5 Madd. 1, which depended before the Vice-Chancellor (Sir John Leach), a mercantile firm who were creditors of another firm arrested its individual partners, all of whom put in bail, with the exception of Wilbran, who remained in prison for two months, when he was made bankrupt by the incarcerating creditors. Wilbran then petitioned to supersede the commission, on the ground that it had been unfairly used for the purpose of dissolving the partnership in so far as he was concerned. The petition was opposed by the creditor firm, who did not, apparently, dispute the fact that they desired and intended to put an end to Wilbran's connection with his firm, but pleaded that such motive was not a ground of interference, either on general equity, or as an abuse of the commission. Sir John Leach, after conferring with the Lord Chancellor, dismissed the petition. His honour said "that a commission was, in a qualified sense, a legal right, like an action, and that courts of justice had no concern with the motives of parties who asserted a legal right. In *Ex parte Harcourt*, 2 Rose 203, the bankrupt himself, with a view to dissolve the partnership, procured a commission to be issued against him. Being the bankrupt's commission it could not stand. In *Ex parte Gallimore* the commission was used for a fraudulent purpose. He fully adopted the principle of these cases. Here it appeared that the petitioning creditors, having no concert with the other partners, desired to operate a dissolution, considering it an advantageous measure for them that the bankrupt should not continue in a firm with which they had large dealings. There was in this no fraud, and it is not enough that there be a bye-motive unless there be fraud."

The very intelligible principle which was recognized in *Ex parte Wilbran* does not appear to their lordships to have been departed from in any of the subsequent decisions which were brought under their notice by the industry of the appellant's counsel. Motive cannot in itself constitute fraud, although it may incite the person who entertains it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result, which the law regards as constituting fraud. In *In re Davies*, 25 W. R. 239, 3 Ch. D. 461, the Court of Appeal refused to make an adjudication in bankruptcy where it was clearly shown that the proceeding had been used and was meant to be used for the illegitimate and fraudulent purpose of extorting money from the debtor. And, again, in *Ex parte Griffin*, 28 W. R. 208, 12 Ch. D. 480, the same court, although there was a good petitioning creditor's debt, and an act of bankruptcy had been committed, refused to make an adjudication. The ratio of the decision was thus explained by James, L.J.: "I think I never knew a case so transparent as to the fraud with which the whole thing was conceived, and the oppression which it was intended to exercise. It would, I think, be a shocking thing for any court of justice in a civilized country to be made the instrument of proceedings like these."

Counsel for the appellant argued, with great plausibility, that on the trial of a case like the present, involving the inquiry whether the proceedings complained of were taken without reasonable and probable cause, it is within the province of the jury, and not of the judge, to find the facts upon which the question of probable cause depends, and that it is for the judge, upon these facts, to determine the question of law. The rule was so laid down by the House of Lords in *Lister* v. *Perryman*, L.R. 4 H. L. 521, 18 W. R. H. L. Dig. 14. Their lordships admit the propriety and cogency of the rule in any and every case where the facts admit of its application. But it appears to them that the circumstances of the present case, as these are disclosed in the evidence of the appellant, are very different in their character from the facts, as appearing in the evidence, with which noble and learned lords had to deal in *Lister* v. *Perryman*. It certainly is not the duty of the presiding judge to submit any issue of fact to the jury which is not fairly raised by the evidence. There is, no doubt, evidence by the appellant tending to show that the respondent, in petitioning for a sequestration order, was influenced by a desire to get the appellant out of the firm of H. J. King & Co. But their lordships have been unable to find in the evidence any fact or circumstance calculated to raise the question whether, in petitioning for sequestration of the appellant's estate, the respondent had committed a fraud upon the law or upon the court; and, in their opinion, the learned judge would not have been justified in raising such an issue, even if he had been invited to do so.

Their lordships are satisfied that, in point of fact, no such issue was raised by the appellant in either of the courts below. There is no reference to it in the note made by the presiding judge of the argument of the appellant's counsel against the respondent's motion for a nonsuit; and, what is of more importance, it is not raised in the memorandum for a rule *nisi* which was filed by the appellant. In that document, it is pleaded (Art. 7) that the learned judge ought to have ascertained by the verdict of the jury whether the respondent presented his bankruptcy petition for the concealed purpose of forcing the appellant out of the partnership of H. J. King & Co.; and also (Art. 11) ought to have directed the jury that "the presentation of a petition for an ulterior private purpose other than the equal distribution of a debtor's assets is a fraud upon the court of bankruptcy." A direction in these terms would, according to their lordships' opinion, have been clearly erroneous. A desire and intention, on the part of the petitioning creditor, to terminate a partnership connection between the debtor and a firm which owed money to him and to Mr. Wood, whom he represented as agent, is simply a bye-

motive, which would not taint his procedure unless there were proof of positive fraud, which is absent in this case. It was not necessary for the learned judge to submit any question to the jury as to the alleged motive of the respondent; because, on the assumption that it did exist, which has never been seriously disputed, there are no legal grounds for coming to the conclusion that the respondent had acted without reasonable and probable cause.

Their lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Solicitors for the appellant, *Clapham, Fitch, & Co.*

Solicitors for the respondent, *Snow, Snow, & Fox.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Dec. 2.

HALL v. COX. (a.)

Lottery—Prize competition—Prediction of number of births and deaths in London in a given week—Chance—Skill.

A newspaper proprietor advertised in his paper that a prize of £1,000 would be given to the person who correctly predicted the number of births (male and female) and deaths in London, as disclosed by the Registrar-General's returns, during the week in which the particular number of the paper was published. Each prediction had to be written on a voucher printed in the paper, and forwarded to the proprietor.

Held, that the competition was not a lottery.

Appeal by the plaintiff from the judgment of Lawrance, J., at the trial of the action with a jury at Leeds. The facts were as follows:

The defendant was the proprietor of a paper called the *Rocket*. He announced in the issue of the paper for the 11th of December, 1897, that a prize of £1,000 was offered for a correct prediction of the number of male and female births and the number of deaths in London during the week ending the 11th of December, 1897. The competitors had to fill in and sign the accompanying voucher, paste it on a sheet of paper, and send it with a coupon cut from the front page of the *Rocket* in accordance with the instructions given. The voucher contained the following words, "I say that the number of births and the number of deaths in London during the week ending the 11th of December, 1897, as disclosed by the Registrar-General's returns, will be—" Then followed spaces for the competitor to insert the number of births (male), births (female), and deaths. The answers were to be sent in so as to reach the office of the *Rocket* not later than the first post on the 10th of December. Competitors were not limited to one prediction, but each prediction had to be written on a voucher cut from the current issue of the paper. If more than one correct prediction was received the £1,000 would be divided. The advertisement also stated that according to the Registrar-General's returns the number of births and the number of deaths in London during the week ending the 12th of December, 1896, were as follows, births (males) 1,342, ditto (females), 1,213; deaths, 1,539."

The plaintiff alleged that he had sent in a correct prediction and brought this action against the defendant to recover the £1,000. The action was tried without pleadings, and the defence raised at the trial was that the plaintiff's answer had never been received. The jury found a verdict for the plaintiff, but on the application of counsel for the defendant, Lawrance, J., entered judgment for the defendant on the ground that the competition was a lottery. The plaintiff appealed. The defendant had died since the trial of the action, and his personal representatives had been served in the notice of appeal, but they did not appear.

Brooke Little, for the plaintiff.—The learned judge was wrong in holding that this competition was a lottery. The winning of the prize by making a correct prediction was not dependent on mere chance. This competition afforded scope for the exercise of some degree of skill—namely, in the making a calculation from the returns of the Registrar-General for previous years as to the probable number of births and deaths in London during the week in question.

He referred to *Caminada* v. *Hulton*, 60 L. J. M. C. 116; *Morris* v. *Blackman*, 2 H. & C. 912, 12 W. R. C. L. Dig. 80; *Taylor* v. *Smetten*, 11 Q. B. D. 207, 31 W. R. Dig. 115; *Barclay* v. *Pearson*, 42 W. R. 74, [1893] 2 Ch. 154; *Stoddart* v. *Sagar* 44 W. R. 287, [1895] 2 Q. B. 474.

A. L. SMITH, L.J.—In my opinion this competition was not a lottery. The cases show that to constitute a lottery the matter must be one depending entirely on chance. The solution of the question in this case did not depend entirely on chance. Although it depended largely on chance, there was an element of statistical inquiry brought into the matter. The paper itself gave the number of births and deaths during the corresponding week in the previous year. That would serve as a start for the competitors to make inquiries, and thus an element of investigation and research was introduced into the competition, and the successful prediction was not entirely due to chance. In *Caminada* v. *Hulton* a Divisional Court, consisting of Day and Lawrance, JJ., held that an offer of prizes to any purchaser of a book who should fill up a coupon with the names of the winning horses in certain races about to take place was not a lottery, upon the ground, as I understand, that the skilled knowledge of the competitor for the prize was an ingredient in the matter, and their view has been confirmed in *Stoddart* v. *Sagar*. The appeal must be allowed.

RIGBY and COLLINS, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *H. G. Campion*, for *Muir Wilson*, Sheffield.

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) — Nov. 30.

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY. (a.)

Landlord and tenant—Lease—Assignment—Sub-lease by way of mortgage—Original lessee compelled to pay rent—Right of original lessee to recover from sub-lessee of assignee.

The plaintiffs, being the lessees of premises, assigned their term to P., who sub-let the premises to the defend-

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ants for the residue of the term, except the last day, by way of mortgage. The mortgage contained a covenant on the part of the defendants that, if they entered into possession of the premises under their powers, and received the rents and profits, they would pay the rent reserved by the original lease. The defendants entered into possession, and P. became bankrupt. The defendants did not pay the rent reserved by the original lease, and the lessor compelled the plaintiffs to pay it.

Held, that the plaintiffs were not entitled to recover from the defendants the amount so paid for rent.

Moule *v.* Garrett, 18 *W. R.* 697, 20 *Ibid.* 416, *L. R.* 5 *Ex.* 132, 7 *Ibid.* 101, *explained.*

Appeal from the judgment of Channell, J., at the trial of the action without a jury.

The action was brought by lessees who had assigned their lease to recover from mortgagees of their assignee £97, the amount of ground-rent which they had been compelled to pay to the lessor.

By a lease dated the 3rd of April, 1882, Henry Moore demised the premises in question to the plaintiffs for a term of ninety-nine years at a rent of £20 per annum.

On the 5th of April, 1889, the plaintiffs assigned the term to one Price, who covenanted to pay the rent and to indemnify the plaintiffs therefrom.

On the 18th of October, 1889, Price mortgaged the premises to the defendants by a sub-demise of the term except the last day, as security for certain advances made by them to him. The mortgage contained a covenant on the part of the defendants that, if they entered into possession of the premises under their powers and received the rents and profits, they would pay the rent reserved by the lease of the 3rd of April, 1882.

In 1890 the defendants entered into possession of the premises and remained in possession and in receipt of the rents and profits.

In 1891 Price was adjudicated bankrupt.

The defendants did not pay the rent which accrued due while they were in possession, and the lessor compelled the plaintiffs to pay it.

At the trial of the action Channell, J., held that the plaintiffs were not entitled to recover the amount from the defendants, and gave judgment for the defendants.

The plaintiffs appealed.

R. M. Bray, Q.C., and *Tindal Atkinson*, for the plaintiffs.

Jelf, Q.C., G. Spencer Bower, and *Grimwood Mears*, for the defendants.

Cur. adv. vult.

Nov. 30.—A. L. SMITH, L.J., read the following judgment: This is an action by plaintiffs who are lessees of premises for a long term to recover from the defendants £97, being rent they have had to pay to their lessor under the covenants in their lease, which rent accrued during the time the defendants were in possession of the premises as mortgagees by way of demise from an assignee of the term. Between the plaintiffs and the defendants there exists neither contract nor privity of estate; the defendants were not liable to pay to the plaintiffs the rent in question, nor were they liable to pay it to the plaintiffs' lessor. In these circumstances my brother Channell gave judgment for the defendants, being of opinion that the action was not maintainable, and that the principle of the decision in *Moule* v. *Garrett*, 18 W. R. 697, 20 *Ibid.* 416, L. R. 5 Ex. 132, 7 *Ibid.* 101, did not apply, the defendants being under-lessees and not assignees of the term as in the case cited. My brother Channell held, as I read his judgment, that no request by the defendants to the plaintiffs to pay their lessor the rent in question on their behalf could be implied whereon to maintain the action, and I am of opinion that he was right.

The facts are these. On the 3rd of April, 1882, the owner of the premises, Moore, demised them to the plaintiffs for a term of ninety-nine years at the rent of £20 per annum, which the plaintiffs covenanted to pay. On the 5th of April, 1889, the plaintiffs assigned to Price the residue of the term, Price covenanting with the plaintiffs to pay the covenanted rent and indemnify the plaintiffs therefrom. On the 18th of October, 1889, Price demised by way of mortgage the term less one day to the defendants to secure advances made by them to him, and the defendants covenanted with Price that, if they should enter into possession of the premises and receive the rents and profits, they would pay the yearly rent of £20 per annum reserved by the lease of the 3rd of April, 1882. In November 1891, Price was adjudicated bankrupt. The defendants have entered into possession of the premises under their mortgage, and have received the rents and profits thereof in part satisfaction of their mortgage debt, and they have remained in possession ever since. The defendants have not paid the rent which accrued whilst they were in possession, and Moore, the landlord, has compelled the plaintiffs, his lessees, under the covenant in their lease with him, to do so; they have done so, and they now sue the defendants to recover the amount they have thus had to pay to Moore.

It is clear that no contract or privity of estate exists between the plaintiffs and the defendants, nor between the original lessor, Moore, and the defendants; and, unless there be circumstances from which a request to pay can be implied, or in other words a contract can be implied between the defendants and the plaintiffs that the defendants would indemnify the plaintiffs if they paid to their landlord the rent accruing whilst they, the defendants, were in possession, there are no circumstances which will support an action by the plaintiffs against the defendants to recover the amount so paid. It is true that Moore could sue the plaintiffs, his lessees, upon their covenants with him in the lease. It is also true that the plaintiffs, the lessees, could sue their assignee, Price, upon his covenant with them. It is also true that Price could sue the defendants, his under-lessees, upon their covenant with him. But how can the plaintiffs sue the defendants? I omit Price's trustee in bankruptcy, for he, in my opinion, does not affect this case. It is said that the case of *Moule* v. *Garrett* shows that the plaintiffs can sue the defendants to recover what they have been compelled to pay to their lessor, and that this case falls within the principle of that case. Now what was the case of *Moule* v. *Garrett*? It was a case in which there had been two assignments of the term, the defendant being the second assignee thereof. First of all there was, as here, a lease from the lessor to the lessee, Moule, the plaintiff in the action, containing the usual covenants by a lessee. Moule afterwards assigned the term to Bartley, who afterwards assigned the term to the defendant Garrett, who then committed breaches of covenants in the lease. Moule, having been compelled under his covenant with his lessor to pay to him damages for these breaches committed by the defendant Garrett, the assignee of Bartley, sued Garrett to recover the amount so paid by him, Moule, to his lessor. It was held that, inasmuch as both the plaintiff and the defendant were compellable to pay to the original lessor the damages accruing to him for the breaches of covenant by the defendant whilst assignee of the term, the former by reason of his covenant with the original lessor and the latter by reason of his being assignee of the term and having committed the

breaches whilst assignee, and inasmuch as the plaintiff had been compelled to pay damages to his lessor for these breaches of covenant by the defendant, which the defendant was also compellable under privity of estate to pay to the lessor, he, the defendant, was liable to indemnify the plaintiff in respect of these payments of which the defendant had had the benefit. For, as Willes, J., puts it in *Roberts* v. *Crowe*, L. R. 7 C. P. 629, at p. 637, 20 W. R. C. L. Dig. 18, the lessee is liable for breaches of covenant committed by the assignee, but being only secondarily liable he has his remedy over against the person primarily liable—that is, the assignee. The *ratio decidendi* of *Moule* v. *Garrett* is this: If A. is compellable to pay B. damages which C. is also compellable to pay B., then A., having been compelled to pay B, can maintain an action against C. for money so paid, for the circumstances raise an implied request by C. to A. to make such payment in his case. In other words, A. can call upon C. to indemnify him: see the notes to *Lampleigh* v. *Brathwait*, 1 Smith's Leading Cases, at p. 160 (9th ed.), and cases there cited. To raise this implied request both A and C. must, in my judgment, be compellable to pay B., otherwise, as it seems to me, the payment by A. to B. so far as regards C. is a voluntary payment, which raises no implication of a request by C. to A. to pay. If Cockburn, C.J., in his alternative reason in *Moule* v. *Garrett* for holding the defendant liable meant this by the expression "by the legal default of another," I agree; but if it means by a default for which he was not compellable to pay in that case to the original lessor, I do not agree, and none of the other learned judges who decided that case adopted what Cockburn, C.J., then said, and, indeed, Willes, J., expressly points out that the obligation of the contract must be common to the plaintiff and the defendant, and the whole benefit must be taken by the defendant. In the present case the defendants are underlessees of an assignee of the term, and are not liable at all to the original lessor for rent whenever it accrued, there being between them and the original lessor neither contract nor privity of estate, and there is no suggestion that there were goods upon the demised premises available for distress other than the goods of the mortgagor Price, even if this would have sufficed to maintain the action, about which I say nothing, for it is not before me. The above, in my judgment, is what was decided in *Moule* v. *Garrett*, and the present case, as it appears to me, is an attempt to stretch the decision of that case and to say that the principle therein laid down applies equally to the case of an underlessee of an assignee who is not compellable to pay the original lessor as to the case of an assignee who is compellable to pay the original lessor. It will be seen upon looking at the case of *Penley* v. *Watts*, 7 M. & W. 601, at p. 608, that Parke, B., deals with this exact point. He says: "The lessee and his assignee are liable to precisely the same extent, and the assignee is a surety for the lessee, but that is not the case in a sub-lease." And, again, in *Moule* v. *Garrett*, in the Exchequer Chamber, when it was suggested that the case of an underlessee of an assignee and an assignee of an assignee were the same, Blackburn, J., said: "No; because the underlessee has never come under any obligation to the lessor, but here the defendant, by taking the same estate which the plaintiff had, has become liable to the same obligation," and this is the foundation of the judgment of the Court of Exchequer delivered by Channell, B., and the ground upon which the judgment was upheld in the Exchequer Chamber. The fact that in this case the defendants covenanted with Price, the assignee, that if they, the defendants, became mortgagees in possession they would pay the rent, gives Price a remedy against them subject to any set-off which may exist between him and them, and does not give the present plaintiffs a right of action against them. In my judgment, for the reasons above, this action is not maintainable. I agree in the judgment of my brother Channell and think that this appeal must be dismissed with costs.

RIGBY, L.J., read the following judgment: The only question in this case is as to the liability of the defendants, who are mortgagees by sub-lease of an assignee of a lease originally granted to the plaintiffs, to indemnify the plaintiffs in respect of rent recovered by the lessor against them on their covenant in the lease. The mortgagees entered into possession of the leasehold property by virtue of their sub-term in 1890, and the assignee became bankrupt in 1891.

Now, *primâ facie*, a sub-lease of a lessee or assignee of a term comes under no liability to the original lessor, either for payment of rent or performance of covenants in the original lease. This is true, whether the sub-lease be by way of sale or by way of mortgage, and entry into possession of the sub-term does not make the sub-lessee liable to the lessor. But it is said that the present case is distinguishable from the ordinary case by the fact that the mortgagees expressly covenanted with their mortgagor (assignee of the lease) that, if they entered into possession, they would out of the rents and profits received by them (among other things) pay the rent, and that they have been, as they have, in possession during the whole time during which the rents recovered by the lessor against the plaintiffs, original lessees, have been accruing. The argument is that they are thus placed in the position of the defendants in *Moule* v. *Garrett*, who were held liable to repay to the plaintiff money which the latter had been compelled to pay to the original lessors for breach of covenant in the original lease. In that case the plaintiff, like the plaintiffs here, was original lessee, who had assigned the term before the breach on which he was sued, but the defendants were not, like the defendants here, holders of a sub-term, but were the actual owners at the time of the breach by puisne assignment of the whole of the original term, and in that capacity liable, by privity of estate, to the original lessors for the very damages which had been recovered by them against the original lessee, who in the action was seeking to recover them over. Both plaintiff and defendants were under a direct obligation to pay the rent to the lessors, but the defendants reaped all the benefit of the payment. It was treated as plain that, as between the plaintiff and defendants, the liability of the defendants to the original lessors by privity of estate was in the nature of a primary liability, that of the plaintiff by privity of contract being secondary; and on this ground the plaintiff was held entitled to recover over against the defendants, as though he was in a manner surety for them for payment of their debt. Here there is no privity either of estate or contract between the defendants and either the original lessor or the plaintiff, so that there can be nothing analagous to the relation of principal and surety between them. The reasoning in *Moule* v. *Garrett*, therefore, has no application.

If the assignee had been solvent, the plaintiffs would have had a sufficient remedy in recourse to him. The fact of his having become bankrupt can give no right of action against the defendants on the principle of *Moule* v. *Garrett* which did not otherwise exist. The Legislature has made provision in the Bankruptcy Acts for the adjustment of rights of bankrupt holders of leases and other parties interested,

and it is in bankruptcy, if anywhere, that the plaintiffs must find their remedy.

VAUGHAN WILLIAMS, L.J., read the following judgment: In this case Moore by an indenture of lease dated the 3rd of April, 1882, let to the plaintiffs two houses numbered 12 and 14, Lordship-lane, Tottenham, at the yearly rent of £20. The plaintiffs on the 5th of April, 1889, assigned the term to Edward Price, who covenanted to pay the rent of £20 a year reserved by the lease of the 3rd of April, 1882, and to indemnify the plaintiffs therefrom. By an indenture of mortgage dated the 18th of October, 1889, Price, in consideration of the sum of £400 lent him by the defendants, the Tottenham and Edmonton Permanent Investment Building Society, demised to the defendants the said houses for the remainder of the said term of ninety-nine years except the last day of such term by way of mortgage for securing to the society the payment by the mortgagor of 180 advance instalments of £3 14s. each, payable monthly, and all fines and other sums which according to the rules of the society might become payable by him. The mortgage deed provided for the mortgagor remaining in possession until default by the mortgagor in the payment of the instalments and fines or in the payment of the rent reserved by the lease under which the mortgagor held, and that, if such default should be made, the society might distrain for the amount of the monthly payments and fines, and the amount of any payments made by the society under the powers thereby conferred upon them, as for rent in arrear upon a common demise, and might enter into possession of the premises or the rents and profits thereof, and might demise or sell the premises, and should, out of moneys so received by them, whether the same were the rents and profits or purchase-money, pay in the first place the rent reserved by the lease under which the mortgagor held, and, in the next place, retain for the said society all advance instalments, fines, &c., and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would have to be paid by the mortgagee in case he were about to redeem, and pay the surplus, if any, to the mortgagor. Price has become bankrupt, and the defendants have gone into possession. There is no evidence what rents, profits, or proceeds they have actually received. The only remaining fact is that the plaintiffs have been called on to pay, and have paid, the principal rents since April, 1892.

The question raised in this case—namely, whether an underlessee who is a mortgagee by way of demise from an assignee of the lessee, and who is in possession of the demised lands, can be sued for money paid by the lessee, who has been compelled according to his covenant to pay the rent reserved by the principal lease, has not, so far as I know, been directly determined until now. It is plain that, generally speaking, an underlessee, whether holding of the lessee or of the assignee of the lessee, cannot be under any obligation to indemnify the lessee against the claim of the lessor for the rent reserved by the lease, because the underlessor generally is presumed to indemnify the underlessee against the rent payable by the principal lease (see *Jones* v. *Morris*, 3 Exch. 742), and the payment of the rent would not therefore be for his relief. The case of *Moule* v. *Garrett* does not determine the question, although it goes far to define the principles upon which the question must be decided. In *Moule* v. *Garrett* the defendants were not underlessees, but assignees of the term, and the ground upon which they were held to be liable was that, the lessee and the defendants both being liable to the lessor upon all the covenants in the lease, which ran with the land, the former by contract and the latter by privity of estate, the defendants, having had the whole benefit for which the covenant was entered into by the plaintiff as lessee, were liable to recoup to the plaintiff the amount which he had been compelled to pay the lessor for breaches of covenant occurring during the defendants' possession. Channell, B., in delivering the judgment of the majority of the court, says: "It is true that there is no express covenant between the parties, but they are each liable to the lessor for the performance of the covenants; they are each directly liable, and the lessor may sue either at his option; but the assignee having at the time the estate which has been the consideration for the covenants ought, as between himself and the lessee, to perform them"; and in the Exchequer Chamber Blackburn, J., says: "I express my entire concurrence in what fell from Channell, B."; and Willes, J., says: "I concur upon the ground that where two parties have become bound, the one by contract and the other by estate, to perform the same covenant, the former is entitled to indemnity against the latter to the extent of his interest, although there is no immediate privity of contract between them; and I think that the defendants are liable in this action by reason of their having had the whole benefit for which the covenant was entered into by the plaintiff as lessee. The principle of the decision in *Deering* v. *Earl of Winchelsea*, 2 Bos. & P. 270, appears to govern the case." Cockburn, C.J., bases his judgment on precisely the same ground, but adds: "There is another ground upon which the judgment of the court below may be upheld—namely, that the premises, the subject-matter of this lease, being in the possession of the defendants, they were the parties whose duty it was to perform the covenants to be performed upon and in respect of those premises, and whose immediate duty it was to keep those premises in repair. By reason of their default the plaintiff, the original lessee, became liable (although he had parted with the estate) by the terms of his covenant to make good to his lessor the damage which had arisen from the default of the defendants; and I take it to be a general proposition applicable to such a case as this, that, where one man is compelled to pay damages by reason of the default of another, he is entitled to recover compensation from the person through whose default that damage is occasioned. The reason for this rule appears to be well stated in Mr. Leake's excellent work on contracts. The passage referred to runs thus: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount": Leake on Contracts, 1st ed., p. 41. Now, what (according to the judgments of Channell, B., Blackburn and Willes, JJ.) were the conditions upon which the liability of the defendants to the plaintiff was based? First, that the plaintiff and defendants were both liable to be sued by the lessor for the same breaches of the same covenant; second, that the defendants had had at the date of those breaches the whole benefit of the land the subject of the lease containing that covenant.

These being the conditions upon which the defendants in *Moule* v. *Garrett*, the sub-assignees of the lease, were held liable, it is necessary to consider whether one finds these conditions in principle present in a case in which lessees, who have been compelled to pay the rent reserved by the lease, are seeking to get recoupment from underlessees of an assignee of the lease, who are in possession as

mortgagees. Now, first, as to the common liability of the lessee and underlessee, they clearly are not both liable to be sued by the lessor for rent. The lessee alone can be sued, and the underlessee is only liable to the lessor in the sense that the lessor has a remedy *in rem* by distress on goods on the property demised and by the power of re-entry for non-payment of rent or breach of covenant. It is in this sense only that the underlessee can be said to be liable to the lessor for the rent, and, so far as distress is concerned, his direct liability is limited to cases in which he happens to have goods on the land, although he may have an indirect liability to indemnify against distress those who, by his license having goods on the land, have been compelled to redeem their goods from distraint. Is this a common liability within the reason upon which the condition is based? I think it is not. I am now dealing only with the principle upon which the common law liability is based. There is a common law principle of liability and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or *pro tanto*, as in the case of a surety who has paid and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued. The two principles are well illustrated by the cases of *Hunter* v. *Hunt*, 1 Q. B. 300, and the observations of Eyre, C.B., in *Deering* v. *Winchelsea*. The former was a case in which one underlessee of a separate portion of premises, the whole of which were held under one original lease at an entire rent, who had paid the whole rent under threat of distress, brought an action against an underlessee to recover from him a proportion of the money which he had so paid as money paid to his use, and it was held that at law he had no right of action. In the latter case the Lord Chief Baron, in dealing with the principle in equity, takes as an illustration of the equitable principle a series of cases in some of which the defendant seems to have been under no liability to be sued, but in which the goods of one had been legally taken or sacrificed for the benefit, not of himself alone, but of himself and others, and says that "the reason is that they are all in *æquali jure*, and as the law requires equality, they shall equally bear the burden. This is considered as founded in equity. . . . The principle operates more clearly in a court of equity than at law. At law the party is driven to an *audita querela* or *scire facias* to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law." The *audita querela*, which is a defendant's writ, and the *scire facias* both assume a legal liability to judgment or execution in some person other than him against whom judgment has been obtained. The case also of *Leigh* v. *Dickeson*, 33 W. R. 538, 15 Q. B. D. 60, in which it was held that one tenant in common of a house who expends money upon the repairs of the house has no right of action against his co-tenant in common for contribution in respect of money so expended, is based upon the consideration that there is no common liability to repair, and seems further to show that in equity as well as at law there must at least be a legal liability on the plaintiff to pay the sum or bear the burden in respect of which he seeks recoupment or contribution from the defendant. This seems to me to account for the common law condition that the defendant cannot be liable to be sued for money paid unless he is personally liable to be sued for the money which the plaintiff claims to have paid to his use. The common law condition may also be explained by reference to the form of action, "money paid to the use of the defendant at his request," for it seems that, unless the defendant is under a personal liability to pay the money which the plaintiff has assumed to pay for him, one cannot imply the authority from the defendant to the plaintiff to make the payment on his behalf. This proposition does not, of course, extend to cases where the contractual relation of the parties, whether by express contract, or by contract to be implied from their dealings with one another, raises a request or authority to pay, but otherwise I believe it of universal application in an action for money paid: see *Lewis* v. *Campbell*, 8 C. B. 541, p. 549. For these reasons I think that the right of the lessor to distrain or re-enter does not constitute a liability in the underlessee to the lessor within the meaning of the condition of the common law principle. But the plaintiff may be entitled to recover within the equitable principle, if he has been compelled to pay or bear the burden, and can establish that the defendant has such an interest or benefit as to make the maxim apply *qui sentit commodum, debet sentire et onus*; but in my judgment an underlessee has no such interest in the lease or benefit from the payment of the rent as to make that maxim apply or to bring him within the equitable principle. The equitable principle seems to me based upon natural justice requiring that equity should neutralize *inter se* the accident that the burden has been borne by one for the benefit of others associated with him in interest, whether such incidence of burden is the result of election of a plaintiff who might have sued all those interested, or whether it is the result of the requirements of the law as to the parties to actions, or whether it is the result of what may be more properly called "accident," like the "jettison" of a part of a cargo severally owned, or the seizure of wines on behalf of the Crown in right of prisage. For each of these cases the application of the equitable principle depends on community of interest in something in respect of which one has borne a burden for the benefit of another or others. The covenant in accordance with which a lessee pays rent or expends money in repairs is a covenant in a lease in which the underlessee has no interest. He has no contractual interest and no estate is vested in him; the only sense in which it can be said that he has an interest in the lease is that the lessee or assignee of the lease who has granted the underlease cannot defeat his own grant by a collusive surrender of the lease to the original lessor, and it does not seem to me that this fact constitutes such an interest in him that he can within the equitable principle be said to have an interest in the lease containing the covenant under which the lessee is compellable to do the act alleged to have been done for the benefit of the underlessee. The case of the assignee of a lease, on the contrary, does show the necessary interest, as is well-illustrated by the judgment of Popham, C.J., and the whole court in *The Dean and Chapter of Windsor's case*, quoted by Tindal, C.J., in *Tremeere* v. *Morison*, 1 Bing. N. C. 89 at p. 98, "that the action of covenant did lie, although the lessee had not covenanted for him and his assigns; for such covenant which extends to the support of the thing demised is *quodammodo* appurtenant to it, and

goes with it: and in respect the lessee hath taken upon him to bear the charges of the reparations the yearly rent was the less which goes to the benefit of the assignee and *qui sentit commodum, sentire debet et onus.*" It may be remarked on this passage that the rent payable by the underlessee has no necessary relation to the rent reserved by the lease.

In conclusion, in my judgment the defendants have not within either the equitable or common law principle such an interest in the lease that it can be said that the payment by the lessees of the rent reserved by the lease was a payment for their benefi or relief, and I do not think that it makes any difference that the underlease was in fact a mortgage by demise.

The only other question with which I have to deal is the question whether there is anything in the provision in the underlease or mortgage by demise for the application of the rents and profits to the payment of the rent reserved by the lease in case the mortgagees go into possession which will enable the plaintiffs to maintain this action. I think not. It is plain that, apart from the provision for the application of rents and profits, an underlessee who has bought an interest by way of underlease from an assignee of the lease by the payment of a lump sum cannot, according to any principle, be called on to pay again for that for which he has already once paid by ndemnifying the lessee against the periodical rent as it accrues from time to time. Now, so far as the clause for the application of the rents and profits is concerned, first, it is plain that the lessee cannot at law take advantage of a contract to which he is not a party. It may be true that the trustee in Price's bankruptcy, who does not seem to have disclaimed, may be entitled to compel application of the rents, profits, and proceeds to the payment of the paramount rent, as being a fund held by the defendants in trust for that purpose, and the plaintiffs are, I think, entitled to insist upon the trustee in Price's bankruptcy on proper terms taking proceedings to enforce the application of the fund; but I do not think that the lessees can, at all events in this action as framed and with these parties, enforce that trust. It is not as if the defendant society was in course of liquidation and the lessees were attempting to carry in a proof to enforce the indemnity due from the estate to their debtor. It is sufficient, however, to say that the judgment of Channell J., in the action before him was quite right, and that the plaintiffs cannot in it recover any indemnity from the defendants.

With regard to the second ground upon which Cockburn, C.J., based his judgment in *Moule* v. *Garrett* I do not think that it is anything more than a statement of the principle of *Deering* v. *Winchelsea*, which principle is the foundation of all the cases in which the assignee has been held liable to recoup a lessee who has been compelled to pay rent as it were as surety for the assignee. It seems to me that no injustice is done to the plaintiffs by holding that they must fail in this action, for I am of opinion that if they take proper steps against the trustee in bankruptcy, they can in effect recover this rent from the defendants, provided the state of things is such that the trustee can compel the defendants to apply moneys received to the payment of these rents in arrear; and, moreover, as the trustee has not disclaimed, they have, it seems, a remedy against the trustee personally as an assignee of the lease in respect of such rents as have accrued since the bankruptcy, unless and until the trustee assigns over. I have only to add with regard to the cases of *Sapsford* v. *Fletcher*, 4 T. R. 511; *Taylor* v. *Zamira*, 6 Taunt. 524; *Dawson* v. *Linton*, 5 B. & Ald. 521; and *Exall* v. *Partridge*, 8 T. R. 308, which were cited to us, that each of these cases turned really on the contractual relations of the parties.

Appeal dismissed.

Solicitor for the plaintiffs, *Albert Saunders.*

Solicitors for the defendants, *Howard & Shelton*, for *C. E. Burrows*, Tottenham.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — July 29, 30; Aug. 1, 11, 1898.

In re STOCKPORT RAGGED AND INDUSTRIAL SCHOOLS. (*a.*)

Charity—Industrial school—Endowment—Mortgage of property—Petition—Consent of Charity Commissioners—"Cathedral, collegiate, chapter, or other schools"—Words ejusdem generis—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66.

The proviso at the end of section 62 *of the Charitable Trusts Act*, 1853, *that the "exemption" thereby conferred shall not extend to "any cathedral, collegiate, chapter, or other schools," does not extend to all schools, but only to the schools there mentioned and others of a similar description.*

Decision of Stirling, J. (46 *W. R.* 455, [1898] 1 *Ch.* 610), *affirmed.*

Government grants and contributions by school boards and other public bodies to an industrial school are not voluntary contributions within the meaning of section 62.

The trustees of an industrial school which possessed land and buildings occupied by the school, and was maintained partly by voluntary subscriptions and partly by a Government grant and contributions from public bodies, presented a petition asking for the consent of the court to a mortgage of the school lands and buildings.

Held, that the consent of the Charity Commissioners was required to the presentation of the petition and the proposed mortgage, the property to be mortgaged being a permanent endowment.

Whether the Charity Commissioners have jurisdiction over the voluntary subscriptions of a charity which is maintained by voluntary subscriptions and possesses a permanent endowment yielding no income, quære.

This was an appeal from a decision of Stirling, J. (reported 46 W. R. 455, [1898] 1 Ch. 610).

The facts were as follow: Prior to 1865 a school for poor children had existed at Stockport, which was managed by a committee, and was supported at first entirely by voluntary contributions, but these were afterwards augmented by a Government grant. In 1865 the committee purchased a freehold house and grounds called Town End House. The consideration was a perpetual rent-charge of £20 a year, and on the 28th of November, 1865, the premises were conveyed to three nominees of the committee, subject to the rent-charge. No trusts were declared by the indenture of conveyance. By the aid of donations from the Marquis of Westminster and other voluntary contributions the existing building was improved and new buildings erected, and the school was carried on on the premises. In 1866 the school was certified under the Industrial Schools Act, and was thenceforth called the Stockport Ragged, Industrial, and Reformatory Schools.

The annual rent-charge of £20 was always paid out of the general funds of the charity.

By an indenture dated the 20th of June, 1866, the three nominees above mentioned conveyed the Town

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

End House property, subject to the rent-charge, to fifteen trustees upon trust to permit the land and schoolhouse to be used as a ragged, industrial, and reformatory school, to be governed by a committee of management constituted and empowered as therein provided, and having the exclusive management and disposal of the funds and finances of the school. And the trustees were thereby empowered to sell the premises thereby conveyed, and to apply the proceeds in building or acquiring other larger and more convenient premises, to be settled on the same trusts as the premises thereby conveyed.

On the 7th of November, 1887, a lease for the term of 999 years, from September, 1887, of a piece of land in Dial Stone-lane, Stockport, was granted to three nominees of the trustees at the annual rent of £20, and on this site the committee of management built a schoolhouse for girls. The cost of so doing was defrayed by the committee, as to £2,000 by subscriptions, and as to £1,500 and upwards by a balance which they had in their hands, derived from legacies and from voluntary contributions and profits from the school children's industrial occupations during previous years. This building was completed in 1888, and the annual rent was paid out of the general funds of the school.

In February, 1890, a strip of land adjoining the girls' school was demised to the same three persons for a similar term and similar purposes. Owing to the growth of the town of Stockport the present buildings had become unsuitable, and the committee of management proposed to remove the boys' school to a better position, and for that purpose to sell the present premises, and out of the proceeds, together with a sum to be raised by mortgage of the girls' school, to erect a larger and more commodious school for boys. The trustees accordingly presented a petition under the provisions of Sir Samuel Romilly's Act (52 Geo. 3, c. 101), that they might be at liberty to execute such deeds as might be necessary for carrying the proposed mortgage into effect, and to apply the moneys to be raised thereby to the erection of the proposed new school.

A site had already been purchased by the committee for £1,000, which had been paid out of the general funds of the charity in the hands of the committee of management. The site had been conveyed to the nominees of the charity in fee.

The petition came on before Stirling, J., and was opposed by the Charity Commissioners on the ground that the proviso at the end of section 62 of the Charitable Trusts Act, 1853, excludes all schools from the exemption conferred by the section; and, further, that the property proposed to be mortgaged was an endowment within the meaning of section 66 of the Charitable Trusts Act, 1853, and that the sanction of the Charity Commissioners to the mortgage was necessary.

The evidence showed that the income of the school was derived from a grant from Government, contributions from school boards, boards of guardians, and other public authorities, subscriptions from residents in the neighbourhood of Stockport, and the earnings of the school children in their industrial capacity.

All donations or bequests made to the school were applied in aid of these voluntary contributions and other sources of income.

Stirling, J., held that the property proposed to be mortgaged was an endowment within the meaning of section 66 of the Charitable Trusts Act, 1853, but that the school was not included in the exception at the end of section 62. He accordingly thought that the consent of the Charity Commissioners was not necessary to the presentation of the petition, and gave the liberty prayed for.

The Charity Commissioners appealed.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appeal.—The property proposed to be mortgaged is clearly an "endowment." We submit that it does not fall within the exemption clause in section 62 at all. This charity is not entirely maintained by voluntary subscriptions; nor is it maintained partly by voluntary subscriptions and partly by income arising from endowment, because this endowment produces no income. In any case, however, we submit that the proviso takes the case out of the section.

They referred to *In re Clergy Orphan Corporation*, 43 W. R. 150, [1894] 3 Ch. 145; *Smelting Co. of Australia* v. *Inland Revenue Commissioners*, 45 W. R. 203, [1897] 1 Q. B. 175; *Fenwick* v. *Schmalz*, 16 W. R. 481, L. R. 3 C. P. 313; *In re Duncan*, 15 W. R. 526, L. R. 2 Ch. App. 356; Charitable Trusts Act, 1853, ss. 62, 66; and the Endowed Schools Act, 1867.

[LINDLEY, M.R., referred to *Anderson* v. *Anderson*, 43 W. R. 322, [1895] 1 Q. B. 749.]

Henry Johnston, contra.—These schools are not a charity within the definition of section 66 of the Act of 1853. A gift of which capital only is applicable for the purpose of the charity is not an endowment, and, except for the purposes of section 44 and 62, is no more than a voluntary gift. This is a charity wholly maintained by voluntary subscriptions, and is within the exemption in section 62, and is not excepted by the proviso at the end of that section.

He referred to Finlason on the Charitable Trusts Act, p. 3; *Fenwick* v. *Schmalz;* and the Charitable Trusts Amendment Act, 1855, s. 48.

Ingle Joyce, for the Attorney-General.

Cozens-Hardy, Q.C., replied.

Cur. adv. vult.

Aug. 11.—LINDLEY, M.R.—This case turns upon that very obscure section, the 62nd section of the Charitable Trusts Act, 1853.

Stirling, J., has held that the exception at the end of that section does not include the schools mentioned in the petition, and that the consent of the Charity Commissioners to the presentation of the petition and the proposed mortgage was not necessary.

The Charity Commissioners have appealed from that decision, and they ask this court to make a declaration that under the Charitable Trusts Act, 1853, the consent of the Charity Commissioners to the presentation of the petition and the proposed mortgage is necessary.

The Stockport Ragged, Industrial, and Reformatory School is maintained partly by voluntary subscriptions. It has payments made to it by boards of guardians and other boards for pupils who are sent to be educated there.

It has a Government grant as well, and it has also certain landed property, and the object of the present application to the court is to raise money by a mortgage of that part of this landed property which consists of the girls' school and the new boys' school.

I will first of all address myself to the main question on which the Charity Commissioners appealed—namely, what is the true construction of the proviso at the end of section 62 of the Charitable Trusts Act, 1853.

The Charity Commissioners contend that by virtue of this proviso all schools are taken out of the exemptions enumerated in the section. Now, the section enacts that the Act shall not extend to certain universities, colleges, cathedrals, or collegiate churches, and so on, giving a long list of exemptions, amongst which are enumerated Roman Catholic charities or institutions, which is an important

exemption; and at the end of the list there is this proviso: "Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools."

The Charity Commissioners ask the court to read the expression "other schools" in the largest possible sense, so as to exclude all schools whatever from the exemption, and therefore to bring them within their jurisdiction. I agree with the decision of Stirling, J., that this cannot be the meaning of the section. There are two ways of reading it: one is that the exemption shall not extend to any school; the other way of reading it is that the exemption shall not extend to any cathedral, collegiate, chapter, or other schools more or less like them. Stirling, J., has adopted the second construction, and it appears to me that this is the natural and proper construction. I am quite aware that there have been cases, such as *Anderson* v. *Anderson* (to which I drew attention during the argument), where the Court has protested against pushing the doctrine of *ejusdem generis* too far. It is very often pushed too far; but I cannot conceive why the Legislature should have taken the trouble to specify in this section such special schools as cathedral, collegiate, and chapter, except to show the type of school which they were referring to, and, in my opinion, "other schools" must be taken to mean other schools of that type.

If we were to adopt the other construction for which the counsel for the Charity Commissioners contend, and to hold that all schools were in 1853 and are now within their jurisdiction, we should, having regard particularly to the exemption of Roman Catholic charities and institutions, be running entirely contrary to the real meaning of the Legislature. I cannot help regarding this as the great point in the case, and upon it I think Stirling, J., was perfectly right.

But another point has been raised which was not so much pressed below, and in fact seems to have been rather lightly passed over. Mr. Cozens-Hardy, for the Charity Commissioners, contends that the school is within their jurisdiction because it does not fall within any of the exemptions. There, for reasons which I will give, I think he is right. Passing over the universities, colleges, and so on, the first material exemption is in favour of a charity. Having regard to the statements in the petition and the evidence as to how these schools are maintained, I do not think that they can be brought within that exemption. At all events, it is not proved that they can. Having regard to this Government grant, and to the fact that board schools and boards of guardians contribute to them, I feel great difficulty in saying that the schools come within this exemption.

Then, coming to the next one, "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall with respect to such charity extend and apply to the income from endowment only to the exclusion of voluntary subscriptions and the application thereof." I do not quite understand the words "where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment." Why cannot a charity be maintained by some other means? In other words, those two sources do not exhaust the whole of the income of a charity. Here we have got this case. This charity is unquestionably maintained partly by voluntary subscriptions. Is it maintained partly by income arising from any endowment?

Now, "endowment" there, in accordance with *In re Clergy Orphan Corporation*, must mean some endowment not arising from the investment of voluntary subscriptions. It is said by Mr. Cozens-Hardy, and in point of language I can see no answer to it, that this school land and school buildings do not yield income, and therefore you cannot say that this charity is maintained partly by income arising from any endowment. There is no income from endowment if you read the word "endowment" in that narrow sense. As I say, I do not see the answer to that on the words; but if that is the true mode of interpreting the expression "partly by voluntary subscriptions and partly by income arising from any endowment," and you hold that this school is not within the exemption, what do you do? You throw the whole school under the jurisdiction of the Charity Commissioners and give them power over the voluntary subscriptions, which is a result very formidable, and certainly one not contemplated by the Act of Parliament, and, I should say, contrary to what is obviously meant, which is that the Charity Commissioners shall not have jurisdiction.

If in order to avoid that startling result one puts an artificial sense on the word "income," although there is none, by treating the institution as occupying the lands and schools at an occupation rent, receiving it on the one hand and paying it on the other—if you look at it in that way, then you bring the endowment within the jurisdiction of the Charity Commissioners, because, subject to certain exemptions, they are to have jurisdiction over the income from the endowment; and further, if you put that forced construction on the language in order to escape from the consequences which flow from the other construction, then it will follow that the Charity Commissioners have the power and the right to be consulted about this mortgage.

I do not propose at present to decide the very knotty point whether the Charity Commissioners would have general power over the voluntary subscriptions of schools like this. I see the difficulty, but I leave it until it arises. Construe the clause as you will, it appears to me the Charity Commissioners ought to be consulted about this particular mortgage. Therefore, although I agree with Stirling, J., upon what I call the great point of the interpretation of the proviso, I think he has inadvertently fallen into a mistake in saying it follows that in this case the Charity Commissioners ought not to be consulted. The consequence is that his order must be varied in accordance with the notice of appeal, and there must be a declaration that under the Charitable Trusts Act, 1853, the consent of the Charity Commissioners to the presentation of the petition and the proposed mortgage is necessary.

CHITTY, L.J.—I am of the same opinion. The point that was seriously argued before Stirling, J., was upon the proviso at the end of the 62nd section. If the proviso is applied it takes the charity out of the exemption, and therefore leaves it, under the main provisions of the 62nd section, within the jurisdiction of the commissioners. Upon the construction of the proviso I entertain no doubt whatever. The proviso is that the exemption shall not extend to "any cathedral, collegiate, chapter, or other school." It appears to me that, reading those words by themselves, and seeing what a number of endowed schools there are in the country, it cannot be the intention of the Legislature, when it begins by speaking of "cathedral, collegiate, chapter" in that way, and then goes on to "or other schools," that all other schools of whatever character or denomination, including Roman Catholic and the like, shall be included within the proviso, and, therefore, taken out of the exemption. The reason why "cathedral"

and "collegiate" are put in is plain from the opening part of the 62nd section, which relates to cathedral or collegiate churches, and takes them out of the general jurisdiction. Now, there are schools attached to cathedral or collegiate churches, and such of those schools as are charities are intended to be put back into the jurisdiction. The class of schools mentioned—namely, "cathedral, collegiate, or chapter," are of the most peculiar and special class of schools connected with the Church of England. I do not stay to say what is meant by "chapter." There seems to be some difficulty about it, whether there is in this country such a thing as a chapter school. The word may have some meaning counsel has not explained, but that is a class of school indicated. I am of opinion that the "other schools" cannot be read by itself, but must be schools of the like class. I entirely agree with Stirling, J.'s, observations on this point, and I shall not weaken them by repeating them.

Then, with regard to the other point which was mentioned to Stirling, J., but not seriously argued, I think the commissioners are right. With the intention of founding a school, land was taken by conveyance to certain persons who did not declare the trusts thereof. The money for the purpose of building the school was subscribed by the Marquis of Westminster (as he then was) and some other gentlemen, and the school was duly erected.

After the school had been erected a conveyance was made to trustees by the deed of 1866, and under that deed the land with the buildings thereon became, and was, a permanent endowment, an endowment which the trustees were no longer able to treat as being income. The trusts declared by the deed were—first, that the building should be used as a school. Then there was a power of sale, with a direction to lay out the money in purchasing a better site for a school, but the land proposed to be thus acquired was subject to the same trust as the original land.

In these circumstances the trustees had a power of sale which they have purported to exercise. They have agreed to sell the land and school above mentioned, and they purpose with the purchase-money when they get it, and with the money they are going to raise on mortgage, to provide and build a new boys' school.

Now, it seems to me, without going through this very troublesome 62nd section, that the commissioners are right, at any rate as to their consent being required; and it is quite enough for the decision of the case that here there was a fixed permanent endowment. Now, the Charity Commissioners contend that their consent to the presentation of this petition was requisite under the 17th section of the Act of 1853—a consent which I understand they have given, but without prejudice to the appeal.

I am not much disposed to unravel this tangled skein of the 62nd section, and the only observation I make about it is that I conceive that the Legislature did not intend that any charity that was maintained by voluntary contributions should, so far as it was so maintained, be within the jurisdiction of the commissioners; but it is not necessary, in my opinion, to dive further into the section, or try to find its meaning if the commissioners are right on the simple point (and on that my decision goes) that there is here a permanent endowment in the shape of land which the trustees cannot treat as income.

COLLINS, L.J.—I am of the same opinion.

Solicitors, *Clabon; Andrew, Wood, & Purves*, for *John W. Johnston*, Stockport; *Treasury Solicitor*.

High Court of Justice.

Chan. Div. Stirling, J. } Nov. 8, 9; Dec. 8.

In re WASDALE.
BRITTIN *v.* PARTRIDGE. (*a.*)

Trustee—Notice—Assignment—Notice to trustees—Notice to new trustees—Priority.

An assignee who has given notice to all the trustees in existence at the time of his assignment is not bound to give notice to every new trustee, and is entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all the original trustees and given notice to the new trustees.

This was a summons raising the question whether an assignee who has given notice to all the trustees in existence at the time of his assignment is bound to give fresh notice on the appointment of new trustees.

The facts were as follows: Under the will of Matthew Wasdale, who died in 1856, Edward Nix Watson became entitled to a reversionary interest in the proceeds of sale of certain lands devised to trustees upon an imperative trust for conversion.

By an indenture dated the 9th of February, 1871, Edward Nix Watson assigned this interest to John Samuel Partridge, who in the same month gave notice of the assignment to Dingley Askham Brittin and Robert Burton, then the sole trustees of the testator's will.

In June, 1881, the survivor of these trustees died, and thenceforth down to 1896 his executors appear to have acted as trustees of the will of Matthew Wasdale. On the 1st of July, 1896, the plaintiffs were duly appointed trustees of that will.

By an indenture dated the 27th of February, 1897, Edward Nix Watson assigned his interest under the will of Mr. Wasdale (still reversionary) to Louisa Bell, widow, by way of mortgage to secure repayment of £400.

On the 28th of February, 1897, Mrs. Bell gave notice of her incumbrance to the plaintiffs, the trustees of Wasdale's will.

Subsequently the interest of E. N. Watson fell into possession, and as it was claimed both by Partridge and by Mrs. Bell, the present summons was taken out by the plaintiffs, the trustees of the will, to determine the priority between them.

Tebbutt, for the trustees.

R. F. Norton, for J. S. Partridge.—I gave notice to all the trustees in existence at the time of the assignment. The death of the trustees cannot take away my priority. The only case against me is *Timson* v. *Ramsbottom*, 2 Keen 35. *Ward* v. *Duncombe*, 42 W. R. 59, [1893] A. C. 369, is in my favour.

Eustace Smith, for Mrs. Bell.—The facts in *Timson* v. *Ramsbottom*, were very much the same as in this case. The whole rule as to notice was established to give protection against fraud, and it ought to apply on the appointment of new trustees.

He referred to *Dearle* v. *Hall*, 3 Russ. 1; *Foster* v. *Cockerell*, 3 Cl. & Fin. 456; *Browne* v. *Savage*, 7 W. R. 571, 4 Drew. 635; *Phipps* v. *Lovegrove*, 21 W. R. 590, L. R. 16 Eq. 80; *Hallows* v. *Lloyd*, 37 W. R. 12, 39 Ch. D. 686; *Ward* v. *Duncombe*; *In re Hall*, 7 L. R. Ir. 180; White & Tudor's (last ed.), vol. i., p. 122; Lewin on Trusts (last ed.), p. 858.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Norton replied.

Cur. adv. vult.

Dec. 8.—STIRLING, J., stated the facts and continued:

The assignment to Partridge is earlier in point of date, and is consequently entitled to priority unless the subsequent assignee establishes that she has a better title in equity.

It has been held that where, as here, a fund consisting of personal estate is vested in trustees a subsequent assignee who gives notice of his assignment to the trustees has a better title in equity than a prior assignee who has entirely omitted to give notice of his: *Dearle* v. *Hall*, 3 Russ. 1; *Foster* v. *Cockerell*, 3 Cl. & Fin. 456. If, however, one only of the trustees in existence at the date of the second assignment had notice of the prior assignment, that assignee does *not* lose his priority: *Ward* v. *Duncombe*, 42 W. R. 59, [1893] A. C. 369.

It has been further held in *Timson* v. *Ramsbottom*, 2 Keene 35, and *In re Hall*, 7 L. R. Ir. 180, that an assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice was given. In the latter case the Vice-Chancellor in Ireland gave as a reason that it is the fault of the earlier assignee that he did not give notice to both trustees, and refers to *Meux* v. *Bell*, 1 Hare 73.

So far as the decisions have gone, I am now asked to hold that an assignee who has given notice to all the trustees in existence at the time of his assignment is not entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all these trustees and who gives notice of such assignment to the new trustees. That, as I think, goes beyond the decisions in *Timson* v. *Ramsbottom* and *In re Hall*, for in both cases the assignee omitted to give notice to a trustee in existence when he took his assignment.

The principle on which the doctrine of the court as to notice is founded was the subject of much discussion in the House of Lords in the recent case of *Ward* v. *Duncombe*. Lord Herschell, after referring to *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, says: "It is impossible, I think, to read these judgments without seeing that the leading consideration which induced the court to lay down the rule that he who gives notice has a better equitable right than a prior incumbrancer who has given no notice was this, that any other decision would facilitate fraud by the *cestui que trust*, and cause loss to those who might have used every precaution that was possible to ascertain, before parting with their money, that the title they were taking was a valid one, and who might have done everything they could to render that title secure"; and Lord Macnaghten says: "I have made these observations, not for the purpose of impugning the authority of the rule in *Dearle* v. *Hall*. The rule is settled law. But it seems to me that when your lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded. For the reasons which I have already given, I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case. There is one argument which I ought to notice before I conclude. It was said that if the mortgage had not been created until after Mr. Sharp's death, and the mortgagees had then given notice to the surviving trustee, they would have gained priority. That may be so. But that is not this case. I take leave, however, to doubt whether the proposition on which the argument is founded can be treated as settled law. There is no authority for it that I know in this country but the case of *Timson* v. *Ramsbottom* before Lord Langdale, M.R. I do not think that that case can be regarded as one of much weight, for it was appealed, and after the appeal was opened the parties came to a compromise, and moreover, it will be observed that his lordship seems to have thought that the notice in that case was insufficient even during the lifetime of the person who received it, because he held that each one of the other holders of the fund being executors 'had separate authority to receive and pay on account of the estate,' and he thought that if they had no notice of the assignment they 'might have made payment without incurring any liability on that account.' As Westbury, L.C., says in *Willes* v. *Greenhill*, 10 W. R. 33, 'It is well established, whether rightly or wrongly, that upon assignments or mortgages of equitable interest in property held by trustees, the duty devolves upon the assignee or mortgagee to give to the trustees notice of the assignment or incumbrance. But it may be that when an assignee or mortgagee has once discharged that duty he has done all that the rule requires of him, and that for the rest the law holds, as Lord Cairns lays it down, and that he is not, on a change of trustees, to be deprived of his pre-existing equitable title by the diligence or by the happy thought of a subsequent incumbrancer. Certainly I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think, would be less likely to conduce to the security of equitable titles."

In my opinion it would be imposing an unreasonable burden on assignees to hold that they are under an obligation to give notice to every new trustee, or are to be treated as guilty of neglect to take reasonable precautions if they omit to do so. I think, therefore, that the title of Partridge must prevail.

Solicitors, *H. E. Watts*, for *Day & Watts*, St. Ives, Hunts; *Munk & Co.; Prince & Co.*

Chan. Div. } Oct. 29; Nov. 21; Dec. 7.
Romer, J. }

ELLIS v. BEDFORD (DUKE). (a.)

Practice—Parties—Joinder of plaintiffs—Class actions—Preferential rights of market gardeners in Covent Garden Market under 9 Geo. 4, c. cxiii.—R. S. C., ord. 16, rr. 1, 9.

Ord. 16, r. 9, which provides for persons suing or being sued as representing a class, only extends to cases where the class have or claim some beneficial proprietary right which is being asserted or defended in the action.

By the Act for the Regulation of Covent Garden Market (9 Geo. 4, c. cxiii.), certain stands were exclusively appropriated to the reception of wagons and carts belonging to growers of fruit, flowers, vegetables, roots, and herbs, at tolls or rent according to a schedule, and such growers were to be deemed to be persons having preferential rights to resort to such stands under the provisions of the Act. The plaintiffs in the above action were six market gardeners, who sued on behalf of themselves and all other such growers as aforesaid attending Covent Garden Market for a declaration that the defendant, the owner of the market, should not deprive them of preferential rights as to stands conferred by the statute.

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

The defendant applied to set aside the proceedings, on the grounds that the plaintiffs, as having separate and distinct causes of action, could not join, and also could not, as private individuals, sue on behalf of a class of the public.

Held, that the growers, as a class, had not any proprietary rights in respect of the market under the provisions of that Act in their favour, and that such right as the growers as a class had thereunder was in the nature of a public right which must be enforced at the suit of the Attorney-General.

Temperton *v.* Russell, 41 *W. R.* 321, [1893] 1 *Q. B.* 435, *followed.*

Held, also, that the plaintiffs had not and did not claim any right to relief "in respect of or arising out of the same transaction or transactions," and therefore the six several claims of the plaintiffs as individuals were not rightly joined under ord. 16, *r.* 1.

Summons.

The plaintiffs in the above action were six market gardeners, who sued on behalf of themselves and all other growers of fruit, flowers, vegetables, roots, or herbs, within the meaning of the enactment referred to below, for a declaration that the defendant, who was the owner of Covent Garden Market, was not entitled to exclude them from certain preferential rights as to stands conferred by the Act for the Regulation of Covent Garden Market (9 Geo. 4, c. cxiii.), and they also claimed consequential relief. The said Act, after certain provisions as to a portion of the said market delineated in a plan therein referred to, which provisions are not material for the purposes of this report, contains amongst others the following provisions (section 7): "That the remainder of the said market shall, subject to the provisions hereinafter contained, be appropriated as follows, namely: Those parts thereof which are marked respectively in the said plan with the letter (B) shall be divided into stands, which stands shall be called 'The Casual Cart Stands,' and shall (except and subject as hereinafter mentioned) be exclusively appropriated to the reception of wagons and carts in which fruit, flowers, vegetables, roots, or herbs shall be brought to the said market for sale, and for the exposing to sale and selling such fruit, flowers, vegetables, roots, or herbs on the stand to which the same shall be brought, subject to such tolls or sums of money as are in the schedule to this Act in that behalf mentioned, and the growers of fruit, flowers, vegetables, roots, or herbs shall be deemed to be the person having the preferable right to resort to such stands under the provisions of this Act. Those parts of the said market which are marked respectively in the said plan with the letter (C) shall be divided into stands, which stands shall be called 'The Yearly Cart Stands' and shall (except and subject as hereinafter mentioned) be exclusively approriated to the reception of wagons and carts of or belonging to growers of fruit, flowers, vegetables, roots, or herbs, and to the exposing to sale and selling the fruit, flowers, vegetables, roots, or herbs grown or reared by such growers and be let by the said Duke [*i.e.*, of Bedford], his heirs or assigns, being owners of the said market, or their tenants thereof by the year or for any shorter period at such yearly or other rents and subject to such tolls or sums of money as are in the schedule to this Act in that behalf mentioned, and the person to whom any such stand shall be let shall be deemed to be the holder thereof, and the person having the preferable right to resort thereto under the provisions of this Act.

"Those parts of the said market which are marked respectively in the said plan with the letters (F and G) shall be divided into stands, which stands shall be called 'The Yearly Pitching Stands' and shall (except and subject as hereinafter mentioned) be exclusively appropriated to the exposing to sale and selling fruit, flowers, vegetables, roots, or herbs, and may be let by the said Duke, his heirs or assigns, being owners of the said market, or their tenants thereof exclusively to growers of fruit, flowers, vegetables, roots, or herbs by the year or for any shorter period at such yearly or other rents and subject to such tolls or sums of money as are in the schedule to this Act in that behalf mentioned, and the person to whom any such stand shall be let shall be deemed to be the holder thereof and the person having the preferable right to resort thereto under the provisions of this Act."

The plaintiffs in the above action were all growers of fruit, vegetables, roots or herbs, and frequenters of the market for the purpose of sale, and they complained that the defendant, who was the owner of the market, did not within the meaning of the Act comply with the provisions aforesaid of the Act relating to the stands and the exaction of tolls. They alleged that they had each been refused stands when unlet, and also alleged excessive charges. They submitted that the defendant had not the right to admit others to the use of certain stands so long as growers presented themselves and required the use thereof, and alleged that the defendant made it a practice either to refuse to growers the use of such stands or by filling such stands with others than growers to prevent growers having the use of such stands, with the result that growers had to go to other parts of the market or to places outside the market, or to the public streets, where, the restrictions contained in the Act not being applicable, the defendant charged higher rates than would have to be paid under the Act, and with the further result of injury to the growers in their trade. They further alleged that in each case of refusal of stands to any of the plaintiffs no objection had been made to such plaintiff as a proper tenant, but, although several of such stands were unlet and growers were desirous of tenancies, the defendant had stated his practice to be not to let such stands.

The defendant now applied to set aside the writ and all proceedings in the action on the ground that the plaintiffs, as having separate and distinct causes of action, could not join, and that also they could not as private individuals sue on behalf of a class of the public in respect of public or other statutory rights.

By ord. 16, r. 1, several plaintiffs are allowed to join in one action distinct causes of action if the right to relief arises out of the same transaction or series of transactions, and there would be a common question of law or fact if they brought separate actions; by rule 9, where there are numerous persons having the same interest, one or more may sue on behalf of all.

Levett, Q.C., Danckwerts, and *A. Gwynne James,* for the defendant, supported the application.

Asquith, Q.C., Farwell, Q.C., and *J. T. Prior,* for the plaintiffs.

The following cases were cited by counsel—namely: *Smurthwaite* v. *Hannay,* 43 W. R. 113, [1894] A. C. 494; *Stroud* v. *Lawson,* 46 W. R. 626, [1898] 2 Q. B. 44; *Drincbrier* v. *Wood,* 43 SOLICITORS' JOURNAL, p. 29; *The University of Oxford and The University of Cambridge* v. *Gill, Ib.,* p. 27; and *Temperton* v. *Russell,* 41 W. R. 321, [1893] 1 Q. B. 435.

ROMER, J.—This application gives rise to questions of some nicety. The first point I have to consider is whether the plaintiffs are entitled to sue on behalf of themselves and all other growers of fruit, flowers, vegetables, roots, or herbs within the meaning of the

Act 9 Geo. 4. c. cxiii. Now, as pointed out in *Temperton* v. *Russell*, ord 16, r. 9, which provides for persons suing or being sued as representing a class, only extends to cases where the class have or claim some beneficial proprietary right which is being asserted or defended. I have, therefore, to consider whether the growers in question as a class have a beneficial proprietary right under the above Act which is being asserted in this action. On consideration of the provisions of that Act in favour of the growers with regard to Covent-garden Market, I am unable to come to the conclusion that the growers as a class have any proprietary rights in respect of the market. All members of the public have a right to go to and use the market, and it appears to me that, by the Act, all that in substance is provided is that those members of the public coming to use the market who are growers shall have preference over the rest of the public in using and having let to them certain parts of the market. Of course, if any individual grower had let to him under the Act a part of the market he would, during the letting, and in respect of the part let, have a proprietary right. But I cannot see that growers as a class can be said to have a proprietary right in respect of the market merely because if any member of the class chooses to go to and use the market he can claim to be preferred over what I may call an outside member of the public in using or having let to him a portion of certain specified parts of the market. If I held the opposite view I do not see how I could avoid also holding that the public as a class had a proprietary right in respect of the market, because, as against the owner of the market, it had a right of access to, and user of, the market. It appears to me that such right as the growers as a class have under the Act is in the nature of a public right, which must be enforced when necessary by the Attorney-General. Of course, any member of the class who has been injured by the provisions of the Act being disregarded will have his remedy in respect of his own individual injury. But where the complaint is that the rights of the growers as a class have been disregarded and relief is sought on behalf of the class by way of declaration of right or injunction, then I think the Attorney-General is the proper person to sue.

It was suggested that questions under the Act might arise as between the growers as a class and the rest of the public, and that the Attorney-General must then represent the general public. But in a case of that kind the difficulty could be met by the Attorney-General on behalf of the Crown representing the one section of the public and the Solicitor-General representing the other section. A similar difficulty in other cases has in this way been got over. The views above expressed dispose of the plaintiffs' case so far as it seeks relief on behalf of the growers as a class.

But I have still to consider the general claims of the six plaintiffs as individuals. Each of those claims is perfectly distinct from the others, and depends for its determination upon its own facts, and constitutes in substance a separate action as against the defendant. The question whether these six separate claims are rightly joined depends upon ord. 16, r. 1. On consideration it appears to me that the six plaintiffs, so far as their individual claims are concerned, have not and do not claim any right to relief "in respect of or arising out of the same transaction or series of transactions" within the meaning of those words as used in the above rule. The right to relief of each plaintiff depends upon the transactions peculiar to him under which it is allegd he has been specially injured as an individual. These transactions are not the same as those on which the other plaintiffs have to rely in support of their special injuries and of their special claims in respect of such injuries, and the transactions on which the plaintiffs have respectively to rely to support their claims are not made one merely because the defendant is alleged to have made a practice of disregarding the rights of growers. For these reasons it appears to me that the six several claims of the plaintiffs as individuals are not rightly joined in one action. I think, therefore, that the further prosecution of this action, as at present constituted, ought not to be allowed. But, in order to save unnecessary expense, I will give the plaintiffs liberty to elect, if they can agree between themselves to do so, to continue the action on behalf of any one of the plaintiffs so far as he seeks relief as an individual, and to enable that to be done I give liberty to amend writ and statement of claim. The election and amendment must be made within fourteen days from the drawing up of this order. The plaintiffs must pay the costs of the defendant incurred in the action up to the present time, including the costs of this application. If no election and amendment be made under the liberty above given, then the statement of claim will be struck out, and all further proceedings in the action will be stayed.

Application allowed.

Farwell, Q.C., applied for leave to appeal, which was granted.

Solicitors, *Herbert B. Bell; Taylor, Son, & Humbert.*

Chan. Div. } Romer, J. } Aug. 10; Nov. 1; Dec. 16.

In re WREXHAM, MOLD, AND CONNAH'S QUAY RAILWAY CO. (a.)

Company—Company borrowing ultra vires—*Debenture-holders—Subrogation.*

A railway company exceeded their powers in borrowing largely from their bank for the purposes of paying the interest due on their authorized issue of debentures. At the time of the last overdraft for the purpose of paying the debenture interest proceedings were pending against the company, but of this the bank had no knowledge. Judgment was subsequently recovered in these proceedings against the company and a receiver appointed. The bank claimed to be entitled to be subrogated to the rights of the debenture-holders in respect of the overdraft, and that their debt should be paid by the receiver in priority to any payment to the debenture-holders.

Held, that the bank was not entitled to be paid out of moneys in the receiver's hands before interest due and payable to the debenture-holders was paid.

It subsequently came to the knowledge of the bank that there were A, B, and C debenture stockholders, and that the income of the company was sufficient to pay the interest on the A. debenture stock and leave a surplus available for the B debenture stockholders.

Held, on a further application by the bank, that they were not entitled to be repaid in priority to the B debenture stockholders even to the extent of the interest on the A stock paid out of the bank's money.

Adjourned summons.

By the Wrexham, Mold, and Connah's Quay Railway Act, 1883, the company was authorized to create and issue debenture stock to the amount of £350,000, and under another similar Act in 1888 a further issue was authorized to the amount of £145,000.

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Nearly the whole of the debenture stock authorized by these two Acts had been issued permanently charged upon the undertaking of the company.

The railway company kept a current account with the Wrexham branch of the North and South Wales Bank (Limited), the working expenses of the railway being paid out of, and the receipts of the company paid into, this account. This account was also drawn upon for the purposes of paying the interest on the debenture stock, and this from time to time caused a considerable overdraft. Towards the end of July, 1897, the bank consented to an application on the part of the railway company to allow a further overdraft of about £10,000 to meet the debenture interest due on the 1st of August, and accordingly, about the 3rd of August, a sum of £9,672 was paid by the bank as interest to the debenture stock-holders.

On the 5th of August, 1897, the Great Central Railway Co. obtained judgment against the Wrexham, Mold, and Connah's Quay Railway Co. in respect of a sum of £59,128, and on a petition presented on the 12th of August. When the fresh overdraft for the debenture interest was allowed by the bank they had no knowledge that any proceedings were pending against the railway company.

The current account was discontinued by the receiver on the 5th of November, and on this, together with bank charges and interest, a debt of £7,601 was owing to the bank.

The bank in the present proceedings claimed that they were entitled to be subrogated to the rights of the debenture-holders in respect of this sum of £7,601 with interest at 5 per cent., and took out the summons for a declaration to this effect and for an order that the receiver should pay the amount they claimed in priority to any payment to the debenture-holders.

Neville, Q.C., Methold, and *Danckwerts,* for the bank.—The overdraft at the bank was a debt that the railway company had no power to incur, but the bank's money was applied in paying a debt that the company were legally bound to pay, and the bank is entitled to stand in the shoes of the debenture-holders to the extent of the interest so paid: *Cunliffe, Brooks, & Co.* v. *Blackburn Building Society,* 33 W. R. 309, L. R. 9 App. Cas. 857; *Baroness Wenlock* v. *River Dee Co.,* 35 W. R. 822, 19 Q. B. D. 155; *In re Cork and Youghal Railway Co.,* 18 W. R. 26, L. R. 4 Ch. App. 748. The debenture-holders must be taken to have assigned their interest to the bank, and thus the bank has a charge on the undertaking, and should be paid by the receiver in priority to the debenture-holders.

Frederick Thompson, for certain debenture-holders.

Theobald, for other debenture-holders in the same interest.

R. J. Parker, for the Wrexham Co.

Mark Romer, for the Great Central Railway Co.

Neville, Q.C., in reply.

Cur. adv. vult.

ROMER, J.—This is an extraordinary application. The applicant, the bank, has already in these proceedings brought in a claim to be admitted as a creditor of the railway company, and so far neither the railway company nor the debenture stock-holders have disputed the claim of the bank to be regarded as an ordinary creditor of the railway company. But the bank now applies to the court and seeks in substance to establish as to the sum mentioned in its summons, being money borrowed from it by the railway company, that the railway company had no power to borrow this money, and consequently did not become liable to repay it. The bank seeks to establish that it is not directly a creditor in order to assert that thereby it is placed in a better position than if the money had been validly borrowed. And it seeks to establish this startling proposition in the following way: It contends (1) that the borrowed money was applied in paying interest on the debenture stock of the railway company, which is a charge on the undertaking of the company; (2) that on the principle of the well-known cases cited before me the bank is therefore entitled to stand in the shoes of the debenture stock-holders to the extent of the interest so paid; and (3) that the bank is, moreover, entitled not only as against the railway company but as against the debenture stock-holders themselves to be considered as assignees of that interest as if it had never been paid, and as having a charge or something in the nature of a charge on the undertaking of the railway company which gave it a right to call upon the receiver, when he has moneys in his hands available for payment of subsequent interest due on the debenture stock, to pay the bank before he pays the debenture stock-holders their interest. At the present time the receiver, has not, and he may never have, any moneys in hand available for payment of the ordinary debenture-holders their interest, and no one is at present concerned in considering whether the bank is an ordinary creditor of the railway company, either by reason of the original borrowing or by reason of the debts of the railway company, which that company was legally liable to pay. The real object, therefore, of the present application is to obtain a decision of the court, as against the debenture stock-holders, that the bank's claim has priority over their interest. The first two contentions of the bank I may therefore pass by, or assume to be correct if its third contention fails. And, dealing with this third contention, I cannot see on what principle I can hold as against the debenture stock-holders that they are to be treated as ranking after the bank. No authority whatever gives sanction to any such claim on the bank's part. As to the past interest, the stock-holders never assigned it to the bank. It was paid by the railway company in the ordinary way so far as they were concerned, and it did not matter to them or form any matter for inquiry on their part how the railway company got the money to pay that interest. There are, no doubt, expressions in some of the judgments in the cases of subrogation above referred to which speak of the person who has lent money to a company which the company was not legally liable to repay, but which was applied in paying the legal debts of that company, as being entitled under the circumstances of those cases to be considered as assignee of the debts and rights of the creditors paid. But those expressions were used with reference to the only question before the courts in those cases, which was whether as between the person who lent the money to the company and the company he could be regarded as having a claim in respect of that money, and in no wise concerned questions between that person and the creditors whose debts were paid.

The argument on the part of the bank that, as between the creditors paid and the person whose money went in paying them, he is to be treated as if those creditors had actually assigned to him their debts and securities, is, in my opinion, unfounded. If well-founded it would lead to the most astonishing results. For instance, consider the case of a creditor of a building society whose debt is secured on the land of the society. If that society is being wound up, could a person from whom the society illegally

borrowed money come forward and by proving that his money went in paying off part of the secured creditor's debt, be entitled as against that creditor to have the security applied in repaying the money borrowed before it was made available to the secured creditor for the payment of the balance of his debt. Clearly not, and yet it appears to me that the bank's contention in the present case would lead to such a result. I therefore hold that the bank is not to be regarded in these proceedings as a creditor whose debt is to be paid by the receiver in priority to the debenture stock-holders. I propose, therefore, to make this declaration: Declare that the bank is not entitled as against the debenture stock-holders to have any part of its claim paid out of moneys in the receiver's hands before payment thereout of interest due and payable to the debenture stock-holders. Beyond that it appears to me unnecessary to make any further order on this summons beyond ordering the bank, which has substantially failed, to pay the costs. But it should be stated that this is not to prejudice any claim of the bank or any application it may make in respect of any moneys that may be in the hands of the receiver after paying all interest due and payable to the debenture stock-holders, and available for payment of other debts of or claims against the railway company.

Dec. 16.—It subsequently came to the knowledge of the bank that there were A, B, and C debenture stockholders, and that the income of the company was sufficient to pay the interest on the A debenture stock and leave a surplus available for the interest on the B debenture stock, and an application was made by the bank that to the extent of the interest on the A stock paid out of the bank's money the bank was entitled to be repaid in priority to the B debenture stockholders.

ROMER, J., without calling on the debenture-holders, delivered judgment as follows: This case is restored to be heard on a fact and particular contention on the part of the bank not previously before me. It appears that the income of the company is sufficient to pay the interest on the A debenture stock and leave a surplus available to pay the interest on the B debenture stock. The bank contends that, on the principle of subrogation, to the extent of the prior interest on the A stock paid off by the bank, it is entitled to be ranked as debenture-holders, and to be paid in priority to the B debenture stock. Much of what I previously said applies to this contention, and need not be repeated. I may, however, again point out that the bank advanced its money under no contract purporting to give it a security for the money, and that the B stockholders knew nothing of the source from which the money came which paid the former interest, and were not bound to inquire. I cannot see any sufficient reason why the B stockholders should now find themselves placed in the position of having a charge second not only to that of the A stock, but to that of the bank. It is said they are not injured because if the bank's money had not been applied in paying off the A interest it would still rank for payment. But suppose the case had been that the railway company had at the time when the bank lent its money other assets which could and should have been applied in paying off the A interest, and that the railway company's insolvency had arisen from a subsequent unexpected loss, are the B stockholders to be now affected because, instead of applying their other assets at the time in paying the A interest, the railway company chose to pay it out of the money borrowed from the bank? And if not, is the court to embark in an investigation as to what the exact pecuniary position of the company was at the time of the borrowing? I think not; and if the principle advocated by the bank is correct, where is it to stop? There might have been years of past interest paid off by money illegally borrowed from the bank. If the bank's contention be correct, all those years' interest might have been accumulating against the B stockholders without their knowledge or consent, and so that all further payment of interest to them would practically cease. They would certainly thereby be greatly prejudiced, yet during all the time of the accumulation they would have had no opportunity of protesting against it or of applying for any remedy. I cannot accede to the application. It appears to me to be wrong in principle and supported by no authority. The case of *Blackburn District Building Society* v. *Cunliffe, Brooks, & Co.*, L. R. 29 Ch. D. 902, is no authority for this application. All that was there done was to allow bankers from whom money had been illegally borrowed by the building society, and which money had been applied in paying off members who had given notice of withdrawal, to stand in the place of those members as against the building society. That was no extension, to my mind, of the prior cases, for the withdrawing members, so far as concerns the building society, were in the position of creditors or *quasi*-creditors, so that in allowing the principle of subrogation to apply in that case the court was not extending the old cases, or doing anything more than allowing the bankers who found the money there to rank as creditors of the society. Such a point as that involved in the case before me was not before the court, and certainly was not argued. It appears at p. 911 of the report of that case that the right of the bankers there was not objected to by their opponents, and when the court said that they thought the claim was right, it was, in my opinion, in the view that without argument the case was a simple one of the principle of subrogation in no wise affecting a question of secured creditors' rights. For these reasons I think the application fails, and the applicants must pay the costs incurred subsequent to my last order.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool; *Field, Roscoe, & Co.*, for *Evan Morris & Co.*, Wrexham; *Sharp, Parker, & Co.*, for *Alsop, Stevens, Harvey, & Crooks*, Liverpool; *Norris, Allens, & Chapman*, for *J. B. Pollitt*, Manchester; *Cunliffes & Davenport*, for *R. B. Lingard-Monk*, Manchester.

Chan. Div.
Byrne, J. } Nov. 7, 8.

In re HALE.
LILLEY *v.* FOAD. (*a.*)

Mortgage — Receiver—Mortgage of business—Appointment by mortgagee—Extent of agency—Conveyancing Act, 1881, *s.* 24—*Management of business—Payment of debts—Statute of Limitations.*

A receiver appointed by a mortgagee under a power contained in the mortgage deed, which incorporates and extends the powers conferred by the Conveyancing Act, 1881, *s.* 24, *is not limited in the exercise of those powers to matters arising between the mortgagor and the mortgagee, but may by his acts affect the rights of others; and this is so where the receiver is appointed after the death of the mortgagor.*

And therefore, where a receiver so appointed as above

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

mentioned, acting within the powers so conferred upon him, paid to a creditor an instalment of a debt contracted by the mortgagor in connection with the mortgaged property, such payment operates as an acknowledgment of the existence of the whole debt on the part of the executrix of the mortgagor, whose agent the receiver is, and prevents time running under the Statute of Limitations.

A receiver so appointed as above mentioned, and being authorized by the terms of his appointment to manage and carry on a business which was the subject of the mortgage, is authorized to pay debts incurred by the mortgagor in respect of the business.

This action was commenced by an originating summons taken out by J. E. Lilley on behalf of himself and all other creditors of F. W. Hale, deceased, against Jane Foad, the executrix of Hale, for the administration of Hale's real and personal estate, and the following issues were tried before Byrne, J.: (1) Whether there was a debt due to the plaintiff or not; (2) if there was a debt, whether it was barred by the Statute of Limitations.

The facts were as follows: By an indenture dated the 13th of December, 1886, and made between Jennette G. B. Von Swartwout and her husband, and F. W. Hale and his wife, reciting that J. G. B. Von Swartwout was entitled to a certain business connected with the manufacture and sale of patent medicines for her separate use for life, and that Mrs. Hale was the owner for "her separate use of the reversionary interest in the same business," it was agreed that the business should thenceforth be considered as belonging to F. W. Hale during the life of J. Von Swartwout, and after her death to Mrs. Hale, "subject and charged . . . with an annual sum of £520, payable without any deduction except property tax (if any), during a period of five years from the date of those presents to" J. G. B. Von Swartwout "her executors and administrators (whether she shall survive for that period or not), by equal weekly payments of £10."

The agreement contained a covenant by Mr. and Mrs. Hale, jointly and severally, to pay the annuity of £520, and certain provisions as to how the business was to be carried on. Then followed a clause to the effect that if the annuity should fall into arrear for four weeks, or if Mr. or Mrs. Hale should sell or encumber the business, J. Von Swartwout, her agents or attorney, might enter into possession of and hold, manage, and carry on the same for her own benefit, and that the business should then be assigned to her subject to the proviso for redemption in the event of payment of the arrears of the annuity. Clause 9 of the agreement was as follows: "In case the said J. Von Swartwout shall at any time become entitled to enter into possession of the business as aforesaid, the powers conferred by the Conveyancing and Law of Property Act, 1881, upon a mortgagee when the mortgage money has become due shall, so far as the same are applicable to the terms and conditions of these presents, thereupon become exercisable. And it shall be lawful for the said J. Von Swartwout, either by herself or by her agents or attorney, in lieu of taking possession or before or after taking possession of the business, to exercise the power of appointing a receiver conferred by the said Act. And by way of extension of the provisions of the said Act, it is hereby also agreed that any receiver appointed under the said power in that behalf shall be at liberty, if so directed in writing by the said J. Von Swartwout, her agents or attorney, to manage and carry on the business as he may think fit, and that any moneys he or the said J. Von Swartwout, her agents or attorney, may pay or expend for that purpose, and whether before or subsequent to redemption by the said F. W. Hale or other the person or persons entitled tot he business as aforesaid, shall be considered as charged upon the business with interest thereon at the rate of five per cent. per annum."

Hale in carrying on the business became indebted to the plaintiff for printing. In October, 1888, the debt was £1,000, and it was arranged between them that this should be paid off by instalments of £25 per month. These instalments were paid down to the time of his death by Hale, who in the meantime continued to carry on the business. He died on the 16th of June, 1891.

By his will Hale appointed the defendant, Miss Foad, and one Richardson, who had acted as his manager, his executrix and executor.

Richardson renounced probate, and the will was proved by the defendant only. Under the will the defendant was beneficially entitled to all Hale's estate, subject to debts and charges thereon.

Until the 29th of July, 1891, the business was carried on by Richardson and one Lewis, who was also in Hale's employment at the time of his death.

At the time of Hale's death the annuity was in arrear to the extent of £1,010, and by a document under her hand dated the 29th of July, 1891, which referred to the agreement of the 13th of December, 1886, J. Von Swartwout appointed a receiver in these terms: "I hereby, in virtue of the powers vested in me for that purpose by the said agreement, appoint Frederick Johnson as receiver of the said business with full power to manage and carry on the same as he may think fit, but subject to the provisions and restrictions contained in the said agreement," and the receiver was to be remunerated by a percentage on his gross receipts.

After the death of Hale four sums of £25 each were paid to the plaintiff on account of his debt, the first sum being paid on the 8th of July, 1891, by Richardson before the appointment of the receiver, the second on the 6th of August by Johnson, the receiver, the third and fourth by Lewis on the 4th of September, and on the 2nd of October, 1891. In October, 1891, a fresh receiver was appointed by the annuitant, and he declined to make any further payments to the plaintiff. As regards the first payment the learned judge was not satisfied on the evidence that it was made by Richardson as the agent of the executrix, and the decision of the case turned upon the payment by Johnson on the 6th of August, 1891. This summons was taken out by the plaintiff on the 3rd of July, 1897.

Younger, for the plaintiff.—There is no decision which is quite in point as to the authority of the receiver, but the observations of Rolt, L.J., in *Law* v. *Glenn*, L. R. 2 Ch. App. 634, and of Rigby, L.J., in *D. Owen & Co.* v. *Cronk*, [1895] 1 Q. B. 265, at p. 275, 43 W. R. Dig. 147, show that a receiver appointed under a deed of mortgage by the mortgagee is a receiver for all purposes, and that his acts may affect the rights of others beside the mortgagor and the mortgagee. Here Johnson, being expressly empowered to manage and carry on the business, was authorized to pay this debt which was incurred in respect of the business, and being the agent of the mortgagor under the Conveyancing Act, 1881, s. 24, his payment on the 6th of August was equivalent to a payment by the executrix of the mortgagor, and prevented the debts being barred under the statute. Secondly, I say that in any case the time could not begin to run until November, 1891, as until then there had been no default in payment: *Reeves* v. *Butcher*, 39 W. R. 626, [1891] 2 Q. B. 509.

Astbury, Q.C., and *Montague Lush*, for the

defendant.—The receiver appointed by the mortgagee, although the agent of the mortgagor, was not the agent of the executrix. He in any case was not her agent to give an acknowledgment of the debt so as to prevent it being barred as against a third party: *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *Chinnery* v. *Evans*, 13 W. R. 20, 11 H. L. Cas. 115; *Newbould* v. *Smith*, 34 W. R. 690. It was not intended by the Conveyancing Act, 1881, to enable a receiver appointed under section 24 to alter the legal rights of third persons. He is only to act as between mortgagor and mortgagee. The only object of the appointment of the receiver is to protect the property: see observations of Cranworth, L.C., in *Jefferys* v. *Dickson*, 14 W. R. 322, L. R. 1 Ch. App. 183; *Bayly* v. *Went*, 51 L. T. Rep. 764, 33 W. R. Dig. 106. To prevent the time running the payment must be made by someone liable to pay: *Morgan* v. *Rowlands*, 20 W. R. 726, L. R. 7 Q. B. 493. The receiver was not liable to pay this debt. It was not an outgoing from the mortgaged property: *Gosling* v. *Gaskell*, 46 W. R. 208, [1897] A. C. 575. If he was liable to pay this debt, he would have been liable to pay all the debts of the mortgagor. To prevent the operation of the statute the acknowledgment must amount to a new promise to pay the whole debt: *Wainman* v. *Kynman*, 1 Exch. 118; *Stamford Banking Co.* v. *Smith*, 40 W. R. 355, [1892] 1 Q. B. 765; *Hollis* v. *Palmer*, 2 Bing. N. C. 713. Can it be said that Johnson had any such authority from the executrix? Suppose the debt had been wholly barred at the time, could it be said the receiver was authorized to make a new promise to pay the debt, or give an acknowledgment of its existence?

BYRNE, J.—It is common ground that if any of these four payments can be properly considered as one raising the implication of a promise to pay the balance of the debt, the plaintiff has not the stumbling-block of the Statute of Limitations in his way. I will take the one made by Johnson on the 6th of August, after he was appointed receiver, and while he was, under the power conferred upon him by the document appointing him, carrying on the business, with the duty imposed upon him of managing and preserving it and the assets and goodwill which constituted the security for the annuity. Now, if this payment had been made by the executrix no question could have arisen. And if it was made by her agent authorized to make such a payment unconditionally and without circumstances negativing the implication of a new promise to pay which ordinarily arises from such a payment, then it is sufficient to prevent the operation of the statute. It was clearly a proper payment to be made. But it is said that it was a payment made by the receiver without authority from the person liable to pay. What, then, is the true result of the contract between the parties and the appointment of the receiver under it? In my opinion the reference in the agreement to the Conveyancing Act shows clearly that the intention of all the parties was that, although Mrs. Swartwout was to have the power of appointing the receiver, that receiver when so appointed was to be the agent of the mortgagor, and not of the mortgagee, for the purpose of managing and carrying on the business, and for the other purposes either expressly enumerated or incorporated by reference to the statute. That was hardly disputed, and it is further conceded, as indeed it must be, that the receiver was responsible to the mortgagor, and accountable to him for his receipts and for his doings as receiver. But it was said that even if Hale was to be regarded as the mortgagor within the meaning of the agreement (as undoubtedly he was, although there was another person having an interest in the business after his death), still his executrix was not necessarily regarded in the same position. It was urged that, although this was a debt arising out of business transactions, yet, as Hale alone was carrying on the business, he alone was the person to be sued, and that it was his private debt as much as any other debt which he might owe independently of the business. I cannot accept this view. In my opinion the executrix of Hale occupied under the agreement the same position as Hale did as between herself and the mortgagee—that is to say, the position of mortgagor to mortgagee within the meaning of the phrase as used in the document. Hale was liable to the whole extent of his assets, while his executrix was liable to the extent of the same assets so far as they came to her as executrix. To that extent her liability was the same as his, and she was the person to be sued in respect of the debt. Now, this particular payment of £25 on the 6th of August, 1891, was a payment which, if Hale had been alive and carrying on the business, would have been justly due from him, and for which his executrix was to the extent of assets liable and bound. The payment having been made was clearly a payment made on behalf of the mortgagor, and by the agent of the mortgagor, such agent being the mortgagor's agent for the purpose of managing and carrying on the business, and making all proper payments necessary for its good conduct and preservation. But it was ingeniously urged that the real principle of all these cases of part payment depriving the Statute of Limitations of its operation is that an unconditional payment, if made by the person liable to pay to the person entitled to receive it, is, standing alone, such evidence of a new promise to pay the balance of the debt as that it may be acted upon, and so destroy the operation of the statute. The true principle is, however, that part payment takes the debt out of the statute, because payment of part is an acknowledgment of the existence of the whole debt, and from it the law raises the implication of a promise to pay the remainder. There might be circumstances which would prevent that implication arising, but in the present case I find none such existing. It, then, remains for me to consider whether there is anything in the argument that a distinction must be drawn between an authority to make a new promise to pay, and an authority to do that which in law, and in the absence of express agreement, would raise the implied promise to pay. I think not. I do not think that it matters whether the receiver is appointed with the direct authority in so many terms to make new promises to pay old debts, or whether the authority given to him is an authority to do such acts as will raise the inference of a new promise to pay them. It appears to me that in the present case the receiver, so long as he acted providently and rightfully, was entitled to manage this business by doing that which a prudent man owning the business would have done in his place had he been carrying it on on his own account. I think therefore that he was justified in making the payment he did. I think that he made such payment unconditionally, and as agent of the mortgagor, who at that time was the executrix, and that the payment having been made by the agent of the person liable to pay to the person entitled to receive it, the implication of a new promise to pay the balance of the debt arises, and that therefore this one payment being sufficient the statute does not apply.

I have not gone through the various cases which were cited before me. There is very little difference as to the principle to be applied. Most of them

have arisen as between mortgagor and mortgagee. I will refer to the observations of Rolt, L.J., in *Law* v. *Glenn*, L. R. 2 Ch. App. 634, at p. 641, and the *dictum* of so great a judge is entitled to the very greatest attention: "It was contended on behalf of the defendants, the Messrs. Martin, that the appointment of the receiver by the deed of even date with the plaintiffs' first mortgage (which was in the usual form of such deeds) did not constitute the receiver for all purposes the agent of the mortgagor, and that in fact the receiver must be deemed when in possession to have received the rents as agent of the plaintiffs, and that the only object and effect of the receivership deed was to prevent the plaintiffs from being charged in the accounts for wilful neglect or default. No direct authority was cited for this proposition, and if it were necessary now to decide it, I should hold that it could not be maintained, and that the receiver must be treated as being for all purposes the agent of the mortgagor, and that the payments made by him to the mortgagee were payments by the mortgagor continuing in possession of the mortgaged estate." That was a case as between mortgagor and mortgagee, but I think the same principle must apply so long as payments are made by the receiver within the authority conferred upon him. They are to be referred to his agency of the mortgagor, and not to his agency of the mortgagee. I will also refer to a passage in the judgment of Rigby, L.J., in *Owen* v. *Cronk*, [1895] 1 Q. B. 265, at p. 274: "It has been said that as the defendant is called a receiver, we must be guided by cases which have established the personal liability of executors or trustees who carry on a business. In my opinion those cases are in no way analogous to the present." After giving his reasons why he does not think that applies to the particular case which was before him, which was the case of a business being carried on by a receiver appointed by trustees for debenture-holders under a deed, he says: "The court cannot carry on the business itself, nor can it be responsible to the creditors. In order that cases of this kind may apply to the present case, it must be shown that the defendant carried on the business of the company upon similar terms. But when we look at the trust deed we find that it contains no such provision. The deed provides that the receiver, though appointed by the mortgagees, shall be deemed to be the agent of the mortgagors. It is said that this applies only as between the mortgagors and the mortgagees; but I do not think it can be so limited."

As I have said, I do not think it necessary to go through all the cases that have been cited. It comes in each case to be a question whether the payment was made by a person authorized as agent of the person liable or bound to pay to the person entitled to receive, and in the present case I consider that the payment to which I have referred was such a payment. Having regard to my decision upon the first point, I need not decide the second point made for the plaintiff; but I desire to say that I do not express upon it any hostile opinion.

Judgment for the plaintiff.

Solicitors for the plaintiff, *J. B. & F. Purchase.*

Solicitor for the defendant, *Graham Gordon.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Dec. 7, 8.

SOUTHWARK AND VAUXHALL WATER CO. *v.* HAMPTON URBAN DISTRICT COUNCIL. (*a.*)

Local government — Rating — General district rates— "Land covered with water"—Reservoir—Assessment at one-fourth of the net annual value—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* 1 (b)—*Practice—Appeal—"Criminal cause or matter" —Justices—Order for payment of general district rates—Case stated by justices—Civil debt—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Public Health Act,* 1875, *s.* 256—*Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35.

The judgment of the Queen's Bench Division upon a case stated by justices on summary proceedings taken before them under section 256 *of the Public Health Act,* 1875, *for the recovery of general district rates, is not a judgment in a criminal cause or matter within section* 47 *of the Judicature Act,* 1873, *inasmuch as such rates are, by sections* 6 *and* 35 *of the Summary Jurisdiction Act,* 1879, *enforceable only as civil debts; and an appeal, therefore, lies to the Court of Appeal.*

Seaman *v.* Burley, 45 *W. R.* 1 [1896] 2 *Q. B.* 344, *distinguished.*

A reservoir of a water company held to be "land covered with water" within the meaning of section 211 (1) (b) *of the Public Health Act,* 1875, *and therefore assessable to general district rates at one-fourth of its annual value.*

Reg. *v.* Birmingham Waterworks Co., 1 *B. & S.* 84, 9 *W. R. C. L. Dig.* 76, *approved.*

Appeal from the judgment of the Queen's Bench Division upon a case stated by justices under 20 & 21 Vict. c. 43, s. 2, and 42 & 43 Vict. c. 49, s. 33.

Upon the hearing of a complaint preferred by the Hampton Urban District Council against the Southwark and Vauxhall Water Co. for the recovery of general district rates, the justices ordered the company to pay the amount thereof, subject to a case.

At the hearing of the complaint it was proved that the company were rated in respect of part of a reservoir, the net annual value of which part was £1,940, and that the rates were calculated on the full net annual value of £1,940. The company tendered a sum calculated on one-fourth part only of the net annual value, which was refused.

The reservoir was partly in the Hampton urban district, and the total water area was 10½ acres. The bed of the reservoir consisted of a lining of concrete 9 inches thick laid on the earth which had been excavated so that the bed of the reservoir was several feet below the surface of the surrounding land, and the reservoir was surrounded on all sides by an earthen embankment lined with concrete 9 inches thick, and faced as to the upper 12 feet thereof with bricks 4½ inches in thickness, the whole being surrounded with a brick coping 14 inches in width. The embankment was used solely for the purpose of keeping the water in the reservoir, and varied from 10 feet to 18 feet high above the natural surface of the ground, and had a depth of about 35 feet. The reservoir was used simply for storing water taken from the River Thames, and was covered permanently with water, except when the reservoir was emptied for the purpose of cleaning it, which

(*a.*) Reported by W. F. BARRY and F. G. RUCKER, Esqrs., Barristers-at-Law.

would take about a week. The reservoir had been constructed about three years, and had been cleaned only once in that time, and in future it would probably be emptied on the average about once in two years. The total cost of constructing the reservoir was £63,000.

The company contended that the reservoir was "land covered with water" within the meaning of section 211, sub-section 1 (*b*), of the Public Health Act, 1875, and that they ought to be assessed in respect thereof in the proportion of one-fourth only of the net annual value. The question for the court was whether this contention was correct.

By section 211 of the Public Health Act, 1875, it is enacted as follows: "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect: . . . (1) (*b*) The owner of any tithes, or of any tithe commutation rent-charge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market-gardens, or nursery-grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

The Divisional Court (Wright and Darling, JJ.) held that they were bound by the judgment of the Court of Queen's Bench in *East London Waterworks Co.* v. *Leyton Sewer Authority*, 20 W. R. 95, L. R. 6 Q. B. 669, and allowed the appeal.

The Hampton District Council appealed.

Sir E. Clarke, Q.C., and *Courthope-Munroe*, for the Hampton District Council.—There is a preliminary objection to this appeal being heard which ought to be mentioned, though neither side wishes to take it. In *Seaman* v. *Burley*, 45 W. R. 1 [1896] 2 Q. B. 344, this court held that the judgment of the Queen's Bench Division on a case stated by justices upon an application to enforce payment of a poor rate by a warrant of distress was a judgment in a "criminal cause or matter" within section 47 of the Judicature Act, 1873, and that no appeal lay to the Court of Appeal. But that was the case of a poor rate, where it has been held that justices act merely ministerially, *Reg.* v. *Price*, 28 W. R. 615, 5 Q. B. D. 300; and does not touch the case of a general district rate, which is recoverable upon complaint to a court of summary jurisdiction under section 256 of the Public Health Act, 1875. By 11 & 12 Vict. c. 43, s. 22, justices were empowered, in cases of orders for payment of money, in default of distress, to commit the defendant to prison. But now by section 6 of the Summary Jurisdiction Act, 1879, a sum recoverable on complaint to a court of summary jurisdiction is made a civil debt; and by section 35, in the case of a civil debt recoverable summarily, any sum declared by the Act to be a civil debt recoverable summarily shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority to make an order on complaint; and an order made by the court shall not in default of distress be enforced by imprisonment unless the person making default has or has had since the date of the order the means to pay and has refused or neglected to do so, and the court shall have the same power of imprisonment as a county court judge would have if the debt had been recovered in the county court. A general district rate is therefore now a civil debt, and the proceeding is not in a "criminal cause or matter" within section 47, and an appeal lies. Moreover *Seaman* v. *Burley* was decided upon a local Act to which perhaps the Summary Jurisdiction Act, 1879, does not apply.

Cripps, Q.C., and *Ryde*, for the Southwark and Vauxhall Water Co.

A. L. SMITH, L.J.—In my opinion we have jurisdiction to hear this appeal. The last case upon the subject is *Seaman* v. *Burley*, which related to the enforcement of a poor rate by a warrant of distress, and this court held that the judgment of the Queen's Bench Division in such a case was a judgment in a criminal cause or matter within section 47 of the Judicature Act, 1873. The Summary Jurisdiction Act, 1879, was not called to the attention of the court in that case, probably for the reason that it had been held in *Reg.* v. *Price* that the Act of 1879 did not apply to proceedings for the recovery of poor rates. It is quite clear, however, that the Act of 1879 does apply to the recovery of general district rates. By section 256 of the Public Health Act, 1875, if any person assessed to any rate made under the Act (which includes general district rates) fails to pay the same when due and for fourteen days after demand in writing made upon him, any justice may summon the defaulter to appear before the court of summary jurisdiction to show cause why the rate in arrear should not be paid; and if no sufficient cause for non-payment is shown, the court may make an order for payment of the same, and, in default of compliance with such order, may by warrant cause the same to be levied by distress. By section 6 of the Summary Jurisdiction Act, 1879, where a sum of money is recoverable on complaint to a court of summary jurisdiction, it shall be deemed to be a civil debt, and shall be recoverable as a civil debt, and not otherwise; and by section 35, any sum declared to be a civil debt, which is recoverable summarily, shall be deemed to be a sum for the payment of which a court of summary jurisdiction has authority by law to make an order on complaint, and an order made by a court of summary jurisdiction for payment of a civil debt shall not in default of distress be enforced by imprisonment unless the defendant has or has had since the date of the order the means to pay the sum and has refused or neglected to do so, as in the case of a county court judgment. Put shortly, a sum recoverable summarily before a court of summary jurisdiction as a civil debt is now recoverable, in default of distress, in the same way as a judgment debt in a county court action. That is not a criminal cause or matter. This class of debt—namely, general district rates—is by the Summary Jurisdiction Act, 1879, taken out of the class of criminal matters, and made a civil debt. Therefore the judgment of the Queen's Bench Division is not a judgment in a criminal cause or matter, and an appeal lies.

RIGBY and COLLINS, L JJ., concurred.

Objection overruled.

Sir E. Clarke, Q.C., and *Courthope-Munroe*, for the Hampton District Council.—The reservoir is not "land covered with water" within the meaning of section 211, sub-section 1 (*b*), of the Public Health Act, 1875. Those words mean land covered naturally with water. They cannot include a reservoir, which is an artificial construction, like a large tank placed on the land. In *Peto* v. *Overseers of West Ham*, 7 W. R. 586, 2 E. & E. 144, it was held that a wet dock was "property other than land" within section 33 of the Lighting and Watching Act, 1833. In *Reg.* v. *Overseers of Neath*, L. R. 6 Q. B. 707, 20 W. R. C. L. Dig. 74, a canal and towing-path, and in *Reg.* v. *Midland Railway Co.*, 23 W. R. 921, L. R. 10 Q. B. 389, a line of railway, were held to be "land" within that section. In *Reg.* v. *Birmingham Waterworks Co.*, 1 B. & S. 84, 9 W. R. C. L. Dig. 76, a reservoir was

held to be "land covered with water" within the meaning of a local Act; and in *Newport Dock Co.* v. *Newport Local Board*, 2 B. & S. 708, 11 W. R. C. L. Dig. 136, a dock was held to be "land covered with water" within section 55 of the Local Government Act, 1858. These cases were followed by *East London Waterworks Co.* v. *Leyton Sewer Authority*, 20 W. R. 95, L. R. 6 Q. B. 669, where it was held that a canal and filter beds were "land covered with water" within section 17 of the Sewage Utilization Act, 1867. These last three cases were wrongly decided, and, as they are not binding upon this court, they ought to be overruled. The considerations applicable to the case of *Peto* v. *Overseers of West Ham* are applicable here.

They also cited *Thursby* v. *Churchwardens, &c., of Briercliffe-with-Extwistle*, [1895] A. C. 32, 43 W. R. Dig. 130.

Cripps, Q.C., and *Ryde*, for the Southwark and Vauxhall Water Co.—The reservoir is "land covered with water" within the meaning of the Public Health Act. *Reg.* v. *Birmingham Waterworks Co.* is an express authority for this, and it was affirmed in the *Newport case* and the *Leyton case*. On the other hand, *Peto* v. *Overseers of West Ham*, *Reg.* v. *Overseers of Neath*, *Reg.* v. *Midland Railway Co.*, and *Thursby* v. *Churchwardens, &c., of Briercliffe-with-Extwistle* are all decisions on the meaning of "property other than land" in the Lighting and Watching Act, and do not in any way govern this case.

A. L. SMITH, L.J.—I am of opinion that the appeal must be dismissed. An attempt has been made to apply a decision on a set of words in one Act of Parliament to a different set of words in another Act of Parliament. A water company claims to be entitled to be assessed to a general district rate in respect of a reservoir at one-fourth of its annual value. The rating authority assessed the company at the full annual value of the reservoir, but the Queen's Bench Division on the hearing of a special case held that the company was entitled to be assessed at one-fourth of the value. The question turns on section 211, sub-section 1 (*b*), of the Public Health Act, 1875, which enacts that in the making of general district rates certain classes of hereditaments, among them being "land covered with water," are to be assessed at one-fourth of their net annual value. There are three decided cases on the words used in this section, but even without their help the section itself seems to me quite clear, and, when they are taken into consideration, the case for the appellants seems to me to be unarguable. We have to consider what is the *primâ facie* meaning of "land covered with water"; and when the question is asked whether a reservoir is "land covered with water," the only answer that I can give to that question is, yes. It is argued that because this reservoir has a bed of concrete and was constructed at enormous expense, therefore it cannot be "land covered with water" within the meaning of the section. But almost the next exception mentioned in the section is a railway, and everyone knows that it costs a great deal of money to make a railway. It seems to me that on the plain construction of the Act a reservoir is "land covered with water" within the meaning of section 211.

I now come to the cases, which are decisions on words identical with the words used in this section. In 1861 it was held by the Court of Queen's Bench in *Reg.* v. *Birmingham Waterworks Co.* that a reservoir was "land covered with water" within the meaning of those words occurring in a local Act. I quite agree with the judgments there delivered. It is pointed out that *Peto* v. *Overseers of West Ham* was not referred to in argument. I am not surprised, for that case is not an authority on the meaning of the words "land covered with water." Then in 1862 the same court held in *Newport Dock Co.* v. *Newport Local Board* that a dock was "land covered with water" within the meaning of those words occurring in section 55 of the Local Government Act, 1858. In that case *Peto* v. *Overseers of West Ham* was cited. The next thing that happened in order of date was that in 1867 the Sewage Utilization Act was passed, and in that Act the Legislature, having before them those two judgments of the Court of Queen's Bench, again used the same words "land covered with water." Then in 1871 came the case of *East London Waterworks Co.* v. *Leyton Sewer Authority*, in which the Court of Queen's Bench again put the same construction on the same words, and held that a canal and filter beds were "land covered with water" within the meaning of those words occurring in the Sewage Utilization Act, 1867. Then lastly in order of time came the Public Health Act, 1875, in which the Legislature again used the same words in the section now under consideration.

The rating authority relied on the case of *Peto* v. *Overseers of West Ham*, where the question was whether docks were "land" or "property other than land" within the meaning of section 33 of the Lighting and Watching Act, 1833, and the Court of Queen's Bench held that they were "property other than land," and therefore rateable at the higher rate under that Act. They also referred to the cases of *Reg.* v. *Overseers of Neath* and *Reg.* v. *Midland Railway Co.*, in which it was held that a canal and a railway were "land" within that section. It seems to me that these three cases on the Lighting and Watching Act are not applicable to the consideration of what is "land covered with water" in the Public Health Act, 1875. The rating authority also cited *Thursby* v. *Churchwardens, &c., of Briercliffe-with-Extwistle*. But it is clear that there Lord Herschell did not intend to overrule any of the previous authorities, and in my judgment that case does not affect our present decision.

RIGBY and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitors for the water company, *Lanfear, Tanner, & Lanfear.*

Solicitors for the district council, *Kent & Son.*

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Dec. 5.

BAXTER *v.* HOLDSWORTH. (*a*.)

Practice—Trial—Notice of trial—Length of notice—Ten days before trial—R. S. C., 1883, *ord.* 36, *rr.* 14, 18; *ord.* 30, *r.* 2.

The court has jurisdiction to order a defendant, in any case in which it seems just, to take ten days' notice of trial, to expire on the day when the trial comes on.

Appeal from an order of Channell, J., at chambers.

The writ of summons in the action was issued on the 26th of October, 1898, and was indorsed with a claim for the recovery of possession of land.

In June, 1898, negotiations had been going on between the parties for the sale of the land in question by the plaintiff to the defendant, and the defendant

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

had gone into possession. Five days before the issue of the writ in this action the defendant had commenced an action against the plaintiff in the Chancery Division for specific performance of a contract for the sale of the land.

On the 10th of November, the defendant took out a summons for the transfer of the present action from the Queen's Bench Division to the Chancery Division. That summons was ordered to stand over till after the hearing of a summons for directions in the present action.

On the hearing of the summons for directions the master made an order that pleadings should be delivered—viz., a statement of claim forthwith, the defence within ten days after the statement of claim, and a reply, if any, within one day after the defence. He refused to make any order as to notice of trial.

On the 16th of November, an appeal from the master's order came before Channell, J., when the learned judge varied the order by ordering that the defendant should take such notice of trial as might be necessary for the then ensuing Liverpool Assizes, if such notice were given within one day after the delivery of the defence, the case not to be tried before the 7th of December.

In pursuance of this order the plaintiff gave notice of trial to the defendant on the 26th of November. The Liverpool Assizes commenced on the 28th of November.

The defendant appealed from the order of the judge.

T. W. Chitty, for the defendant.—By ord. 36, r. 14, "Ten days' notice of trial shall be given, unless the party to whom it is given has consented or is under terms or has been ordered to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the court or a judge." And by rule 18, "Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given." Rule 18A gives special provisions as to Manchester and Liverpool, which, however, do not avail the plaintiff in this case. The effect of rules 14 and 18 is that every defendant is entitled to ten days' notice of trial, unless he is himself asking the indulgence of the court, or is in mercy, as it is called; and in the case of actions to be tried at assizes the notice must be a notice to expire not later than the commission day: *Laskier* v. *Tekeian*, 67 L. T. Rep. 121, 41 W. R. Dig. 184. Here the defendant only had two days' notice of trial. Notice given ten days before the trial actually comes on is not sufficient.

L. Sanderson, for the plaintiff, was not called upon to argue.

A. L. SMITH, L.J.—By the order of Channell, J., the defendant had ten days' notice of trial given to him prior to the day on which it was intended that the trial should come on. The question is whether the learned judge had jurisdiction to make that order. No doubt without an order of a judge the proper notice of trial is a ten days' notice prior to the commission day, except in the cases of Manchester and Liverpool, as to which there is a special provision. But the question is whether a judge has not jurisdiction to make a special order that the defendant shall take ten days' notice prior to the day on which the trial is to come on. It is argued that a defendant, unless he is in mercy, is absolutely entitled to ten days' notice of trial, and that, unless the notice is given ten days before the commission day, the case must necessarily go over to the next assizes. I do not think so. Ord. 36, r. 14, says that ten days' notice of trial shall be given, but that rule says nothing about its being ten days before the commission day, though that has been the practice and no doubt will continue so, except in cases where the defendant has put himself in mercy by coming to the court to ask for some indulgence. We were pressed with rule 18, which says that notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given. I do not see anything in that rule which says that a judge may not, in any case in which it appears to him to be right, order a defendant to take ten days' notice, to expire before the hearing of the trial. Then ord. 30, r. 2, says that upon the hearing of a summons for directions a judge shall make such order as may be just with respect to all interlocutory proceedings to be taken in the action before the trial. I cannot see why the order made in this case was not just, and I think that the learned judge had jurisdiction to make it. I am not now deciding anything contrary to what we decided in *Laskier* v. *Tekeian*. I think the appeal must be dismissed.

RIGBY and COLLINS, L.JJ., concurred.

Solicitors for the plaintiff, *Arkcoll, Cockell, & Chadwick*, for *J. T. Sanderson*, Lancaster.

Solicitors for the defendant, *Bell, Brodrick, & Gray*.

High Court of Justice.

Chan. Div. } Stirling, J. } Nov. 6, 8.

In re OWEN'S PATENT. (*a*.)

Patent—Pending action for infringement or proceeding for revocation — Disclaimer—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.

Where an action for infringement, or proceeding for the revocation, of a patent is pending, the patentee may not, under section 19 *of the Patents, &c., Act of* 1883, *apply for leave to amend the patent by way of correction or explanation, except so far as such correction or explanation is incidental to a disclaimer strictly so called.*

The case raised a question as to the true construction of section 19 of the Patents, &c., Act of 1883.

The facts are stated in the judgment of Stirling, J.

Moulton, Q.C., and *J. C. Graham*, for the patentee.—Section 19 must be read as if the words "correction or explanation" were therein inserted after the word "disclaimer." The question has come before the law officers, and their practice is settled, and they read the section in the wider sense: *In the Matter of Lang's Patent*, 7 Rep. Pat. Cas. 469; *In the Matter of Goulard and Gibbs' Patent*, 5 Rep. Pat. Cas. 189.

Bousfield, Q.C., and *Buckmaster*, for the respondents, cited *In the Matter of Armstrong's Patent*, 1[illegible] Rep. Pat. Cas. 747.

STIRLING, J.—This is an application made under section 19 of the Patents, Designs, and Trade-Marks Act, 1883, which provides that "in an action for infringement of a patent and in a proceeding for revocation of a patent the court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the court or judge may impose, be at liberty to apply at the Patent Office for leave to amend his specifications by

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

There is pending before me a proceeding for the revocation of this patent, and the application to me is in form that the patentee may be at liberty to apply for leave to amend his specification by way of disclaimer. In chambers before me it was stated by the respondents that the application was not for leave to amend by way of disclaimer, and thereupon I requested that it should be made clear to me exactly what the patentee proposed to apply for, and the patentee has now produced to me a copy of the specification amended as he desires to have it amended. The language of sections 18, 19, and 20 of the Act of 1883 are somewhat remarkable. Section 18 (1) is "an applicant or a patentee may from time to time, by request in writing left at the Patent Office, seek to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same." Sub-sections 2 to 9 inclusive, are consequential on that. Sub-section 10 ran as follows: "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending." By the 5th section of the amending Act of 1888 another sub-section is substituted by sub-section 10, which runs thus: "The foregoing provisions of this section do not apply when and so long as any action for infringement or proceeding for revocation of a patent is pending." Section 19 of the Act of 1883 I have already read, but it is important to observe that that section is limited to amendment by way of disclaimer. Section 20, which also deals with amendment by way of disclaimer, provides that "Where an amendment by way of disclaimer, correction, or explanation has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of this court that his original claim was framed in good faith and with reasonable skill and knowledge."

The contention on the part of the applicants is that there has been a slip made in section 19 of the Act, and that the word "disclaimer" ought to be read as having the same meaning as if the words "correction or explanation" were added after it. It has been admitted very candidly that the amendment proposed is not by way of disclaimer, if that word is to be construed in its narrower meaning.

It is said that this matter has been discussed before the law officers, and that the wider construction has been put upon the section by them. The practice is stated to have been settled so far as the law officers are concerned by the case of *In the Matter of Lang's Patent*. There the law officer was dealing with an objection founded upon the peculiar language of section 18, sub-section 10, as amended by the Act of 1888, that is to say, "the foregoing provisions of this section (section 18) do not apply when and so long as any action for infringement or proceeding for revocation of a patent is pending." Whilst section 19 merely gives the court power to direct that the trial or hearing of the action shall be postponed, therefore it is said none of the earlier clauses of section 18 apply, and there is no machinery for making applications as to the amendment of the patent. The court and the law officers have got over that by saying that sub-section 10 must be read as subject to the qualifying proviso, "Save so far as shall be necessary for enabling an amendment under section 19 to be made."

But does that enable an application to be made otherwise than for an amendment by way of disclaimer? The law officer answers "No." He says: "My jurisdiction here is under the combined operation of the 18th and 19th sections of the Patents Act, and I have no doubt that when, under the 19th section, the court or judge orders that the patentee shall be at liberty to apply to the Patent Office for leave to amend his specification by way of disclaimer, the provisions of section 18 do apply as if that section stood without the three words in it 'correction or explanation.'" Consequently in that case his jurisdiction is limited to allowing amendment by way of disclaimer only. He continues: "I do not doubt that I have power to allow any amendment—whether of the letterpress of the specification, or of the drawings, or by way of adding drawings if drawings have not in the first instance been appended to the specification—necessary to define the disclaimer which it is desired to make." That is to say, that when an application is made for a real disclaimer there is a power to amend by giving all explanations necessary for the purpose of defining more clearly the disclaimer; and in that case the patent which came before the law officer was one which it was desired to amend by way of disclaimer.

I was also referred to the case of *In re Goulard & Gibbs' Patent*. The disclaimer there asked for was of clause 3 of the specification, and it was allowed.

These cases do not, in my opinion, help the applicant. The very point, however, seems to have been present to the mind of Chitty, L.J., in *In the Matter of Armstrong's Patent*, 14 Rep. Pat. Cas. 747, for at p. 754 he says: "The amendment that could be made, even if leave were granted, would merely be by way of disclaimer; that being clear under section 18 (and also section 19), which uses the three terms, and shows that the term 'disclaimer,' which alone occurs in the 19th section, is so used advisedly." Therefore it appears to have been the opinion of the Lord Justice in that case, that the word "disclaimer" could not receive the extended meaning which it is sought to give it here. There is no express decision upon the point, but the authorities appear to me to be all one way, that is to say, to read "disclaimer" strictly.

Having regard, therefore, to the nature of the amendment proposed to be made in this case, it seems to me that this application must be refused with costs.

Solicitors, *Ashurst Morris, Crisp, & Co.; J. & M. Solomon.*

Chan. Div. } Nov. 25; Dec. 16.
Kekewich, J. }

WOOLF v. WOOLF. (a.)

Practice—Costs—Liability of infant defendant.

Where an order had been made against an infant defendant, granting a perpetual injunction restraining him from carrying on his business under a style calculated to lead the public to believe that it was in any way connected with the similar business of the plaintiff,

Held, that the order, in also ordering the defendant to pay the costs, was good.

Action, the motion being taken as the trial.

The plaintiff, M. Woolf, trading as "Woolf Bros.," sued the defendant, J. Woolf, trading, in the same line of business, under the style of "Woolf Brothers," and claimed an injunction to restrain him from

(a.) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

carrying on his business under that style or in any manner leading the public to believe that his business was connected with that of the plaintiff. It transpired that the defendant was an infant. His lordship granted the injunction, and ordered the defendant to pay the costs of the action. The defendant objected on the point of costs, denying his liability. At the instance of the registrar, his lordship directed the point to be mentioned in court.

J. F. Waggett, for the plaintiff, asked that the order should go as made, as it was now settled practice that an infant defendant in such a case could be made liable: *Chubb* v. *Griffiths*, 35 Beav. 127; *Lemprière* v. *Lange*, 27 W. R. 879, 12 Ch. D. 675, which are cited on the point in such text-books as Morgan and Wurtsburg on Costs, Simpson on Infants, Sebastian on Trade-Marks, Chitty's Equity Index.

A. H. Dennis, for the defendant, contended that the authorities did not cover the present case, which was not one of fraud; here liability in respect of a tort might carry liability for damages, but not for costs, since, being an infant, the defendant could not engage in legal proceedings. (Counsel distinguished the cases above cited, and referred to *Cory* v. *Gertcken*, 2 Madd. 40.)

KEKEWICH, J., did not regard as satisfactory the case of *Chubb* v. *Griffiths*, where it was not clear that the defendant was an infant, while the judgment of Romilly, M.R., was so puzzling as not to throw light on the principle. His lordship did not think he could regard the distinct words of Jessel, M.R., in *In re Jones*, 29 W. R. 747, 18 Ch. D. 109, otherwise than as a judicial expression on the point, and he was bound to take it as settled practice that an infant defendant in such an action could be made liable; so that the order must go as made.

Solicitors, *Osborn & Osborn; Sheffield, Son, & Powell.*

Chan. Div.
Kekewich, J. } Dec. 2.

In re WALLER.
WHITE *v.* SCOLES. (*a.*)

Will — Misnomer — Description — Construction — Latent ambiguity — Extrinsic evidence — Admissibility of former wills.

W. by his will bequeathed legacies to such of the daughters of his late friend I. S. as should survive the testator unmarried. The facts showed that I. S. survived the testator and was a Roman Catholic priest and unmarried, but having five unmarried sisters, all being the children of J. S., who predeceased the testator by many years, and was scarcely known by him. The five ladies claimed the legacies, on the ground that the testator had made an obvious nominal error, and relying on the evidence of three previous wills, which as a series showed that they were in fact the beneficiaries in the testator's mind.

Held, that the three discarded wills were admissible as evidence, but that in this particular case the remoteness of the first from the testator's final mind did not justify the alteration of the mistake in the court's construction of the will.

Originating summons.

This was a summons taken out by the two surviving executors and trustees of the will of C. H. Waller, deceased, dated the 6th of July, 1896, whereby the testator bequeathed legacies out of the residue of his estate in the following terms—viz., "to such of the daughters of my late friend Ignatius Scoles deceased as shall be living and unmarried at my decease legacies of one hundred pounds each"; the residue was then to be divided equally between the following four charities: The British Home for Incurables, the Orphan Hospital, Edinburgh, the National Lifeboat Institution, and the London Female Preventive and Reformatory Institution, of which the first-named was made one of the defendants, the other three consenting to be bound by any order made. The direction of the court was required because there were no legatees answering to the description given in the will; one Ignatius Scoles, a friend of the testator, survived him, and for thirty years prior to his own death was a priest in the Roman Catholic Church and was never married; but he had seven sisters, also the children of Joseph John Scoles, an architect, who died in 1863; five of these sisters were unmarried at the death of the testator, and were made defendants to the summons.

G. W. Brabant, for the plaintiffs, the trustees, narrated the facts of the case and said that the question was whether the five ladies were each entitled to a legacy of £100, or whether the legacies should fall into the residue.

P. F. S. Stokes, for the defendants, the five ladies.—The defendants are entitled to the legacies under the will; the obvious mistake of the testator ought to be rectified by the court in the light of the evidence adduced. This evidence was extrinsic, and consisted principally of a series of three earlier wills, dated respectively the 20th of March, 1893, the 13th of November, 1894, and the 1st of January, 1896. By the first of these the testator had bequeathed "for the six daughters of the late Mr. Scoles, architect, who formerly resided at Crofton Lodge, Hammersmith—namely, Mrs. Annie James and the Misses Lilian, Caroline, Emily, Catherine, and Octavia Scoles—the sum of £1,000 in equal shares"; by the second, "to such of the daughters of my late friend Ignatius Scoles, deceased, as shall survive me a legacy of £100 each"; the third will contained the same words as the second. The five female defendants can rely on these earlier wills to show that the testator had merely made a mistake in name, and had not meant "Ignatius" at all. Where there was such a latent ambiguity, this extrinsic evidence was applicable: *Camoys* v. *Blundell*, 1 H. L. Cas. 778; *Reynolds* v. *Whelan*, 16 L. J. Ch. 434; *In re Feltham's Trust*, 1 K. & J. 528, 3 W. R. Ch. Dig. 97, 130; *Doe d. Hiscocks* v. *Hiscocks*, 5 M. & W. 363; and *Blundell* v. *Gladstone*, 11 Sim. 467, 1 Ph. 279; Jarman (5th ed.), vol. i., p. 412.

D. Stewart Smith, on behalf of the charities claiming the residuary legacies, contended that such extraneous matter ought not to be imported, unless merely to show the testator's knowledge of surrounding circumstances; they could not be made evidence of testamentary intention where the testator had it in his mind to revoke them: *In re Gregory's Settlement*, 13 W. R. 828, 6 N. R. 282; *Drake* v. *Drake*, 8 H. L. Cas. 172, 9 W. R. H. L. Dig. 18.

KEKEWICH, J., said that the question was whether you are not entitled, and if so whether you are bound, to look in such a case at the immediately preceding will. It was impossible to exclude a former will on general principles; one was entitled to sit in the testator's chair, to have before one what he had before him, to see with his eyes, to hear with his ears, to see with his mind's eye; while rigidly exclud-

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

ing it as proof of his intention, it was impossible to approach the construction of a will which required some evidence, without looking at the will displaced thereby: *Drake* v. *Drake*; his lordship also referred to the case of *Doe* v. *Huthwaite*, 3 B. & Ald. 632. But here the difficulty arose that there were several former wills; how restrict oneself to the last? In *Camoys* v. *Blundell*, at p. 782 of 1 H. L. C., two former wills were received in evidence as exhibits on the re-hearing of the case. His lordship held that on the high authority of Cottenham, L.C., confirming the view of Wood, V.C., he must admit the evidence.

The facts of the case were sufficiently clear for him to say that it was quite possible a mistake had been made. But without reference to the former wills there was no authority on which he could say that "daughters of Ignatius" meant "sisters of Ignatius" or "daughters of Joseph," for that would be too great a departure from the language of the testator. Turning to the former wills, it was made plain that the case was distinguishable from *Doe* v. *Huthwaite*, for here was a mistake continued through several wills, and it was only far back through the series that the intention could be sought, if indeed it could there be so found. His lordship did not think that, although he had admitted the wills, he could rely with any satisfaction on a will which had been revoked again and again and for all practical purposes was out of his mind.

There must be a declaration that the legacies should fall into the residue, and that costs should come out of residue.

Solicitors, *Caprons, Hitchins, Brabant & Hitchins; A. C. Scoles; Devonshire & Co.*

1903, 2 Ch. 111.

Chan. Div. }
Kekewich, J. } Nov. 16.

In re POWER.
POWER *v.* HOWELL. (*a.*)

Inland revenue—Estate duty—Residuary legatee—Title of originating summons—Practice—Costs—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 6 (2) (4), 8 (4), 9 (1), 14 (1)—*R. S. C., ord.* 55, *r.* 9 (*c*).

Estate duty payable on death of tenant for life to be borne rateably by the shares into which the estate became divisible and by the residuary devisee.

Summons.

The testator, Rev. H. B. Power, who died in 1882, by his will made in 1881 gave his widow a life interest in a moiety of his real estate, which on her death was to be distributed among his children in certain proportions, the plaintiff being the residuary legatee. The testator's widow died on the 6th of March, 1898. By a post-nuptial settlement dated the 21st of July, 1898, the legacy bequeathed to a daughter by the testator was settled upon herself, her husband, and their children, the plaintiff and the defendant being trustees of the same. The question was whether the estate duty which became payable on the decease of the life tenant in respect of the one moiety (legacy duty having already been paid on the remaining moiety) should be borne rateably by the several shares or by the residue.

A point arose concerning the intituling of the originating summons under the rules of the Supreme Court, ord. 55, r. 9 (*c*), as to whether it should be intituled in the matter of the estate of the deceased life tenant, or had been properly intituled in the matter of the estate of the original testator.

Lewis T. Dibdin, for the plaintiff.—The estate duty is to be borne rateably by the several shares in which the estate is divisible, and by that of the residuary legatee: Finance Act, 1894, ss. 6 (2) (4), 8 (4), 9 (1), 14 (1); *In re Meyrick*, 45 W. R. 120, [1897] 1 Ch. 99; *Wade* v. *Wade, ante*, p. 43, [1898] 2 Ch. 276.

D. N. Pollock, for the defendant, contended that the whole of the estate duty should be borne by the residuary legatee.

KEKEWICH, J., was of opinion that the estate duty was payable *pro ratâ* out of the shares of all the children and of the residuary legatee. Leave was given to amend, if necessary, by intituling the summons "in the matter of the estate of Mrs. Power" instead of "Rev. H. B. Power." There was no order as to costs, but his lordship intimated that the costs of both parties as between solicitor and client ought to be paid out of the different shares of the residue now divisible rateably according to the different interests therein.

Solicitors, *Hunters & Haynes.*

Chan. Div. }
Kekewich, J. } Nov. 16.

In re PLANT.
GRIFFITH *v.* HILL. (*a.*)

Will—Construction—Legacy to illegitimate children—Intention of mistaken testatrix—Domicil—Roman-Dutch law applicable in Demerara (British Guiana).

Effect given to the express intention of a testatrix to benefit a specified class of children, even where she was in error in believing that as a fact they had been legitimated by the Roman-Dutch law which legitimates children born out of wedlock when the parents are subsequently married by lawful ceremony.

Summons.

This was a summons issued by the surviving trustee of the will of one Sarah Plant, deceased, who by a codicil thereto, dated the 4th of May, 1892, revoked the trusts contained therein concerning the application of a legacy of £600, and directed her trustees "from and immediately after the death of my son Thomas Edward Plant to divide the said sum of £600 and the investments thereof unto and equally between all the children of the said Thomas Edward Plant by his deceased wife and by his present wife, who shall be living at his decease share and share alike as tenants in common." This codicil was made under the following circumstances: T. E. Plant, an Englishman resident in Demerara since 1874, was first married in 1851, and by his first wife had a daughter, the defendant Lucy S. C. Hill. In 1860 the pair separated, and the wife disappeared; T. E. Plant subsequently cohabited in Demerara with an unmarried woman, by whom he had four children, the other defendants. On the 28th of March, 1892, subsequently to the birth of the four children, T. E. Plant went through the ceremony of marriage with their mother, it being believed that his first wife was dead; the effect of this, by the Roman-Dutch law obtaining in British Guiana, was to legitimate the said four children. The testatrix, upon hearing of her son's second marriage, and the effect of the same, had said, "Now Tom is married the children are legitimated, and are as much my grandchildren as Lucy is," and

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

she made the codicil accordingly. The testatrix died on the 2nd of December, 1892, and in January, 1894, it was for the first time found that the first wife was still alive, being seen in the United States.

I. Badcock, for the plaintiff trustee, desired the direction of the court.

J. Rolt, for the defendant Lucy Hill, the child of the first wife, contended that the other defendants were in fact the children of an irregular concubinage; there was no intention shown in the will or by the evidence to benefit any but legitimate children, and the testator is in such case "his own dictionary": *In re Harrison, Harrison* v. *Higson*, [1894] 1 Ch. 561, where Kekewich, J., cited with approval *In re Horner*, 36 W. R. 348, 37 Ch. D. 695.

F. Thompson, for the four children, contended that, since the testatrix thought it was a valid marriage, she believed that all the children who were born at date of codicil, and whom she knew to have been born out of wedlock, were thereby legitimated; her reference was not to names, but to the marriage; she did intend to benefit these four children, all born, as she knew, out of wedlock; there was sufficient reference to them by the will to entitle them to take, and her express intention should be carried out; the Roman-Dutch law applied to the marriage, except for the reappearance of the first wife, for T. E. Plant had become domiciled in Demerara.

KEKEWICH, J., who remarked in the course of the case that it was very near the line, found on the evidence that the testatrix had meant to benefit some others than the child of her son's first wife, and that she knew that he had been living with the mother of the four children, to whom she referred in the codicil as "his present wife." His lordship continued: The difficulty is that she really thought that the first wife was dead, which she was not; that the second marriage was valid, which it was not; and that the law of Demerara, which was, I assume, applicable, was good to the extent of making the four children legitimate, for whom she then provided. I am asked to hold that because as a matter of fact she was wrong, the words of the will do not take effect. The later cases all go to say that, once you can find an express intention to give to illegitimate children, that intention must be fulfilled so far as the objects have been described. The testatrix has here expressed her intention to benefit these children. She had a misconception of facts, which were, however, present to her mind, so that she acted upon them. The question of domicil is, under the circumstances, not relevant. The legacy will go to the child of the first wife and the other four children as tenants in common.

Solicitors, *Field, Roscoe, & Co.*, agents for *Griffiths, Ryland, & Co.*, Cheltenham.

Chan. Div.
Kekewich, J. } Aug. 4, 1898.

In re FURBER. (*a.*)

Solicitor—Scale fee—Negotiating loan—Mortgage of personalty—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*Schedule I. of General Order.*

The scale fee chargeable by a "mortgagee's solicitor for negotiating loan" under Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, *is not limited to loans on mortgages of "freehold, copyhold, or leasehold property" exclusively, but extends also to loans on mortgages of any kind of personal property.*

Summons.

This was a summons by a solicitor who had acted both for the mortgagor and the mortgagees, in a mortgage transaction, to review the taxing-master's certificate, whereby the solicitor had been disallowed certain costs relating to the negotiation of several mortgages and charged according to the scale in Schedule I., Part. I., of the General Order to the Solicitors' Remuneration Act, 1881.

The mortgage security consisted of a reversionary interest under certain wills (being, in part at any rate, an interest in personalty) and of a fund in court, and the solicitor, having procured the required advances from some of his own clients, charged the mortgagor with costs for negotiating the loans according to the scale in Schedule I. The taxing-master had disallowed these costs on the ground that as the mortgage security did not consist exclusively of "freehold, copyhold, or leasehold property," the scale for negotiating was not chargeable.

P. O. Lawrence, Q.C., and *G. Henderson*, for the applicant.—The words in the schedule, "mortgagee's solicitor for negotiating loan," are general words, and are not confined merely to loans on freehold, copyhold, or leasehold property. No doubt the word "loan" must be limited to loans on mortgage: *D'Arcy* to *White*, 31 L. R. Ir. 142, 41 W. R. Dig. 234. The fact that this item is placed between two items dealing with mortgages of realty does not give rise to any implication that the negotiating fee is similarly restricted; on the contrary, it rather militates against that view. The schedule was prepared by competent persons, as was pointed out by the present Master of the Rolls in *In re McGarel*, 45 W. R. 321, [1897] 1 Ch. 400, and it ought not to be assumed that the scope of this item was not intended to be more comprehensive than that of the adjacent items.

Warrington, Q.C., and *Stewart Smith*, for the respondent.—The taxing-master came to his conclusion not only because of the juxtaposition of the negotiating item, but also because of the wording of rule 10 in Schedule I., which seems to confine the loans contemplated in the schedule to loans on freehold, copyhold, and leasehold property exclusively; and we submit that he was right in his conclusion.

KEKEWICH, J.—The question raised on this summons is whether a solicitor can charge a scale fee for negotiating a loan, though the security for the loan is not to consist of freehold, copyhold, or leasehold property exclusively. The taxing-master's view is that the scale fee is to be confined to loans of that character, but the solicitor contends that that view is wrong, and that the scale fee ought not to be so restricted. I think it is clear that the word "loan" means a loan on mortgage. The mortgagee's solicitor is the only person entitled to the scale fee for negotiating the loan, and therefore, if there is no mortgage, the fee is not payable. The Irish case of *D'Arcy* to *White* has been referred to as showing that "loan" means "loan on mortgage"; I do not think there can be any doubt about it, because the schedule is headed "Scale of charges on sales, purchases, and mortgages, and rules applicable thereto." Why the word "loan" was introduced I do not know; but I must assume that it was advisedly introduced by those who drew the rules. They were practical men conversant with these matters, and if they had intended that the scale fee should be confined to a loan on mortgage of freehold, copyhold, or leasehold property exclusively, they would have said so. But

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

it is argued that they have said so plainly by inserting this particular fee between two other scale fees both dealing with mortgages of freehold, copyhold, and leasehold property exclusively, and thereby indicating that this particular fee must also refer to the same thing. Now, it seems to me that that argument points directly the other way. It is because the scale fee for negotiating stands alone, and in that direct contrast, that it seems to me that the word "loan" ought not to be construed as relating only to freehold, copyhold, or leasehold property. It is said, however, that rule 10 is contrary to that view, and that the words at the end of the rule—namely, "but the scale fee for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable," show that that fee is to be limited to transfers and further charges of freehold, copyhold, or leasehold property. But it seems that these words refer to the scale fee for negotiating, as something independent of, and standing apart from, the property which is the subject of the transfers and further charges referred to. In my opinion "negotiating loan" means negotiating loan of any kind so long as the loan is on mortgage, and I think it is erroneous to suppose that, because some property comprised in a mortgage is not of the particular kind to which title is deduced, or of which the title is investigated in the manner indicated in the schedule, therefore the scale fee for negotiating ought not to be charged. With that intimation I must remit the matter to the taxing-master.

Solicitors, *R. Furber; Mear & Fowler.*

Chan. Div.
Romer, J. } Dec. 8.

STATHAM v. BRIGHTON MARINE PALACE AND PIER CO. (*a.*)

Company—Issue of shares at a discount—Companies Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 16)—*Companies Clauses Act,* 1863 (26 *&* 27 *Vict. c.* 118)—*Companies Clauses Act,* 1869 (32 *&* 33 *Vict. c.* 48).

A company governed by the Companies Clauses Consolidation Act, 1845, *and the Acts amending it may issue fully paid-up original shares at a sum less than their nominal value in the same manner as new shares can, under the authority of those Acts, be issued.*

The main object for which the defendant company was formed was to construct a new pier in the place of the old Chain Pier at Brighton, and was incorporated under a private Act of 1888, which embodied the Companies Clauses Acts of 1845 and 1863. The nominal capital consisted of £150,000 in 15,000 shares of £10 each.

The company also had certain borrowing powers subject to a certificate under the Act of 1845 that £2 had been paid on each separate share.

In June, 1890, another company, which may be referred to as the limited company, was formed under the Companies Acts, 1862 to 1886, with a capital of £75,000, in 15,000 shares of £5 each, with (*inter alia*) the following objects: (1) to adopt and carry into effect an agreement made between the defendant company of the first part, the limited company of the second part, and a company, which may be referred to as the works company, of the third part; (2) to acquire all or any of the shares of the defendant company and all or any part of the assets of that company, and to carry on and develop the business of that company; (3) to construct and maintain at Brighton a pier and other works; (4) to borrow money and issue debentures.

By certain agreements, all dated prior to July, 1891, made between the Chain Pier Co. of the one part and the defendant company of the other part, the Chain Pier Co. agreed to sell to the defendant company the pier and property comprised in the undertaking of the Chain Pier Co. for £15,000.

In July, 1891, it had been agreed that the works company should take over these last-mentioned agreements and do the works on behalf of the defendant company, and that the defendant company should from time to time issue to the works company the whole of the authorized share capital of the defendant company—namely, 15,000 shares of £10 each, such shares to be deemed for all purposes as fully paid up; and by an agreement dated the 16th of July, 1891, between the defendant company of the first part, the limited company of the second part, and the works company of the third part, it was agreed that the works company should assign to the limited company all benefit and interest under the above-mentioned agreements between the defendant company and the works company.

By another agreement dated the 16th of July, 1891, between the limited company of the one part and Alfred Woodhouse of the other part, Woodhouse agreed to erect the new pier and buildings fit for use within the time therein mentioned, and in November, 1891, the works were begun and continued until October, 1892.

On the 15th of December, 1891, the defendant company passed a resolution to the effect that 2,500 shares should be allotted as fully paid to the limited company for the sum of £5,000, and on the same day such sum of £5,000 was paid by the limited company to the defendant company, and in due course a certificate for 2,500 shares in the defendant company was handed to the secretary of the limited company.

On the 3rd of May, 1892, the defendant company passed a similar resolution as to a further 2,800 shares in consideration of £5,600, for which a due certificate was subsequently given.

Woodhouse having made default in the proper performance of his contract, the same was determined by the limited company, and in November, 1892, they took possession of the works and continued them until they exhausted all their available funds.

By an order of the 10th of May, 1895, made in a debenture-holders' action against the limited company, a receiver was appointed of the undertaking and property of the limited company, including the shares so issued as above by the defendant company to the limited company, and it was ordered that the property should be sold. In pursuance of such order the receiver agreed to sell to one Howard, amongst other assets of the limited company, 5,299 shares in the defendant company standing in the name of the limited company, and the sanction of the court having been obtained to such agreement, the receiver, at the request of Howard, executed to the plaintiff a proper transfer of the 5,299 shares in the defendant company and the transfer was duly registered in the books of that company. The remaining one share out of the 5,300 shares had previously been transferred by the limited company to one Renald.

The nominal value of the shares transferred to the plaintiff was £52,990, but the defendant company contended that the amount paid on such shares was £37,228 only, being equivalent to about £7 on each £10 share, and this action was commenced for the

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

purpose of having it declared that all the shares issued by the limited company were issued as fully paid up, the important question raised being as to the power of companies incorporated under Acts other than the Companies Acts of 1862 to 1898 to issue shares at a discount.

Farwell, Q.C., and *Methold*, for the plaintiff.—The question is whether a company formed under private Act into which is incorporated the Companies Clauses Acts can issue fully paid-up shares at a discount. *Webb* v. *Shropshire Railways Co.*, [1893] 3 Ch. 307, shows that a railway company governed by the Companies Clauses Acts can issue fully paid-up original stock at a discount. There is no authority as to shares. The reasons for the decision in the *Ooregum Gold Mining Co.* v. *Roper*, 41 W. R. 99, [1892] A. C. 125, against ordinary joint-stock companies issuing shares at a discount, do not apply to companies governed by the Companies Clauses Acts.

Ingpen, for the defendant company.—There is nothing in any of the Companies Clauses Acts authorizing the issue of shares at less than their nominal amount, and the implication is that they have not this power.

ROMER, J.—The point before me is a short one; it is whether the shares of the defendant company, which were issued at a discount, were lawfully issued.

The point is whether or not any company, with which is incorporated the Companies Clauses Acts, 1845 to 1863, and the amending Acts, issuing its shares, which are governed by those Acts, has power to issue them except on the terms that the full nominal amount of the shares should be paid in full.

Now, there is nothing said in the Companies Clauses Acts directly affecting this point with regard to what I may call the original shares of the company; but there are provisions with regard to new shares, and those provisions with regard to new shares show conclusively that the Legislature contemplated and authorized new shares being issued at a discount. One cannot see any reason for a distinction being drawn between new shares of a company of this class and the original shares. When I look at the provisions of the Companies Clauses Act, 1845, with regard to original shares, I find a distinction drawn between shares subscribed for and shares otherwise acquired by shareholders, and it does appear to me that with regard to shares subscribed for the inference from the wording of the Companies Clauses Act, 1845, is that these shares must be paid for in full—at least, that is my present opinion, although I have not expressly to decide the point. But the Act does contemplate shares being acquired otherwise than by subscription, and the shares now in question before me were so otherwise acquired. They were not subscribed for, and with regard to shares which are not subscribed for within the meaning of those words as used in the Companies Clauses Act, 1845, I can find no sufficient reason appearing in the Act, and certainly I can find no reason appearing in the special Act before me why I should hold that those shares should not have been allotted in consideration of a less sum than the nominal amount. I can find no provision in the Act, nor do I see why, on principle, I should hold that shares not subscribed for should not be allotted in consideration of a sum less than the nominal amount just as new shares can be, and I so hold.

Solicitors, *Bolton & Co.; J. T. Rossiter.*

Chan. Div.
Romer, J. } Dec. 2.

In re JARVIS & CO. (LIMITED). (*a.*)

Company—Vendor signatory to memorandum for 6,500 shares—Contract for sale to company subsequently filed—Consideration 6,500 shares—Shares earmarked—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-sections* 1, 4.

An arrangement was made between J. and others that a company should be formed to take over and work J.'s business of a maltster, and that J. should sell the business and premises to the company for 6,500 fully paid-up £1 shares. On the formation of the company J. signed the memorandum of association for 6,500 shares. Subsequently a contract was drawn up setting out the terms of his sale to the company, and this was duly filed in accordance with section 25 of the Companies Act, 1867. *It was considered and intended that the 6,500 shares for which J. signed the memorandum were those issuable to him under the contract. Doubts having arisen as to this, an application was made for an order under section 1 of the Companies Act*, 1898, *that a sufficient contract might be filed, or, in the alternative, a memorandum specifying the consideration for which the shares were issued.*

Held, that, as there was a sufficient contract filed within the meaning of section 25 of the Companies Act, 1867, *the court had no power under the Companies Act*, 1898, *to grant the relief sought.*

Motion.

This was an application under section 1 of the Companies Act, 1898, sub-sections 1 and 4.

F. W. Jarvis arranged to sell his business of maltster and corn merchant to a company to be registered under the above name. The consideration for the sale was to be the allotment to him of 6,500 fully paid-up £1 shares.

The company was formed in September, 1897, and F. W. Jarvis signed the memorandum of association for 6,500 shares.

By an agreement dated the 8th day of October, 1897, made between F. W. Jarvis of the one part, and the company of the other part, the said F. W. Jarvis agreed to sell his said business and the freehold buildings on which the same was carried on, and his trade-marks, plant, &c., to the company for £6,500, payable by the allotment to the vendor of 6,500 fully paid-up £1 shares in the company.

This agreement was filed with the Registrar of Joint-Stock Companies on the 4th of November, 1897, and the said 6,500 shares were allotted to F. W. Jarvis on the 11th of November, 1897. No other shares were ever applied for by or issued or allotted to him, and it was the intention of all parties, and the evidence showed that all parties interested considered that the 6,500 shares for which Jarvis signed the memorandum were the same as those to be issued to him under the contract, the terms of which had been arranged prior to the formation of the company, and that he never intended to make himself liable for any save those to be issued under the contract. A question having arisen as to whether F. W. Jarvis was not liable in respect of those shares for which he had signed the memorandum, the present application was made on his behalf for an order that a fresh contract might be filed, or, in the alternative, a memorandum specifying that the 6,500 shares for which he signed the memorandum of association were the 6,500 shares issuable to him under the filed contract.

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Howard Wright, for F. W. Jarvis, in support of the motion.—There was no contract registered before the issue of the 6,500 shares for which F. W. Jarvis signed the memorandum, as they must be taken to have been issued immediately on the registration of the company (*Dalton Time Lock Co.* v. *Dalton*, 66 L. T. Rep. 704, 40 W. R. Dig. 40), therefore one condition of section 1 of the Companies Act has been fulfilled. The word "credited" in that section imports intention, and the evidence shows that the parties clearly intended to treat these shares as paid up. A contract might have been filed at the issue of the shares that they should be paid for otherwise than in cash (*Fothergill's case*, 21 W. R. 301, L. R. 8 Ch. App. 270), and this is a case where under section 1 of the Act of 1898 this defect should be cured.

Cassel, for the company.

ROMER, J.—I agree this is a case of great hardship, as far as I can see, upon the gentleman who has subscribed to the memorandum of association for this large number of shares, and I only wish I could see my way to help him, but personally it appears to me that the Acts of Parliament bearing on the question before me are too strong to enable me to do what is asked.

In the first place, there was undoubtedly a contract between Mr. Jarvis and the company, under which Mr. Jarvis, as vendor to the company, was to receive 6,500 fully paid-up shares, the consideration being the property he contracted to sell to the company. That contract was duly filed before the issue of the shares. It is a contract which satisfied the provisions of the 25th section of the Act of 1867, and on the face of it there was a proper contract and a sufficient contract filed with the Registrar of Joint-Stock Companies before the issue of these shares, and undoubtedly these shares were intended to be the shares referred to in that contract. So far, then, there appears to be no difficulty. There is no liability on those shares, and the object of the present application is not to get rid of liability on those shares. The object of this application is to obtain indirectly a decision of the court on another and entirely different question—namely, whether or not Mr. Jarvis is or is not under some liability in respect of shares by reason of his having signed the memorandum of association for the same number (6,500) of shares.

In my opinion, it was never contemplated by the Legislature that the Act of 1898 should be used for the purpose of indirectly trying to obtain from the court a decision on such a question as that I have indicated. As to the shares in respect of which this application arises there is no liability. There is a sufficient contract filed, and the procedure of the Act is not necessary to protect the allottee of those shares, and I do not think I am bound to say that such a question as I am now asked to decide properly arises on an application of this kind under the Companies Act of 1898.

But I should be sorry to leave the case there, and I will add a few observations with a view of pointing out the difficulty there is in my saying anything which would relieve any liability Mr. Jarvis may be under by having signed the memorandum of association. Supposing I can hold that I could consider this application on the ground that the contract that was filed was not a sufficient contract within section 25 of the Act of 1867, so that I should be able to consider what I may call the merits of the case then comes the question, Can these shares that were issued in pursuance of that written contract that was filed be taken to be the shares for which Mr. Jarvis subscribed the memorandum of association? Directly the memorandum and articles of association were filed, there was at once a binding contract, between Mr. Jarvis and the company, that he should take these 6,500 shares directly from the company, and the shares are, in one sense of the term, to be deemed issued immediately. How did matters stand at that time? There was no other contract in existence between Mr. Jarvis and the company. In the nature of things there could not have been, and there was not. It was contemplated that a contract would be made between him and the company by which he was to sell property to the company, and take fully paid-up shares for the property; but that was a proposed contract which never could become a contract unless it was rectified and approved of by the company and finally entered into. That contract might never be made. There might be no such contract. But the contract created by the signature of the memorandum and the filing of the memorandum arose at once, and had nothing to do, so far as its validity was concerned, with regard to any other contract that might subsequently be entered into between Mr. Jarvis and the company. There was then, of necessity, immediately the memorandum was filed, a contract by Mr. Jarvis to take shares from the company. What was the contract as to payment of those shares? That is settled by section 25 of the Act of 1867. It is to be deemed a contract to pay for the shares in cash, because, as I have pointed out, in this case there could be no compliance with what I may call the saving clause in section 25 for two reasons. There could be, in the first place, no other contract, no prior contract, no co-existing contract, and still less could there have been any such contract filed. It follows, then, that before anything further was done there was a binding contract between Mr. Jarvis and the company to take these 6,500 shares and pay for them in cash.

Now let me see what effect upon that contract the subsequent contract entered into between Mr. Jarvis and the company could have had. They could not have contracted so as to take the case, so to speak, out of section 25. They could not have contracted so as to free Mr. Jarvis from his liability to pay for the memorandum shares in cash, and therefore any attempted contract entered into between Mr. Jarvis and the directors of the company subsequently to the filing of the memorandum could have had no effect upon the binding contract by which Mr. Jarvis had contracted to pay for these 6,500 shares mentioned in the memorandum in cash. Nor, as I have pointed out already, can you, by looking at the memorandum and articles of association, say that the shares for which he subscribed the memorandum are identified with the shares which had been subsequently the subject of a contract between him and the company. It could not be so. He could not have signed the memorandum of association for shares conditional upon a contract being entered into between him and the company for the company to take his property under certain conditions. At least I know of no such case where that has been done, and certainly it was not done in this case, and there is nothing which would enable me to say that the shares for which he subscribed the memorandum must be, or could be taken to be, the shares which were to be the subject of the agreement which it was hoped would be entered into between him and the company.

The result is that I cannot hold that the memorandum of association was one of the contracts under which these shares were issued. If the directors purported to issue the shares under the memorandum, it appears to me they had no power to do it. If a shareholder has once contracted to take shares and pay for them in cash, he can only pay for them in cash or cash equivalent in the strict sense of the term,

that is to say, by cash or by set-off—something which would amount to payment on the one hand in cash, and repayment on the other. You cannot satisfy the liability of a shareholder to pay for shares he has taken in cash by an arrangement to pay for them in land or property.

For these reasons it appears to me that if on this application I go into, as I have done, the merits of the case, I do not see my way to comply with the request, and I must therefore refuse the application.

Of course, nothing I have said here, I trust, can be taken to prejudice any question that may hereafter arise as between Mr. Jarvis and the company as to whether under the circumstances he is or is not bound to take other shares under the memorandum of association. That is a question which is not finally before me, and which I cannot pretend to dispose of on this application. There may be some grounds not apparent to me now on which he may escape any such liability. All I do is to refuse to comply with this application under the Act of 1898.

Solicitors, *Freshfields & Williams.*

Chan. Div.
Byrne, J. } Nov. 1, 2.

In re SHOREY (DECEASED).
SMITH *v.* SHOREY. (*a.*)

Administration—Practice—Creditor of the executors—Executors continuing the business.

Administration of testator's estate ordered in an action by a creditor of the executors who had continued to carry on the testator's business.

John Shorey carried on the business of a timber merchant in London. By his will and codicil he appointed his widow, the defendant Adelaide Shorey, and his son, the defendant J. C. Shorey, his executors, and thereby declared that should his executors deem it advisable to continue to carry on his business it was his wish that his said son should have the management thereof. The testator died in August, 1894.

The executors carried on the business as "J. & A. Shorey" until May, 1895, and in so doing incurred liabilities. On the 29th of May, finding themselves in financial difficulties, they called a meeting of their creditors, and submitted to them a statement of their affairs. A resolution was passed by the creditors that the estate should be realized under the supervision of three persons (one of whom was the defendant Cooke), and that the amount realized should be paid into the bank in the joint names of the defendants Cooke and Hurt. This was done, and about £170 was realized, which was paid into the bank.

The plaintiff was a solicitor who had acted in the above transactions on behalf of the executors, and his unpaid bills of costs, after taxation and allowing for sums received, amounted to about £30.

The plaintiff claimed payment of his said costs, and in default administration of the estate of the testator by the court.

There did not appear to be any creditors of the estate other than those for debts incurred subsequently to the testator's death.

Eve, Q.C., and *Eustace Smith*, for the plaintiff.—The creditors of the business of J. & A. Shorey have a right to be indemnified out of the whole estate of the testator, *Dowse* v. *Gorton*, [1891] A. C. 190, 40 W. R. 17; and they have a right to bring an action for the administration of the estate. It is true that there does not appear to be any reported case of such an order being made, but Kekewich, J., in *In re Bach*, [1892] W. N. 108, expressed his opinion that the subsequent creditors had a right to such an order. In *Owen* v. *Delamere*, 21 W. R. 218, L. R. 15 Eq. 134, there was no insolvency of the executors. The creditors cannot resort directly to the fund as there has been no declaration of trusts, as in the cases of *In re Johnson*, 29 W. R. 168, 15 Ch. D. 548, and *Strickland* v. *Symons*, 32 W. R. 889, L. R. 26 Ch. D. 245.

G. Thorn Drury, for the defendant Cooke, and

Richard Nevill, for the defendant Hurt, did not oppose the application.

The executors were not represented.

BYRNE, J., made the order for administration.

Solicitors for the plaintiff, *Thomas Dyson & Smith.*

Solicitors for the defendant Cooke, *S. R. Letchford.*

Solicitors for the defendant Hurt, *Roland Horatio Ward.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

C. C. R.
(Lord Russell of Killowen, C.J., and Hawkins, Wills, Wright, and Bruce, JJ.) } Nov. 5, 24.

THE QUEEN *v.* ELLIS. (*a.*)

Criminal law—Obtaining property by false representations—Property obtained in England on false representations made in foreign country—Jurisdiction.

A person made false representations in Glasgow as to his credit and financial position. On the faith of these representations goods were supplied to him on credit at Gateshead, in the county of Durham. He was shortly afterwards made bankrupt. Upon these facts he was tried at Durham for the offences—under the Debtors Act, 1869 (32 & 33 *Vict.* c. 62), *ss.* 11 (13) *and* 13 (1)—*of having obtained the goods on credit by false representations within four months next before the presentation of a bankruptcy petition against him, and of having obtained credit for the goods under false pretences.*

Held, that the offences were committed at Gateshead, and that the court had jurisdiction to try the prisoner.

Case stated by Day, J., as follows:

Frederick George William Ellis was charged before me at the Durham Summer Assizes under 32 & 33 Vict. c. 62, s. 13 (1), that he having been adjudged a bankrupt and within four months next before the presentation of a bankruptcy petition against him did in the county of Durham unlawfully by false representations obtain certain property from Messrs. Arthur & Co. (Limited), of Glasgow, amounting in the whole to £1,726 15s. 10d. on credit and has not paid for the same.

The said Frederick George William Ellis was also charged under 32 & 33 Vict. c. 62, s. 11 (13), that he between the 31st of August, 1897, and the 18th of November, 1897, in the county of Durham, in incurring certain debts or liabilities of various sums amounting in all to the sum of £1,726 15s. 10d. to Messrs. Arthur & Co. (Limited), of Glasgow, did unlawfully obtain credit under certain false pretences—to wit, for that he falsely represented to Mr. John Robert Kay, one of the directors of Messrs. Arthur & Co. (Limited), that he took stock at the end of December, 1896, that such stock amounted to very

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

near £3,500 in value, that his liabilities were £1,400, that he gave no credit, that he had £100 of his own, that he had a large shop which cost him £400 bought through a building society, to be repaid in thirteen years by monthly instalments at, say, £3 14s. per month, that his rent and taxes would come out about £100 per annum including the building society.

Both charges referred to the same goods, and the evidence in respect of both charges was the same.

Thomas Gibson Noble, the representative at Newcastle and Gateshead of Messrs. Arthur & Co. (Limited), of Glasgow, proved that he opened an account with the prisoner, who then carried on business as a draper at Gateshead, in the county of Durham, in July, 1896, and from that date until July, 1897, various orders were booked for the prisoner and executed; that in July, 1897, he began to be afraid to give the prisoner further credit without the instructions of his principals in Glasgow; that he arranged that the prisoner should have an interview with his principals for the purpose of informing them as to his financial position, which interview took place on the 1st of September, 1897, at Glasgow; that no representations of any kind were made to him or in his presence; that after the interview of the 1st of September, 1897, he received instructions from his principals to continue to supply the prisoner, and the prisoner also informed him that the interview had been satisfactory both to his principals and to the prisoner, that in consequence of these instructions and the prisoner's statement he took samples to the prisoner in Gateshead, booked orders there and transmitted most of the orders to Glasgow to be executed, but that some of the orders were executed at Gateshead and the goods delivered there by his porters; that the goods supplied in pursuance of such orders are the subject of the charges against the prisoner.

John Robert Kay, the managing director of Messrs. Arthur & Co. (Limited), of Glasgow, proved that he had an interview with the prisoner in Glasgow on the 1st of September, 1897, that at that interview the prisoner made to him the representations alleged in the charge; that the said interview was the only interview he had with the prisoner, and the only representations made to him were made verbally and at that interview; that in consequence of the representations then made he gave instructions to Mr. Noble to continue to take orders from the prisoner.

Evidence was also given to prove that the said representations were false, and that the prisoner knew that they were false, and that he presented a bankruptcy petition against himself within four months after obtaining the goods, and was adjudged a bankrupt.

There was no evidence to show whether the carriage of the goods sent from Glasgow was paid by Arthur & Co. or by the prisoner.

The jury returned a verdict of guilty.

At the close of the case for the prosecution, counsel for the defence took the objection that the offence was completed in Glasgow and no part of the offence was committed in the county of Durham and there was no jurisdiction.

The only question for the consideration of the court is whether the prisoner could be indicted and tried for the offences aforesaid or for either of them in the county of Durham.

If he could, the conviction is to stand; if not, the conviction is to be quashed.

Shortt, for the prisoner.—There was no jurisdiction to indict or try this prisoner in Durham; the false representations were made in Glasgow, and the credit was given by the order in Glasgow of the director of Arthur & Co. If the credit was given in Gateshead it was given not in consequence of any representation by the prisoner, but in consequence of the instructions received from the principals on Glasgow; if the credit was obtained on the false representations of the prisoner, it was obtained in Glasgow.

He cited *Reg.* v. *Martin*, 15 W. R. 358, L. R. 1 C. C. R. 56; *Reg.* v. *Dawson*, 16 Cox C. C. 556, 37 W. R. Dig. 61.

Henry Sutton, for the Crown.—When an offence is begun in one county and completed in another, the venue may be laid in either county: 7 Geo. 4, c. 64, s. 12; *Reg.* v. *Leech*, 4 W. R. 482, 7 Cox C. C. 100; but it is doubtful whether that Act applies as between Scotch and English counties. [WRIGHT, J.—Even before that Act the same rule, as between two English counties, seems to have been acted on: *Rex* v. *Buttery*, cited by Abbott, C.J., in *Rex* v. *Burdett*, 4 B. & Ald. 95, at p. 179.] In *Reg.* v. *Holmes*, 32 W. R. 372, 12 Q. B. D. 23, a prisoner had posted in Nottingham to the prosecutor in France a letter containing a false pretence, and he was held triable at Nottingham, where he received the goods. But the actual offence lies in obtaining the property: *Reg.* v. *Jones*, 1 Den. C. C. 551; and it is immaterial where the false pretence was made if it was continuing when the property was obtained and was acted on: *Reg.* v. *Martin*. Here the property was obtained in Gateshead, and the offence was committed there.

Shortt replied.

Cur. adv. vult.

Nov. 24.—Lord RUSSELL OF KILLOWEN, C.J., concurred in the following judgment of

WILLS, J.—The prisoner was indicted at the Durham Summer Assizes, 1898, under 32 & 33 Vict. c. 62, s. 11, sub-section 13, for that he, having been adjudged a bankrupt, and within four months next before the presentation of a bankruptcy petition against him, did in the county of Durham unlawfully, by false representations, obtain certain property from Messrs. Arthur & Co. (Limited), of Glasgow, amounting in the whole to £1,726 15s. 10d., on credit, and has not paid for the same, and under section 13, sub-section 1, of the same Act, for that he, between the 31st of August, 1897, and the 18th of November, 1897, in the county of Durham, in incurring certain debts or liabilities of various sums amounting in all to £1,726 15s. 10d., to Messrs. Arthur & Co. (Limited), of Glasgow, did unlawfully obtain credit by certain false pretences, which are set out in the indictment. The evidence touching each charge was the same, and the facts were as follows: The prisoner carried on business at Gateshead, in the county of Durham, as a draper. Messrs. Arthur & Co. (Limited), wholesale drapers, at Glasgow, had a traveller named Noble, who in 1896, at Gateshead, opened an account with the prisoner. In July, 1897, Noble declined to let the prisoner have further goods on credit unless he satisfied the principals at Glasgow as to his financial position. Thereupon on the 1st of September, 1897, the prisoner saw Kay, the managing director of Messrs. Arthur & Co. (Limited), and made to him a number of representations set out in the indictment as to his financial position which were false to the prisoner's knowledge. This interview took place at Glasgow, and there, as both the learned counsel agree, Kay gave instructions to Noble to continue to supply goods on credit to the prisoner. In consequence of these instructions Noble continued to call upon the prisoner at Gateshead, and there booked orders. Some of the goods so ordered were sent from Glasgow, and in respect of these there was no evidence whether the Glasgow house or the prisoner paid the carriage. Some of the orders, how-

ever, were executed by Noble himself at Gateshead, and were delivered by his porters to the prisoner there. The proof of bankruptcy and of the necessary dates was complete, and the only question is whether any offence was proved which the assize court sitting in and for the county of Durham had jurisdiction to try. There is no real difference material to the present case between the two counts. One speaks of obtaining property by false representations, and the other of obtaining credit under false representations. In each case the indictment follows the language of the Act of Parliament, but there does not seem to me to be any difference of substance created by the use of the different prepositions. There is no doubt, then, that the false representations were made in Glasgow out of the jurisdiction of the English courts, and that by or under these false representations goods were obtained in the one case and credit was obtained in the other in the county of Durham; and the question is neatly raised whether, when the false representations are made beyond the jurisdiction of the English courts, and the goods are obtained within the jurisdiction of an English court dealing with the charge, that court has jurisdiction to try the case.

There can be no doubt that the making of the false representations is an element in the crime. Without it there would be no crime. And if it is essential that all the elements of the offence should take place within the jurisdiction of the English courts, the conviction could not be sustained.

The question now raised is new. It has not in fact occurred with respect to false representations made outside England, whether abroad or in any parts of the British Islands. In England itself the question of jurisdiction as between two counties, when the false representations were made in one county and the goods obtained in another, has not been capable of being raised since 1827, for by the 7 Geo. 4, c. 64, s. 12, it was provided that where any felony or misdemeanour shall be begun in one county and completed in another, it may be dealt with and tried in any of the said counties in the same manner as if it had been actually and wholly committed therein.

Three observations here arise. First, that the particular state of circumstances which gives rise to the present question is not of so frequent occurrence as to make it surprising that the question has not been raised for decision. Secondly, that any authority bearing upon the analogous case of the offence in question being committed by false representations being made in one county, and goods being obtained by and supplied under them in another county, must be looked for before 1827. And thirdly, that it is within the undoubted competency of the British Legislature to enact that the obtaining of goods in England by means of false pretences made whether in or out of England shall be an offence against British law.

In this, as in most other cases, there is room for a good deal of argument on either side of the question, and it would not be uninteresting, certainly, to embark afresh upon some of the investigations which formed the subject of much of the discussion in *Rex* v. *Burdett*, 3 B. & Ald. 717, 4 B. & Ald. 95. But if there is distinct authority sufficiently germane to render such a task superfluous, it is, as it seems to me, equally unnecessary and unadvisable to resort to it. In my opinion there is such authority, and I will proceed to state what it is. Some time before the year 1820 one Buttery was indicted and tried in Herefordshire for obtaining goods by false pretences. The false pretences were made in Herefordshire, and the goods supplied in Monmouthshire. The prisoner was convicted and a case reserved, according to the practice of those days, for the consideration of the judges at Serjeants' Inn. The case is not reported, but in *Rex* v. *Burdett*, 4 B. & Ald., at p. 179, Abbott, C.J., after stating the facts, comments upon it in these terms: "The language of the statute" (30 Geo. 2, c. 24, s. 1) "makes the offence to consist in obtaining the money and not in using any false pretence whereby money shall be obtained. The judges thought the indictment was laid in the wrong county. They did not think the party not indictable at all, which they ought to have done if the proposition addressed to us be true." I will state a little later what that proposition was. The Lord Chief Justice continues: "They did not think the party not indictable at all because the pretence which was necessary to constitute the crime was in one county and the receipt in another and *there was no entire crime in either*."

The argument in *Rex* v. *Burdett* to which these observations were addressed by the Lord Chief Justice was that a libel written in one county for publication but published in another county constitutes no offence triable in either because there is in neither any one entire crime.

The majority of the court, consisting of Abbott, C.J., and Holroyd and Best, JJ., held, *dissentiente* Bayley, J., that the offence was triable in either county.

The case of *Rex* v. *Buttery* is cited only in the judgment of the Lord Chief Justice. It was not exactly in point and all that can be said of it in connection with *Rex* v. *Burdett* is that it is cited by Abbott, C.J., without any expression of disapproval.

But in 1825 the case of *Pearson* v. *McGowran* was before the same Court of King's Bench. It is reported in 3 B. & C., at p. 700, and it seems not only to adopt and confirm the decison in *Rex* v. *Buttery*, but to base it upon a ground which entirely covers the present case.

Pearson v. *McGowran* was an action for penalties under a statute which enacted that "every person who shall upon any contract take, accept, or receive by way or means of any corrupt bargain above 5 per cent. shall forfeit" a given sum, half of which was to go to the person who should sue for the penalty. The contract was made in Middlesex. The money paid in pursuance of the contract was paid in London. Upon a rule to set aside a verdict for the plaintiff and enter a nonsuit, pursuant to leave reserved, it was agreed for the plaintiff that the offence was a misdemeanour and was committed partly in one county and partly in another, and therefore triable, according to the decision in *Rex* v. *Burdett*, in either; the court held the contrary and ordered a nonsuit to be entered. The considered judgment of the court, which at that time consisted of Abbott, C.J., Bayley (the dissenting judge in *Rex* v. *Burdett*) and Littledale, JJ., was delivered by Abbott, C.J., who said: "We think the offence consists in the taking and receipt of usurious interest. The corrupt contract is antecedent to and not a part of the taking. The offence therefore was not committed partly in one county and partly in another, although the contract is undoubtedly a material circumstance in the case because it stamps the illegality of the receipt. This resembles *Rex* v. *Buttery*, which was an indictment on the statute 30 Geo. 2, c. 24, for obtaining money by false pretences. That statute enacts that all persons who knowingly by false pretence shall obtain from any person money, goods, &c., with intent to cheat and defraud any persons shall be deemed offending against law. The language of the statute makes the offence to consist in obtaining the money, not in using any false pretences whereby money shall be obtained. The indictment was in Herefordshire, the false pretences were in Herefordshire, but the money was obtained in

Monmouthshire. The judges thought the indictment was laid in the wrong county. That comes nearer to the present case than any of those cited at the bar and found by us. Upon that authority, therefore, and upon the language of the statute, we are of opinion that the rule for entering a nonsuit must be made absolute."

Mutatis mutandis, every part of the passages cited from each of the judgments is applicable to the present case. The making of the false pretences is antecedent to and not a part of the obtaining the goods. It is a material circumstance, because it stamps the illegality of the obtaining the goods. The gist and kernel of the offence is the obtaining the goods by improper means, not in using the improper means whereby goods were obtained, and there was, therefore, an entire offence within the one county, though the circumstances which stamped it with illegality took place beyond the jurisdiction.

If the principle of the decision in *Rex* v. *Buttery* and in *Pearson* v. *McGowran* be correct it can make no difference that the material circumstances which stamped an otherwise innocent transaction with the character of a crime took place outside the jurisdiction of the English courts. It was just as much outside the jurisdiction of the court which tried the offence in *Rex* v. *Buttery* and *Pearson* v. *McGowran* as if it took place in Scotland or abroad. It is, in fact, by these decisions reduced to a mere piece of the evidence necessary to constitute the offence.

There is nothing unreasonable in this view. There is no moral difference between an offence where the representations are made in England and one where they are made in Scotland. There has been no expression of judicial opinion anywhere finding fault with *Rex* v. *Buttery* or *Pearson* v. *McGowran*. The views expressed are those of a perhaps exceptionally strong court, some members of which certainly were exceptionally familiar with questions of pleading, and it seems to me altogether too late to question the authority. The present legislation is subsequent to it—and it is a sound principle that unless there be some strong countervailing reason fresh legislation is *pari materie* and using language identical with or undistinguishable from former Acts which have received judicial construction should be construed upon the lines of the former decisions.

It has been urged upon us that the fact that the Act of 7 Geo. 4, c. 64, s. 12, contained the provisions which have been set forth by which misdemeanours committed partly in one county and partly in another are triable in either indicates a doubt as to the soundness of the decisions, then recent, of *Rex* v. *Buttery* and *Pearson* v. *McGowran*. I do not think there is anything in this argument. The provision in question covers a vastly greater area than those two cases. It is contained in a section which deals with both felonies and misdemeanours. The provisions were undoubtedly new as to most felonies, at all events. It was most natural that when such provisions were enacted as to felonies they should be so extended as to place misdemeanours upon the same statutory footing in this respect as felonies. It was further urged for the prisoner that it required a statute (59 & 60 Vict. c. 52) to make the receipt of stolen property with the guilty knowledge that it had been stolen an offence triable in England where the property had been stolen abroad and the receiving had taken place in England. But the cases have no real analogy. The receiver, although guilty by statute of a substantive felony, is in all essential respects an accessory. There can be no receiver unless there has been a thief, and if the larceny which is the starting-point of the crime be not established there is no offence in the receiver. It is therefore essential to show a crime in someone else before you can make any case against the receiver. A crime in English jurisprudence means a crime by English law, under English law, and cognizable by an English court, and if there was no such crime established the receiver could not be convicted. This seems to me to be the true ground upon which it was rightly decided in *Reg.* v. *Debruie*, 11 Cox, 207, that a receiver in England could not be convicted where property had been stolen in Guernsey. Byles, J., points out there that transactions which may be larceny by English law may not be so by the law of Guernsey, and it would be strange if (without express legislation) that which might be no offence in the country where it took place should be made a foundation of a crime in England which consists essentially in being an accessory to the principal transaction. This is a good illustration of the inconvenience of holding a receiving to be a crime in England where the principal offence has been committed abroad. In the case now under consideration no question arises as to the commission of any crime in Scotland, nor as to the application of Scotch law to any part of the case. For these reasons I am of opinion that the conviction was good and ought to be affirmed.

HAWKINS, J.—I agree in thinking that the conviction ought to be affirmed. The crime consists in the obtaining of goods by means of a false representation previously made. The goods must no doubt be so obtained within the jurisdiction of the court before which the offender is tried, but I find no warrant for saying that it is essential that the false representation should be also made within that jurisdiction. To simply make a false representation with intent thereafter to defraud is not a legal crime, but if goods are obtained by means of it the so obtaining the goods amounts to an indictable offence wheresoever the false representation itself may have been made.

A false representation made to a London tradesman out of the jurisdiction—say, in Paris, with the object fraudulently to obtain goods from that tradesman in London must, according to every dictate of good sense, be intended by the maker of it to operate on and continue present in the mind of the tradesman until the goods are actually obtained from him, and by his conduct in obtaining the goods he ought in my opinion to be treated as having repeated his representations quite as effectually as if he had again put them in words.

Let me suppose that at the interview in Glasgow the managing director, believing the false representations of the defendant to be true, had said to the defendant, "I am satisfied. I shall be in Gateshead in a day or two, and as you have satisfied me I will let you have the goods you require," and in a day or two both had again met in Gateshead, and then, without another word being spoken, the managing director, acting on the Glasgow conversation, had handed to the defendant, on credit, the goods he required, would it not be revolting to good sense if it could be truly said that the law in this commercial country was such that the defendant could avert the consequences of his crime by alleging that, though he had beyond all question obtained the goods by fraudulently false pretences, he could not be punished because his false pretences were made in Glasgow.

WRIGHT, J.—I agree that this conviction ought to be affirmed. Looking at the two counts of the indictment and the provisions of the Act upon which they are founded, it seems to me that they are at any rate good counts after verdict, even if the false pretences are to be treated as made in Glasgow only; for the particular false pretence upon which the

goods or credit were obtained need not be stated, it being sufficient under the statute to aver generally that they were obtained by false pretences. But the evidence here is that the goods were delivered to and obtained by the defendant in Gateshead under a representation made in Glasgow, but continuing in Gateshead at the time when possession of the goods was taken.

I think it better not to determine the larger question of the application of the principle of *Rex* v. *Buttery* to the present case. There all the elements were present which were necessary within the principle laid down by Lord Coke to bring the case within the jurisdiction of the common law, and whether the case was to be tried in one county or another, all questions of law which might arise would have to be determined according to the laws of England. Even so, Bayley, J., was not clear upon this point, and it was thought necessary to pass a statute (7 Geo. 4, c. 64, s. 12) to set the question at rest. It is not quite clear to me that the same principle applies if the false pretence is made in a foreign country, and Scotland must be treated as a foreign country for the purposes of this case. In *Rex* v. *Buttery* the question was one of "*defectus triationis*," and the objection was that the jury could not take cognizance of the case if the goods were obtained in another county. Here the question is one of substance. The offence of obtaining goods by false pretences depends upon whether the person charged has obtained by fraud the consent of the owner to a change in the property in the goods; if consent has not been obtained the offence is larceny, if it has been obtained it is a misdemeanour. But where the false pretence has been made in a foreign country the law as to false pretences may not be the same as it is here; it may differ as to what would amount to a consent to the change in the property, as to the persons who may give such consent, as to what would vitiate that consent, and as to what makes the transaction voidable only as altogether void; and such questions might affect the nature of the crime, for it would be a misdemeanour or a felony according to whether there was or was not a consent to the charge in the property in the goods. I am therefore not prepared to deal with the larger question dealt with by my brother Wills, but for the reasons I have given I agree that the conviction was right.

BRUCE, J.—I agree that the conviction should be affirmed. I have only one word to add. The rule of common law restraining jurors from inquiring into facts arising beyond the limits of the county was not at any time so strictly observed in misdemeanours as in felonies. It seems to me that in the case of a misdemeanour the offence can be properly dealt with in the county where the offence is completed, notwithstanding that some act constituting a material circumstance may have happened altogether beyond the jurisdiction.

Conviction affirmed.

Solicitors for the prisoner, *Joel & Parsons*, Newcastle-on-Tyne.

Solicitor for the prosecution, *The Treasury Solicitor.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Nov. 15, 21.

In re HIRTH.

Ex parte THE OFFICIAL RECEIVER. (*a.*)

Bankruptcy—Fraudulent conveyance—Insolvent trader—Sale of business to limited company—Bankruptcy of trader—Winding up of company—Rights of trustee in bankruptcy—Statute of Elizabeth (13 *Eliz.* c. 5)—*Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1 (b).

The conveyance by an insolvent trader of his business to a limited company entirely under his own control is voidable only, and not void, and cannot be avoided by the trustee in the trader's bankruptcy after the company has gone into liquidation.

In re Carey, Ex parte Jeffreys, 43 *W. R.* 605, 44 *Ib.* 59, [1895] 2 *Q. B.* 624, *dissented from.*

Salomon *v.* Salomon & Co. (Limited), 45 *W. R.* 193, [1897] *A. C.* 22, *followed.*

Motion by the official receiver as trustee in the bankruptcy to set aside an agreement whereby the bankrupt purported to convey his business and stock-in-trade to a limited company.

The bankrupt Hirth began to trade on his own account in 1896, and an action was speedily brought against him by his former employers to restrain him from making use in his business of information obtained by him while in their service. Judgment was given on the 21st of December, 1897, for an injunction and costs against Hirth.

On the 9th of December, shortly before judgment in the action, Hirth, who was then in debt to the extent of £2,000, registered a company under the name of Hirth & Co. (Limited) with a capital of £3,000 in 3,000 £1 shares. Early in March, 1898, the taxation of the costs of the action was begun, and upon the 7th of March, Hirth executed the agreement now sought to be set aside, whereby he conveyed his business and stock-in-trade to Hirth & Co. (Limited) for the consideration of 2,000 fully paid up £1 shares to be allotted to his nominee. At first meeting of the company, attended by the seven shareholders, who made up the whole of the members, was soon held, and the 2,000 shares were allotted to an uncle of Hirth, who resided abroad. Upon the 29th of April the taxation of the costs in the action against Hirth was completed, and execution was levied for the amount, but no goods were forthcoming which could be seized.

Upon the 27th of May a receiving order was made against Hirth, his liabilities amounting to £2,200 and his assets being *nil*. On the same day Hirth & Co. (Limited) passed a resolution for a voluntary winding up, and Mr. Percy Mason was appointed liquidator. The books of the company showed that the business was carried on in exactly the same way as it had been before the transfer to the company. Some of the debts incurred before the transfer had been discharged, but fresh liabilities had also been contracted.

The official receiver having been appointed trustee in the bankruptcy of Hirth, now moved to set aside the transfer of Hirth's business and stock-in-trade to the company as fraudulent.

Muir Mackenzie and *Eldridge*, for the official receiver.—This transfer was void under the statute of Elizabeth (13 Eliz. c. 5) or under section 4, sub-section 1 (*b*), of the Bankruptcy Act, 1883, as a fraudulent transfer of the whole of the debtor's

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

property: *Ex parte Chaplin, In re Sinclair*, 26 Ch. D. 319, 32 W. R. Dig. 10. A similar transfer to a company was set aside by Vaughan Williams, J., in the case of *In re Carey, Ex parte Jeffreys*, 43 W. R. 605, 44 *Ib.* 59, [1895] 2 Q. B. 624, but in that case he gave the creditors of the company a prior charge to the creditors in the bankruptcy on the assets of the company, which we contend was wrong.

Reed, Q.C., and *Clayton*, for the liquidator of the company.—The company is now in liquidation, and it is too late to set aside the agreement under which it took its property. The transaction was not void but only voidable, and it cannot be avoided now that the company is in liquidation. The case of *In re Carey, Ex parte Jeffreys* is no longer law since the decision of the House of Lords in *Salomon* v. *Salomon & Co. (Limited)*, 45 W. R. 193, [1897] A. C. 22.

Muir Mackenzie replied.

WRIGHT, J.—I am sorry that I have to decide this question without having the real facts as between the company and its creditors fully in evidence, for their position is by no means clear. I am told that there never was an instance of an order of this kind having been granted, except the case of *In re Carey, Ex parte Jeffreys*. It seems to me that the order in that case was granted on a doctrine which was acted on as law at that time, but which, since the decision of the House of Lords in *Salomon's case*, is not now law to its full extent. I think, moreover, that the decision in *Carey's case* does not cover the present case. I am satisfied that there was a real resolution to wind up the company, and I must take it that the company is in liquidation, and, if so, I cannot see how, sitting as the judge in bankruptcy and in virtue of my bankruptcy jurisdiction, I can, after the commencement of the liquidation, by any order avoid the transfer of the property to the company. It seems to me that Mr. Reed's contention that the transfer to the company was voidable and not void is correct, and that the trustee not having elected to avoid the transfer till after the company had gone into liquidation, it is too late then for him to do so, as it would be impossible to put the creditors of the company in the position they were in before the liquidation commenced. What the effect of an order to set aside the transfer to the company such as is now asked for would be I do not exactly know, but Mr. Muir Mackenzie agreed that any order I might make must be made without prejudice to the rights of the creditors of the company, who have become creditors since the 7th of March, 1898, the date of the agreement of transfer. I do not see my way to making the order here asked for, but I expressly guard myself against saying that in no case can such relief be given. In this case it is sufficient for me to say that on the facts before me the difficulties are so great that I cannot find my way out of them.

Motion dismissed with costs.

Solicitors for the trustee in bankruptcy, *Sugden & Harford*.

Solicitors for the liquidation of the company, *Firth & Co.*

Court of Appeal.

From County Court. (A. L. Smith, Rigby, and Collins, L.JJ.) — Dec. 17.

LOWE *v.* PEARSON. (*a.*)

Master and Servant—Employment—"Accident arising out of and in the course of the employment"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

A workman was employed in pottery works to make the clay into balls, and to hand them to a woman who was at work at a machine moulding the clay. The workman had nothing to do with the machine, and was expressly told not to interfere with it. The workman, while the woman was temporarily absent from the machine, attempted to clean it, and his hand was caught in the machinery and injured.

Held, that the accident did not arise "out of and in the course of the employment" within section 1, *sub-section* 1, *of the Workmen's Compensation Act*, 1897, *and that, therefore, the employer was not liable to pay compensation.*

Appeal by the defendant from the decision of the judge of the Chesterfield County Court upon proceedings taken by the plaintiff the respondent to recover compensation under the Workmen's Compensation Act, 1897.

The appellant, Pearson, was the owner and occupier of certain pottery works, being a factory within section 7 of the Workmen's Compensation Act, 1897; and the respondent, Lowe, was a boy of the age of fourteen years in the appellant's employment. The respondent was employed in the pottery works to make clay into balls, to put the balls into a mould, and hand the mould to a woman who was at work at a machine moulding the clay into jars and other articles. On the machine were two cones revolving in opposite directions. Express orders were given to the boy not to interfere with the machine; and the evidence showed that if the machine wanted cleaning it was the duty of a particular workman to clean it. Upon the day in question the woman who was working at the machine, being in want of clay, went away to get some, and the respondent, in her absence, attempted to clean the cones, when the fingers of his right hand were caught in the machine, and two of his fingers were injured. Upon a claim by the respondent for compensation under the Workmen's Compensation Act, 1897, the county court judge found as follows: "(1) Course of his employment. I decide, though I find as a fact it was against rules that the plaintiff"—the present respondent—"should clean the cones, and that he attempted to clean them knowing that it was not his duty, yet that the injury was received by an accident arising out of his employment." "(2) Though I find as a fact that he knew it was against orders for him to clean the cones, and that he went about the cleaning in a careless and reckless manner, yet that the plaintiff was attempting to clean the cones with the view of furthering the work, and that his conduct did not, in my opinion, amount to serious and wilful misconduct." He assessed the compensation at 2s. a week from fourteen days after the accident.

C. A. Russell, Q.C., and *Etherington Smith*, for the appellant.—The accident did not arise "out of and in the course of the employment" within section 1, sub-section 1, of the Workmen's Compensation Act, 1897.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The respondent was expressly forbidden to interfere with the machine, and therefore he was acting outside the scope of his employment when he attempted to clean it. To bring a case within the above words, the workman must be engaged in doing that which he was employed to do or something incidental to it. A servant cannot make that a part of his employment which his master has not employed him to do. The question whether the respondent thought that he was furthering his master's work by cleaning the cones is not material upon the point whether the accident arose out of and in the course of the employment. As between master and servant the latter cannot extend the scope of his employment by doing what he thinks will further his master's work. This act of the respondent was as much outside his employment as the act of the respondent in *Smith* v. *Lancashire and Yorkshire Railway Co.*, *ante* p. 146, [1899] 1 Q. B. 141.

They also referred to *Engelhart* v. *Farrant*, 45 W. R. 179, [1897] 1 Q. B. 240.

The respondent did not appear.

A. L. SMITH, L.J.—In my opinion this decision cannot be upheld. This boy's hand was injured while he was employed at a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897, and the question we have to determine is whether the injury was caused "by accident arising out of and in the course of the employment" within the meaning of section 1, sub-section 1, of the Act. I wish to state at the outset that the present is not a case of a workman doing something in an emergency altogether outside what he is employed to do, and I desire to reserve my opinion upon that case until it arises. The boy here was engaged on manual labour, his duty being to make clay balls and to hand them to the woman at work at the machine. He had nothing to do with the machine. He had been expressly told not to touch it. In spite of those express orders he meddled with the machine. He attempted to clean it, and was injured. It was no part of his duty to clean it. The learned county court judge has found that the boy was not guilty of serious and wilful misconduct, because what he did was with the view of furthering the work. That, however, cannot affect the question whether or not the accident arose out of and in the course of the employment. A master may well employ a boy of this age to make balls of clay and hand them to the woman at the machine, whereas it is a very different thing to employ him on that which will bring him into contact with the machine. I base my judgment upon the facts that the boy was only employed to make the clay balls, that he had nothing whatever to do with the machine, that he was expressly ordered not to interfere with it, and that he, knowing of those orders, disobeyed them, and in consequence was injured. The appeal must therefore be allowed.

RIGBY, L.J.—This is a proceeding by an infant to recover compensation under the Workmen's Compensation Act, 1897, and the infant is not represented on this appeal. Therefore, in accordance with the traditions of the Court of Chancery that the judge should take care that the interests of the infant are not thereby prejudiced, I have tested as closely as I could the argument addressed to us on behalf of the appellant. With all possible care on behalf of the infant, I cannot find that the employer is liable in this case. We know what the infant's duty at the factory was. His duty was simply to make the clay balls and to hand them to the woman who was working the machine, and he was expressly warned not to meddle with the machine—that is to say, he was not to clean the machine. The operation of cleaning the machine was not entrusted to the woman who was working at it, that duty being entrusted to another servant, who from his experience would be more likely to do it safely. For that purpose some knowledge of the machine and of the way in which it should be cleaned was necessary, whereas this lad knew nothing about it, and directly he attempted to clean it he was involved in difficulties. In my opinion the accident did not arise out of and in the course of the employment within the meaning of section 1, sub-section 1, of the Act.

COLLINS, L.J.—I am of the same opinion. If we were to hold the employer liable on the facts of this case, we should have to cut out of section 1, sub-section 1, of the Act the words "arising out of and in the course of the employment." It is not the meaning of those words that the employer is to be liable upon mere proof of employment and injury to the workman, but the accident which causes the injury must arise out of and in the course of the employment. We must ascertain what the employment was. When that has been ascertained, it clearly excludes the act of the boy in attempting to clean the machine. His employment was to perform a purely unskilled piece of manual labour, and had nothing to do with the machine, and if he chose to meddle with it, and was injured in consequence, the accident could not be said to arise out of and in the course of the employment.

Appeal allowed.

Solicitors for appellant, *Stevens, Son, & Parkes*, for *Jones & Middleton*, Chesterfield.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 28, 29. Dec. 12.

In re HALIFAX COMMERCIAL BANK AND WOOD. (a.)

Vendor and purchaser of land — Lost title-deed — Secondary evidence, what required, and at what time.

Where a deed forming part of the vendor's title to land is lost, the purchaser can nevertheless be compelled to complete if he is furnished in proper time with satisfactory evidence of its contents and of its due execution.

Bryant *v.* Busk, 4 *Russ.* 1, *and* Moulton *v.* Edmonds, 8 *W. R.* 153, 1 *De G. F. & J.* 246, *followed.*

But evidence not produced till after the time for completion has expired, and the purchaser has properly issued a summons claiming a declaration that the vendor has not shown a good title, is too late; and evidence, in other respects satisfactory, which fails to prove the execution of one material deed by one necessary party, is insufficient.

Decision of Stirling, J., *affirmed* (Vaughan Williams, L.J., dubitante).

Appeal from Stirling, J.

The material facts are sufficiently stated in the judgment of Lindley, M.R.

Jenkins, Q.C., and *Dibdin*, for the vendors, who appealed, referred to the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 5, 6, 8, 9, 14, 15 (repealed by 48 & 49 Vict. c. 26), 22; Dart on Vendors and Purchasers, 6 ed., vol. 1, p. 159; *Bryant* v. *Busk*, 4 Russ. 1; *Sadlier* v. *Biggs*, 4 H. L. Cas. 435; *Waldy* v. *Gray*, 23 W. R. 676, L. R. 20 Eq. 238.

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

[LINDLEY, M.R., referred to Fry on Specific Performance, 3 ed., p. 170, where *Bryant* v. *Busk* is cited as an authority against the vendors. VAUGHAN WILLIAMS, L.J., referred to *Moulton* v. *Edmonds*, 8 W. R. 153, 1 De G. F. & J. 246.]

Farwell, Q.C., and *R. J. Parker*, for the purchaser.—The vendors never gave sufficient evidence of the execution of the deeds; certainly not before the 18th of March, 1898, when their summons was issued. They cited *Brindley* v. *Woodhouse*, 1 Car. & K. 647; Dart on Vendors and Purchasers, 6 ed., vol. 1, p. 353; and section 21 of the Yorkshire Registries Act, 1884. [VAUGHAN WILLIAMS, L.J., referred to *Southby* v. *Hutt*, 2 My. & Cr. 207.]

Dibdin replied.

Cur. adv. vult.

Dec. 12.—LINDLEY, M.R., read the following judgment: The object of this appeal is to obtain a declaration that the Halifax Commercial Banking Co. (Limited) have shown a good title to some property sold by them to Mr. Wood, in accordance with particulars and conditions of sale. The contract for sale is dated the 18th of October, 1897, and the time fixed for completion was the 15th of November, 1897. The purchaser was willing to complete, but the vendors could not produce the deeds, they having been unfortunately lost by their solicitors after the contract had been signed. There is no condition providing for the non-production of lost deeds. But the mere fact of their loss does not release the purchaser from the performance of his contract. He can be compelled to complete if he is furnished in proper time with satisfactory secondary evidence of the lost documents. This was decided in *Bryant* v. *Busk* and *Moulton* v. *Edmonds*. The fourth condition of sale does not place Mr. Wood in a better position in this respect than any other purchaser if the contents of the lost deeds, including their recitals, can be satisfactorily proved. For a long time the purchaser insisted that nothing short of the production of the original deeds would satisfy him, and on the 1st of December, 1897, his solicitors wrote to say that if the deeds were not produced and the title found to be satisfactory, and the matter completed before the end of the year (1897), the contract must be considered at an end. The purchaser, however, did not at the end of the year insist upon having his deposit back. The vendors' solicitors still hoped to find the deeds, and, if they could not, they proposed to supply the purchaser with satisfactory secondary evidence of them. Considerable correspondence took place on this subject. The effect of this correspondence was, in my opinion, to enlarge the time for completion, and to give the vendors still further time from the end of the year 1897 for showing a proper title by producing the deeds. On the 20th of December, 1897, the vendors' solicitors sent some statutory declarations by Fox, Woodhead, and Binns. These declarations referred to and verified a printed abstract of the missing deeds, and the abstract is so full as to show all the recitals. I am satisfied that the abstract is a full and correct copy, except that "whereas" is turned into "reciting," and "duly executed and attested" is all that appears as regards execution by the persons named as parties to the principal deed. These declarations and the abstract did not prove the execution of the deed, and fell short of what the purchaser was entitled to have. On the 5th of February, 1898, the vendors offered an indemnity, which was refused. On the 12th of February, 1898, the vendors offered some further statutory declarations "by the conveying parties to the various deeds to the effect that they signed, sealed, and delivered the documents, and exhibiting true copies which they identify as such." No such declarations, however, were sent to the purchaser, probably because his solicitors wrote on the 22nd of February, 1898, that he would "strenuously resist completion in the absence of the title-deeds, or practically no title at all, and we again assert that secondary evidence, such as you propose to furnish, would not, we are sure, be accepted by a purchaser from our client." There the matter rested until the 18th of March, 1898, when the vendors took out a summons, asking for a declaration "that a good title has been shown in accordance with the particulars and conditions of sale." In support of that summons an affidavit was filed on the 1st of April, 1898, sworn by R. D. Fox. On the 16th of April, 1898, the purchaser issued a summons, asking for a declaration "that the vendors have not made out a title in accordance with the contract," and asking for an order for the return of the deposit. After this many further affidavits were filed, and on the 16th of June, 1898, Stirling, J., made an order on both summonses, declaring that the vendors "have not shown a good title" according to the contract, and ordering the vendors to return the deposit and pay the costs. The secondary evidence of title adduced before Stirling, J., was much more satisfactory than that which the vendors had produced to the purchaser before the vendors issued their summons. But Stirling, J., did not dismiss the vendors' summons on the short ground that they had not shown a good title before its date. He examined the further secondary evidence of title adduced in opposition to the purchaser's summons, and decided against the vendors, even on the additional evidence. This was, in my opinion, too favourable to the vendors. The purchaser had a right to say that, the vendors not having shown a good title within a reasonable time, he (the purchaser) was not bound to wait longer, and was entitled to be discharged from the contract and to have back his deposit. I see nothing in the correspondence or in the conduct of the purchaser to deprive him of that right. In my opinion the evidence adduced by the vendors before the purchaser issued his summons was not such as the purchaser could be compelled to treat as satisfactory. This, in my opinion, disposes of the case in his favour. He cannot be compelled to give further time, as ample time had been given before he took out his summons. The evidence adduced since is, however, still defective as regards the execution of the principal conveyance by one important party—viz., Frances Jane Jarvis. This was frankly admitted by the vendors' counsel. The memorial registered in the Yorkshire Registry, on which the vendors rely for supplying the defect, does not prove the execution of the deed enrolled by all the persons named as parties to it, nor by Frances Jane Jarvis in particular. The appeal ought to be dismissed with costs.

CHITTY, L.J.—I am of the same opinion; and I agree with the Master of the Rolls as to both the grounds he has given. The two authorities cited, *Bryant* v. *Busk* and *Moulton* v. *Edmonds*, show that the court may force the purchaser to take the title upon secondary evidence proving what were the contents of those deeds, and that the deeds were duly stamped and duly executed. But in my opinion the secondary evidence produced ought to be clear and cogent. Without casting any reflection upon those two authorities, it is quite certain that to some extent the purchaser is put in a worse position than if he had the deeds delivered to him, or had proper covenants or acknowledgments for their production. He is in a worse position, because on a sale he would have to make special conditions to protect himself. Therefore I say, without disputing the authority of those cases, that the secondary evidence ought to be clear and

cogent, so that the purchaser may maintain his title against all those who may attack him. In this case it is quite plain that on the 18th of March, 1898, when the vendors took out their summons for a declaration that they had shown a good title, they had not given satisfactory secondary evidence. That was admitted in this court by their counsel. There was some delay before the purchaser took out his summons in the following April, and in June, when the case came before Stirling, J., the evidence was admitted not to be complete. Stirling, J., thought it right to give the vendors some further time to complete their evidence. In that I think Stirling, J., gave a direction too favourable to the vendors, for the time had then arrived for finally closing the matter. The time for completion was the 15th of November, 1897. On the 1st of December, 1897, the purchaser gave a notice to determine the contract; but that notice was plainly waived by the correspondence which ensued. Then the vendors had to produce satisfactory secondary evidence on three points I have mentioned. The deeds were not old deeds—the oldest was dated in 1893; and there ought to have been no difficulty in procuring the required evidence. It appears to me that a case of this sort ought to have been cleared up by proper evidence before the time when the summons came on before Stirling, J.

Passing from that point—though I think that in the circumstances it is fatal to the vendors' case—I find that on the second occasion Stirling, J., held the vendors' evidence to be insufficient. Now, where the learned judge below, after carefully considering the evidence, held it to be insufficient, I should pause before I dissented from his view; the purchaser's contractual right being to have, not only the best evidence available, but cogent evidence. But I pass that by, because I think that the vendors have now failed to show by sufficient evidence the execution of the deed of 1893 by Mrs. Frances Jane Jarvis. That is a point which ought not to be left to inference.

For these reasons I think the appeal ought to be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree in the result, because according to my view this is really a question of what, for shortness, I will call Chancery practice; and, as the other members of the court, who are much more competent to decide such a question than I can possibly be, tell me that in accordance with those rules of practice this is a case in which the vendors have so failed to perform their obligations at the proper time that there ought to be an order against them both on their own originating summons and on that taken out against them by the purchaser, I assent to the judgment. But I think I ought to state why it is that, apart from any question of what the practice may be, I should have hesitated to arrive at this conclusion. As to the law laid down in *Bryant* v. *Busk* there is really no doubt. The loss of the deeds does not prevent the vendors from supplying that loss; by giving, first, sufficient evidence of the loss; and then, secondly, sufficient evidence of the execution of those deeds which have been lost. The vendors delivered an abstract, and then the question arose between the vendors and the purchaser as to whether or not the purchaser was still bound to carry out the contract, those deeds having been lost. The purchaser's position was that he was not bound, while the vendors, relying on *Bryant* v. *Busk*, said that he was. From the beginning to the end of the correspondence that was the only question that was raised. Of course the duty of the vendor is not merely to deliver an abstract, but he has to verify his abstract. Now, this objection being taken, the vendors did send to the purchaser certain evidence of the loss and execution of these deeds. It now turns out that that evidence, even when supplemented by the affidavits read before Stirling, J., is defective in that the execution by one material party, Frances Jane Jarvis, is not (I agree) sufficiently proved. But that is not the matter which was in dispute between the parties. I take it that the object of the Vendor and Purchaser Act, 1874, is to simplify and cheapen procedure. Apart from that Act of Parliament I take it, from the very case of *Bryant* v. *Busk* itself, that if there had been an action for specific performance, and the purchaser had set up as a defence that, having regard to the loss of the deeds, he was not bound to complete; if that question had been tried and decided against him in ordinary course there would have been a further inquiry for the very purpose of verifying the vendor's title; and when, as here, the procedure is under the Vendor and Purchaser Act—although no doubt the summons they have taken out is in the most general terms, that it might be decided that they had a good title—it does seem to me, having regard to what I have read and been told as to the practice in vendor and purchaser summonses, that that summons ought not to be heard without any definition of the real question which the parties invite the court to decide. The matter ought not to be brought in a wholesale manner before the judge, but the parties ought somehow or other to define the question which is really to be raised. In respect of this particular abstract, I say again that, as far as I understand, the only question really at issue between these parties when they went before Stirling, J., was the question of the effect of *Bryant* v. *Busk*. In those circumstances, apart from any question of the practice, I should have thought that it would have been mere waste of money for the vendors to produce further evidence after the purchaser had in the most decided possible manner said that evidence of the loss and execution of those deeds would be of no use, because he, the purchaser, would not accept it. I think it would have been a right and convenient course, if any question was raised as to the sufficiency of the verification, as to some small part of the title, to give the vendors an opportunity to correct any deficiency which the purchaser alleged in the verification. Here he alleged none whatever. His objection was not to the details of the evidence, but was an objection in principle that he could not be compelled to carry out the purchase, having regard to the loss of the deeds. It is to be remembered here, according to my view, that the vendors cannot be charged with any *laches* or delay in this matter. Nothing could be done for the completion or carrying out of this contract until this objection in principle to the whole obligation of the purchaser had been determined.

I entirely agree that if at the hearing before Stirling, J., it was the vendors' duty to come prepared with verification of every detail of their title they have failed to do so. I must assume that it is not right they should have any opportunity of correcting this mistake. I concur in the decision with the greatest reluctance, because I think that upon the real question which was raised as to this title the vendors were absolutely and entirely right. In these circumstances I am sorry to have to concur in a judgment which in consequence of this petty defect throws upon the vendors not only the loss of their right to have this contract carried out, but also the costs of these proceedings.

Appeal dismissed.

Solicitors, *Vincent & Vincent*, for *North & Sons*, Leeds; *Fell & Co.*, for *Dawson & Chapman*, Leeds.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Oct. 31; Nov. 1, 3, 17.

In re PERRY ALMSHOUSES.
In re ROSS'S CHARITY. (*a.*)

Charity—Ecclesiastical charity—"Member of Church of England as such"—Appointment of trustees—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 14, 19, 70, 75.

In re PERRY ALMSHOUSES.

The founder of a charity required that the objects of it should be selected from persons who should have (1) regularly attended Divine service at the parish church for a fixed period; (2) been partakers of the Holy Communion; (3) lived a godly, righteous, and sober life, to the glory of God's holy Name; and that the trustees should be members of the Church of England.

Held (*affirming* Stirling, J., 46 W. R. 360 [1898] 1 Ch. 391), *that this was a charity for the members of the Church of England "as such"; and was therefore an ecclesiastical charity within the meaning of section* 75 *of the Local Government Act*, 1894; *and that therefore the parish council had no power to appoint new trustees under section* 14 *of the same Act.*

In re ROSS'S CHARITY.

A testatrix charged certain lands with the payment of £3 a year, to be paid on a certain day annually to the churchwardens of A., to be laid out by them in the purchase of clothing to be given to six old and poor widows of the said parish whom they should judge to be the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public services of the Church.

Held (*affirming* North, J., 46 W. R. 27 [1897] 2 Ch. 397), *that this was not an ecclesiastical charity within the meaning of section* 75 *of the Local Government Act*, 1894, *and that, therefore, under section* 14 (2) *of that Act, the power to appoint new trustees was vested in the parish council, and not in the churchwardens.*

In re PERRY ALMSHOUSES.

Appeal of the Charity Commissioners from Stirling, J. (reported 46 W. R. 360 [1898] 1 Ch. 391).

The charity was founded by an indenture dated the 1st of July, 1851, whereby Mrs. Mary Ann Jones conveyed to the rector of Winterbourne and other trustees a piece of land and ten cottages then in course of erection to hold upon trust for the benefit of the aged poor of the parish of Winterbourne "who not being let by sickness or some other urgent cause, shall have attended divine service at the church of the parish of their respective residences for the time being every Sunday for the last five years of their respective lives, and have been partakers of the Holy Communion, and lived a godly, righteous, and sober life, to the glory of God's holy Name."

Stirling, J., held that the charity was for members of the Church of England as such, and was therefore an ecclesiastical charity within the meaning of section 75 of the Local Government Act, 1894.

The Charity Commissioners appealed.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appellants.—Section 75 (2) (*e*) relates only to charities *ejusdem generis* with (*a*) (*b*) (*c*) and (*d*). Therefore no purely eleemosynary charity is within the section at all: *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531 (Lord Macnaghten's speech at p. 583). In *Shore* v. *Wilson*, 9 Cl. & Fin. 355, the court held that there was an express requirement that the applicants should be members of a particular sect. The conditions here do not in fact exclude members of other denominations. The Act of 1711 was passed in order to prevent dissenters making themselves eligible for offices by taking the Holy Communion, and is therefore inconsistent with the view that *as* dissenters they were excluded: see Lecky's History of England, vol. 1, p. 115. [VAUGHAN WILLIAMS, L.J.—*Jenkins* v. *Cook* 24 W. R. 439, 1 P. D. 80, only lays down the conditions on which a clergyman of the Church of England is entitled to reject candidates.]

They referred to *Attorney-General* v. *Calvert*, 23 Beav. 218, 5 W. R. Ch. Dig. 13; *Escott* v. *Mastin*, 4 Moo. P. C. 104.

Eady, Q.C., and *Danckwerts*, for the respondents.—In *Jenkins* v. *Cook* the question did not arise. The gift is within section 75 (2) (*c*) by virtue of the proviso at the end of section; (*b*) says, "for the benefit of any spiritual person or ecclesiastical officer as such"; but in the proviso the words "as such" are omitted. The rule for the construction of charity deeds appears from *Shore* v. *Wilson*.

They referred to *Taylor* v. *Timson* 20 Q. B. D. 671, 36 W. R. Dig. 73; Selborne's Defence of the Church and Clergy, ch. 9, p. 196; *Baker* v. *Lee*, 8 H. L., Cas. 495, 9 W. R. H. L. Dig. 2.

In re ROSS'S CHARITY.

This appeal was then opened.

Mary Ross, by her will made in 1799, charged certain lands with the payment of £3 a year to be paid on the feast day of St. Thomas the Apostle in every year for ever to the churchwardens of the parish of Bishop's Hatfield to be laid out by them in the purchase of flannel petticoats, stockings, or gowns to be given as soon as might be to six old and poor widows of the said parish whom they should judge to be the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public services of the church.

North, J., held that this was not an ecclesiastical charity within the meaning of section 75 of the Act, and that new trustees might be appointed under section 14 by the parish council in the place of the churchwardens (see 46 W. R. 27, [1897] 2 Ch. 397).

The churchwardens of the parish of Bishop's Hatfield appealed.

Lord Robert Cecil, for the appellants.—This point has never been before the Court of Appeal, and if the cases are against me they ought to be overruled. Broadly, all charities vested in churchwardens are ecclesiastical charities. [LINDLEY, M.R.—Section 14 amounts to this: you ought to substitute churchwardens for overseers.] Whichever construction is adopted, churchwardens and overseers are dealt with by a side-wind and not directly. I submit that my construction of section 14 is far more consistent with the earlier parts of the Act, and is equally consistent with the construction put upon it by North, J.

He referred to *Shore* v. *Wilson*; *Attorney-General* v. *Calvert*; and *Attorney-General* v. *Ruper*, 2 P. Wms. 125.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the respondents.—[LINDLEY, M.R.—You need not trouble about Ross's Charity not being an ecclesiastical charity, but we want to hear your construction of section 14.] Sections 5 and 6 deal with overseers and churchwardens in so far as they are

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

by statute or common law corporations. Sub-section 3 has no reference to property vested in churchwardens as such, because they are not a corporation capable of holding, except in the case of church property or an ecclesiastical charity. There is no authority whatever that property, other than ecclesiastical property, can be vested in churchwardens as a corporation. Parish councils, where there are no other trustees but churchwardens, in cases of non-ecclesiastical charities, are entitled to hold. The Act of 55 Geo. 3, c. 137, makes overseers a corporation, and churchwardens are a corporation for the purpose of receiving money or goods for the purposes of the church.

Cozens-Hardy, Q.C., in reply, in *In re Perry Almshouses.*—Every one of these qualifications can be fulfilled with perfect good faith and legally by a person not a member of the Church of England, and if there were only one candidate who fulfilled all the conditions, but was not a member of the Church of England, the churchwardens would have no power to refuse him.

Lord Robert Cecil replied as to the construction of section 14 and corporations.

Cur. adv. vult.

Nov. 17.—The following written judgments were delivered:

LINDLEY, M.R.—The questions raised by these appeals are whether the parish councils of the parishes for the poor of which these charities are founded are entitled to appoint new trustees of the charities under section 14 of the Local Government Act, 1894 (56 & 57 Vict. c. 73). The questions in both cases resolve themselves into the narrower question whether these charities are ecclesiastical charities within the meaning of section 75 of the same Act. Stirling, J., has held the Perry Almshouses to be an ecclesiastical charity and that the parish council have no power to appoint new trustees of it. North, J., has held Ross's Charity not to be an ecclesiastical charity and that the parish council has power to appoint new trustees of it. Another question arises in Ross's Charity, in which the trustees are the churchwardens. It is contended that even if the charity is not an ecclesiastical charity, section 14 does not apply to it. No such question arises in the Perry Almshouses case, and it will be convenient to deal first with the important question raised in both appeals—viz., whether these charities are charities to which section 14 is made applicable.

Section 14 is one of a group of sections relating to parish meetings and parish councils, and more particularly to their powers and duties. So far as I can discover their powers and duties extend to parochial charities which are not ecclesiastical, but they do not extend to ecclesiastical charities. They are excepted in every case in which general language is used which would include them and place them under the control of the new bodies created by the Act. Section 5, sub-section 2 (*c*); section 6, sub-section (*a*) i., (*c*) iii.; section 14; section 19, sub-section 4, all show that the above observation is well founded. Section 75 does not define or profess to define the meaning of ecclesiastical charity, but says that unless the context otherwise requires, the expression ecclesiastical charity shall include various things, and, *inter alia*, a charity the endowment of which is held "for the benefit of any particular church or denomination, or of any members thereof as such." The word "church" here clearly does not mean building; it means a religious society of some sort. But to be an ecclesiastical charity its endowment need not be for all the members of a particular church or denomination; it may be for the benefit of some of them only, but then the endowment must be for their benefit as such members. The whole controversy turns on the meaning of these words "as such." They are obviously introduced to prevent the application of the term of ecclesiastical charity to members of a particular church or denomination irrespective of their membership. The words "as such" do not mean "only." Such an interpretation might defeat the object with which the words are introduced. The words "as such" mean as members—*i.e*, in their character of members. But, although the words "as such" do not mean "only," and a charity only for some members of a particular church or denomination might not be an ecclesiastical charity, yet I cannot myself see how a charity for the benefit of some of the members of a particular church or charity can be said to be for their benefit as such if, upon the true construction of the instrument constituting the charity, non-members of that church or denomination are entitled to the benefit of the charity as well as members. The solution of every case must be found in the true construction of the instrument of endowment, and, although I am not prepared to accede to the broad proposition contended for by Mr. Vaughan Hawkins—viz., that no purely eleemosynary charity can be an ecclesiastical charity—I think it may be safely said that no eleemosynary charity for the benefit of the members of a particular church or denomination is made an ecclesiastical charity by section 75, unless the benefits of the charity are (upon the proper construction of the instrument founding it) confined to the members of that particular church or denomination.

If they are so confined, a further question will still remain, whether the benefit conferred upon them is conferred upon them as such members. Ross's Charity is clearly not so confined. The preference to be given to those old widows who were most constant in their attendance in church falls far short of showing that only members of the Church of England were objects of the founder's bounty. North, J., took this view, and I do not think it necessary to say more than that I entirely agree with him.

The Perry Almshouses case is more difficult. No one can doubt that the founder there intended to benefit poor members of the Church of England. But are non-members excluded? For unless they are, the charity cannot, in my opinion, be brought within the statute's definition of ecclesiastical charity. I have come to the conclusion that her intention to benefit members of the Church of England only, is plain from the terms of her gift. It is very forcibly urged by the appellants that the founder has not, in terms, made such membership a condition for participating in her charity. The appellants contend that such a condition cannot properly be inferred from the terms of her gift. It is urged that it is quite consistent with those terms that she did not intend to do more than require performance of the conditions which she expressly prescribed. The answer to this argument is that, although it may be true that some persons may conscientiously perform those conditions without being members of the Church of England, there is nothing to show that the founder ever thought of them. She specified those conditions as the most obvious means of ascertaining who were such members. She took it for granted that poor persons conducting themselves as she required would be members of the Church of England, and a construction which would let in a succession of hypocrites is, in my opinion, clearly inadmissible. *Shore* v. *Wilson* is very important on this point. If the deed is construed as contended for by the appellants, it will

be impossible to exclude conforming hypocrites from the benefits of the charity, and this compels me to reject the construction. I feel the force of the observation that, if the founder had been asked whether any further inquiries were to be made to ascertain whether persons conforming with her requirements were really members of the Church of England, she might have said No, and might have been content with the test she imposed. It may be extremely difficult to determine whether a constant worshipper at church, who partakes of the Holy Communion and leads a godly, righteous, and sober life to the glory of God's holy Name, is or is not a member of the Church of England. *Primâ facie* he would be taken to be so, and the founder took the risk of non-members, whether conscientious or unconscientious, benefiting by her charity. But this is very different from saying that non-members are entitled so to benefit, if known to be non-members. I agree that the founder of this charity has so expressed herself as to render it unnecessary for the trustees to do more than ascertain that a person seeking the benefit of the charity has complied with the conditions laid down. But for all that, her desire to confine her charity to members of the Church of England is, in my opinion, clear from the terms of the deed. The conditions imposed by her are imposed as the most obvious tests of membership, and the charity is for the benefit of the members of the Church of England as such. It is impossible on this deed to come to any other conclusion if I am right in the foregoing observations. The argument that because she says the trustees are to be members of the Church of England, and she does not say that the poor are to be so, does not impress me. The conditions she has imposed are imposed to ensure that they shall be such members. Great reliance was placed by the appellants on *The Attorney-General* v. *Calvert*. The charity there was a pre-Reformation charity, and the court had to decide how the endowment should be applied under circumstances never contemplated by the founder, but arising out of the change in the national religion effected by the Reformation. The judgment must be read with reference to the case with which the court had to deal. We have no such problem to solve. The case of *The Attorney-General* v. *Calvert* does not assist us in construing the deed of endowment before us; nor justify us in holding that mere performance of the conditions contained in it entitles a person not a member of the Church of England to the benefit of the charity founded by that deed. I therefore agree with Stirling, J., in holding the Perry Almshouses to be an ecclesiastical charity.

It only remains to consider the question raised in the Ross Charity case as to the application of section 14, clause 2, to the case of a non-ecclesiastical charity, the endowment of which is vested in churchwardens only. The section is, I think, tolerably plain. It has to be applied to the case of a non-ecclesiastical charity the endowment of which is vested in churchwardens as trustees. The appellants' contention makes it inapplicable to such a case. This cannot be right. Practically the simplest way of dealing with section 14 (2) is to leave the first part, which applies to overseers, to stand as it is; and then to repeal it, making it applicable to churchwardens and confining it to non-ecclesiastical charities. In this way the enactment will be made applicable as well to overseers and churchwardens; and this is what the Legislature obviously intended. Section 19, clause 5, confirms this view. On this point also North J., was quite right. The appeal therefore in Ross's Charity and the appeal in Perry Almshouses will be both dismissed. The costs will be paid as arranged.

CHITTY, L.J.—I am of the same opinion. As to the appeal in Ross's Charity, I think that the preference to be given to the old and poor widows who, not being disabled by infirmity or sickness, were most constant in their attendance on the public service of the Church is not sufficient to make this charity an ecclesiastical charity within the Act of 1894. And as to the point raised on the same appeal, which turns principally on section 14, sub-section 2, of that Act, I think that the parish council has power to appoint trustees in the place of churchwardens, who are the only trustees of a non-ecclesiastical charity. On both these points North, J., appears to me to have come to the right conclusion, and I have nothing to add to what has fallen from the Master of the Rolls in his judgment on the subject.

As to the appeal in Perry Almshouses, the question turns upon the true construction of a deed of July, 1851, whereby the charity was founded. Is the charity then constituted an ecclesiastical charity within the Act of 1894? The 75th section does not define an ecclesiastical charity, but contains a statement of what the term includes. Sub-section 2 (2) includes as an ecclesiastical charity a charity the endowment whereof is held "for the benefit of any particular church or denomination, or of any members thereof as such." I hold that this charity is for the benefit of members of the Church of England as such—that is, in their character of members or in virtue of their membership. The language of the deed appears to me to be plain and unmistakable, and not open to any reasonable doubt; and the meaning is that the persons who take the benefit of the charity are to be members of the Church of England, and the charity is intended for them as such members exclusively. The persons to be selected for the almshouses are to be poor men and women of sound mind who have attained the age of sixty years or are incapable of maintaining themselves wholly by manual labour, and also, having been born in the parish, have resided there for the last five years, or, having been born elsewhere, have resided in the parish for the last ten years. Thus far the charity is eleemosynary only. The founder then adds these further essential qualifications. First, attending divine service at the parish church. This attendance is not to be merely occasional or even habitual; it is to be attendance on every Sunday for the last five years, except when prevented by sickness or other urgent cause. Secondly, the candidates must have been partakers of the Holy Communion—that is, in other words, partakers of the Sacrament of the Lord's Supper according to the rites of the Church of England as administered in the service of the Holy Communion. The expression "partakers of the Holy Communion" is taken from the rubric at the head of that service in the Prayer-book of the Church of England. Thirdly, they must have led a godly, righteous, and sober life to the glory of God's holy Name. This expression, again, is taken from the General Confession at Morning and Evening Prayer of the Prayer-book. These three tests are all practical, and eminently so; indeed, as efficient as any that can be reasonably suggested for ascertaining whether a person is a member of the Church of England. If the question is asked, Is a person who complies with these tests, who attends the parish church service every Sunday for five years, partakes of the Holy Communion, and leads the life described a member of the Church of England? it seems to me that the answer cannot be otherwise than in the affirmative. The third qualification necessarily excludes the argument which was pressed upon us for the appellants of mere conformity. A person who leads such a life must be honest and sincere and truthful as well in act as in words. It is urged as a matter of

history that in former times Dissenters have complied with such conditions as these here imposed; but no instance was cited. What Dissenters, and honest Dissenters, may have done in times past when they were placed under civil disabilities by laws now acknowledged to be unjust, and which they felt to be unjust, appears to me to be wholly irrelevant. By reason of the injustice of the law which they denounced they may or may not have considered themselves justified in a mere outward conformity to the test imposed. It was further suggested that in 1851, when the civil disabilities had been removed, an honest Dissenter might conform to the tests prescribed. I am unable to accept this hypothetical suggestion. I think it is inadmissible. Certainly it is far-fetched and unpractical; it ought to have no weight in determining the question before us. What this founder has said by her deed may, I think, be fairly stated thus: "I will not ask these poor and old or infirm persons to make or subscribe any declaration that they are members of the Church of England. To put upon them such an obligation would be futile. They would probably not be able to understand it." (I throw in parenthetically that the learned counsel for the appellants were unable to state with precision what constituted lay membership.) "Their poverty, their age, or infirmity might induce them to say that they were members with a view to obtain admission into my almshouses. I will do better than that. I will have them judged by a long, continuous course of action, by their conduct, and by their lives. If they do such things and are such persons as I require they will necessarily and in a practical manner manifest that they adhere to the Church of England and are members of that Church. It is for them as such that I intend my charity." The above are the main grounds on which my judgment is based.

In regard to the requirement that the almsfolk shall have been partakers of the Holy Communion, it is worthy of mention that the Legislature, by the Corporations Act (11 Chas. 2, st. 2, c. 1, s. 11), made the taking of the Sacrament of the Lord's Supper according to the rites of the Church of England the test of membership with that Church which it imposed on officers in municipal corporations. There is a further point on which stress was laid by the appellants' counsel. By the deed the trustees of the charity are to be the rector of the parish for the time being (who is necessarily a member of the Church of England) and certain laymen members of the Church of England. In default of a vacancy in the lay trusteeship being filled up within a limited time the rector has the power of filling up the vacancy. These provisions do not appear to me to displace the reasoning as to the effect of the trusts for the beneficiaries. The trustees would naturally be in a better position of life than the poor old folk who would seek admission into the almshouses, and the founder thought proper to require that the trustees should be members of the Church of England without imposing on them all the strict practical qualifications necessary for the candidates for admission into the almshouses. The power of selecting for the almshouses is thus confided to members of the Church of England. This circumstance as to the trustees' qualification does not impair the conclusion at which I have arrived—indeed, it would seem rather to strengthen than to weaken it. In regard to *Attorney-General* v. *Calvert*, I have nothing to add beyond this, that there is nothing in that decision which precludes our construing this particular deed in the manner we have done. There is no rule of construction that stands in our way. Such rules may be and often are useful assistants, but they are not infallible guides.

An argument presented by Mr. Vaughan Hawkins requires notice. He said broadly that no eleemosynary charity can be "an ecclesiastical charity" within the Act of 1894. I do not agree. He attempted to read the words of section 75, sub-section 2 (*e*), as if "benefit of members of a particular church or denomination as such" meant for the religious benefit or edification of the members as such. In my opinion there is no justification for thus qualifying the meaning of the ordinary word "benefit," which includes temporal as well as spiritual or religious benefit. He referred to a passage in Lord Macnaghten's speech in *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C 531, at p. 583, in which charity in its legal sense was spoken of as comprising four principal divisions—trusts for the relief of property, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under the preceding heads. Lord Macnaghten was not there ranging charities into four distinct classes, each of which was exclusive of the others. It is plain that there may be a charity in the legal sense for purposes which are both eleemosynary and ecclesiastical or religious.

VAUGHAN WILLIAMS, L.J.—I have not the slightest doubt but that the charity in the Perry Almshouses is a charity for the benefit of members of the Church of England as such, and that the intention of the donor was to exclude from the benefit of the charity all who are not members of the Church of England. It follows that even if the words of the 75th section, sub-section 2, clause (*e*), must be read as meaning a charity for members of a particular church or denomination exclusively, this charity is an ecclesiastical charity.

As to Ross's Charity, I agree in the construction put by North, J., and the other members of the court upon this very difficult section, and I further think that whether members of a particular church or denomination does or does not mean members of such a church exclusively, the preference given in this case to regular attendants at the church does not make the purpose of the charity the benefit of members of the church as such. I agree that the benefit is not limited to religious benefit to the exclusion of mere temporal benefit.

Both appeals dismissed.

Solicitors, *Clabon; Tatham & Procter*, for *Abbott, Pope, Brown, & Abbott*, Bristol; *Mason & Co.*

High Court of Justice.

Chan. Div. } Romer, J. } Nov. 1, 2, 4; Dec. 20.

CHETWYND v. ALLEN. (*a*.)

Mortgage—Loan on faith of promise to transfer mortgage—Misrepresentations to lender—Part payment of mortgage with money lent—Equitable mortgage by deed to lender—Right of lender to charge on other property comprised in first mortgage—Merger.

C., being entitled to two properties—namely, to No. 1 as trustee for his wife, and to No. 2 beneficially, with her consent mortgaged both to T. for £2,000. Afterwards C. asked M. to lend him £1,200 to pay off an existing mortgage on No. 1, and promised M. a transfer

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

of the above mortgage, but did not disclose that No. 1 belonged to Mrs. C. or inform M. of the amount of, or the securities for, the first mortgage. M. advanced the £1,200, and C. applied £1,000 in paying to T. part of the £2,000 due to him. Later C. executed an equitable mortgage on No. 1 to M. to secure the £1,200.

Held, that, when M. advanced the £1,200 and the £1,000 was applied in payment to T., the charge on both the above properties to the extent of the £1,000 paid to T. was kept alive in equity in favour of M., but so as not to prejudice the rights of T. and Mrs. C.

Patten v. Bond, 37 *W. R.* 373, *followed.*

Held, also, that M. did not lose the benefit of such charge by taking the equitable mortgage executed by C. on No. 1, the charge thereby given not operating as a release or extinguishment of the prior charge, and there being no reason for presuming merger of the securities.

There is no merger at law, even of a lower in a higher security, if the remedy given by the latter is not co-extensive with that given by the former.

Action.

This was a point reserved at the trial of an action. The facts and arguments are sufficiently stated in the judgment.

Levett, Q.C., and *Theobald*, for the defendant Mynors, on whose behalf the point was raised.

Neville, Q.C., and *MacSwinney*, for Mrs. Chetwynd, the plaintiff in the action, *contra.*

Farwell, Q.C., and *Mark Romer; O. L. Clare;* and *T. L. Higgins*, for other parties.

Besides the cases referred to in the judgment the following cases were cited on the point decided by the court—namely, *Forbes* v. *Moffatt*, 18 Ves. 384; *Burrell* v. *Egremont* (*Lord*), 7 Beav. 205, p. 232; *Buckinghamshire* (*Earl of*) v. *Hobart*, 3 Swan. 186; *Phillips* v. *Gutteridge*, 4 De G. & J. 531; *Adams* v. *Angell*, 25 W.R. 139, 5 Ch. D. 634; *In re Pride, Shackell* v. *Colnett*, 39 W.R. 471, [1891] 2 Ch. 135; *Irby* v. *Irby* (*No.* 3), 6 W. R. 853, 25 Beav. 632; *Parry* v. *Wright*, 1 Sim. & St. 368, 5 Russ. 142; *Portsea Island Building Society* v. *Barclay*, 43 W. R. 586, [1895] 2 Ch. 298; *Liquidation Estates Purchase Co.* v. *Willoughby*, 44 W. R. 612, 46 *ibid.* 589, [1896] 1 Ch. 726, p. 734, [1898] A. C. 321; *Medley* v. *Horton*, 14 Sim. 222.

The application of the doctrine of subrogation was argued, but was not decided, and the cases cited on this point are omitted.

ROMER, J.—The point I reserved for consideration is one of some difficulty. Prior to December, 1892, Mr. Chetwynd held a property called The Cedars as trustee for his wife, the plaintiff, and he held a property called the The Riding School in his own right. These properties he had with the consent of his wife mortgaged to Mr. Terrell for £2,000. In November, 1892, Chetwynd came to the defendant Mynors, and without disclosing the fact that The Cedars belonged to Mrs. Chetwynd and that the charge on that property was also a charge on the school, and was for a sum exceeding £1,200, he represented to Mynors that he wanted to borrow from him £1,200 in order to pay off an existing mortgage for that amount on The Cedars, and he expressly stat d that Mynors should have a transfer of the mortgage. As to this statement, which is substantially the only fact bearing on the point before me not admitted, I refer to the evidence of Mynors, supported as it is by the evidence of Mr. Pitt, his solicitor, both good witnesses, whose statements I have no hesitation in accepting. Chetwynd further represented that he expected to repay the amount shortly out of a larger sum which he hoped to raise later on by a mortgage of The Cedars and other property. On the faith and footing of these representations Mynors advanced the £1,200. Chetwynd applied £1,000, part of this £1,200, in paying to Terrell part of his principal sum of £2,000. A correspondence then ensued, and by a letter of the 16th of January, 1893, Chetwynd informed Mynors for the first time that the £1,200 did not entirely pay off Terrell's charge, and thereupon on the same day Chetwynd executed a mortgage on The Cedars to Mynors to secure the £1,200 and other sums, the mortgage reciting, as the fact was, that the £1,200 had recently been advanced to enable Chetwynd to pay off a then existing mortgage. As Mynors did not then know that The Cedars belonged to Mrs. Chetwynd, the mortgage on the face of it, as might be expected, said nothing about the fact of the money having also been advanced on the promise by Chetwynd that Mynors should have a transfer of the mortgage to be paid off with the £1,200.

On these points I have to consider what Mynors' rights are. Now, in my opinion, when Mynors advanced the £1,200 on the representations and promise above mentioned, and the £1,000 was applied in part payment to Terrell, the charge on The Cedars and school to the extent of the £1,000 was kept alive in equity in favour of Mynors so far as that could be done without prejudicing Terrell or the plaintiff. So far as Chetwynd was concerned, he could not complain that the charge was kept alive also on the school, seeing that it was by his fraud that the true facts as to Terrell's charge were kept hidden from Mynors. As regards Terrell, he clearly was not prejudiced, for the balance of his mortgage debt had priority over Mynors' charge; and as regards the plaintiff, she was not prejudiced, so long as no extra costs were thrown on The Cedars by reason of the original mortgage debt of £2,000 being divided as between Terrell and Mynors (and this I can provide for) and provided that as between the school and The Cedars the former remained primarily liable for the debt as between her and her husband. This primary liability clearly became in no way affected merely because the £1,000 debt and the securities for the same became the property of Mynors and not of Terrell. Of course, by subsequent events, the school might have been so dealt with to the prejudice of the plaintiff as to prevent Mynors from asserting his equitable right to the benefit of the £1,000 debt and securities for the same. But, fortunately for him, when the plaintiff came to assert her rights, Mynors owned the school, and it is still available to the plaintiff as the primary security for the £2,000 charged with her assent, and Mynors acknowledges the primary liability of the school. The case, so far, is not without authority to support the view I have taken: see *Patten* v. *Bond*, 37 W. R. 373, which was decided by Kay, J., on three separate grounds, and one of those grounds was based on the principle which I have given effect to in this case.

The next question is whether Mynors lost the benefit of his equitable security arising under the circumstances above mentioned by taking the mortgage of the 16th of January, 1893. I cannot see why I should hold that he did. That mortgage was not a legal mortgage, so that there was no merger of a lower security in a higher. Of course if the mortgage had been a legal one Mynors would have held free from the plaintiff's equity, seeing that he would have acquired the legal estate without notice of the plaintiff's rights. The existence of the equitable charge of the 16th of January, 1893, for the £1,200 is quite compatible with the co-existence of the equitable charge for the £1,000. The charge of the 16th of January, 1893, did not operate as a release or extinguishment of the prior charge. The recital in the charge of the 16th of January, 1893, as to how

the £1,200 came to be advanced is not antagonistic to the fact that the advance was also on terms that Mynors should have the benefit of the prior charge. And certainly Mynors cannot be held to have lost the benefit of his prior charge because by reason of the fraud of Chetwynd he may have been ignorant of his exact rights or of the necessity of preserving them. Nor can I see any reason for presuming merger of the securities. The debts secured were not identical, the debt first secured being £2,000 and that secondly secured £1,200, and the securities were not identical, the first security being on The Cedars and the school, and the second security being on The Cedars alone. The courts do not hold merger to take place under such circumstances (see, for example, cases at law: *Norfolk Railway Co.* v. *M'Namara*, 3 Ex. 628, and *Holmes* v. *Bell*, 3 Man. & G. 213); and there is no merger at law even of a lower in a higher security if the remedy given by the latter is not co-extensive with that given by the former (see *Bell* v. *Banks*, 3 Man. & G. 258); and in the case before me there is another ground on which no merger should be held to take place—namely, that the second charge was ineffectual, owing to its not being binding on the plaintiff, the true owner of the property, and a good prior security will not be held to merge in a later inoperative one.

I therefore hold and declare that Mynors is entitled as against the plaintiff to the extent of £1,000 principal and interest to a charge upon The Cedars, but so that the school is to be the primary security, and so that no mortgagee's costs be unduly thrown on The Cedars by reason of the original mortgage debt of £2,000 given to Terrell having become divided between him and Mynors. I should add that, though in the hands of Terrell the £1,000 bore interest at a higher rate, yet in the hands of Mynors I think it ought only to bear interest at the rate he agreed to charge—namely, 5 per cent. The above decision renders it unnecessary for me to consider whether Mynors could have been held entitled as above on other grounds, such as that based on the principle of subrogation or on the general doctrine that the plaintiff coming to the court for equitable relief should be put on terms.

Judgment for the applicant.

Solicitors, *Lumley & Lumley; Pontifex, Hewitt, & Pitt; Colyer & Colyer.*

Chan. Div. } Romer, J. } Dec. 20.

JOHNS v. WARE. (a.)

Bill of sale—Mortgage—Trade fixtures—Freehold land—Power to sell trade fixtures separately from land—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36).

A mortgage of land, whether by demise or by conveyance of the freehold, if it contain a power to the mortgagee to sell trade fixtures separately from the land, is a bill of sale as to those fixtures.

The principle was established by Ex parte Daglish, In re Wilde, 21 *W. R.* 893, *L. R.* 8 *Ch. App.* 1072, *and* Ex parte Barclay, In re Joyce, 22 *W. R.* 608, *L. R.* 9 *Ch. App.* 576, *and is not limited to mortgages by demise.*

Motion.

By an indenture of mortgage, dated the 25th of March, 1869, and made between Jas. Harper and Thos. Taylor of the first part, Chas. Spackman, Thos. T. Spackman, Geo. Spackman, Julius Spackman, and Hy. Spackman of the second part, and the said Geo. Spackman and Hy. Spackman, hereafter called the mortgagees, of the third part, the parties of the first part, at the request of the said Chas. Spackman and Thos. T. Spackman and Julius Spackman, granted to the mortgagees and their heirs certain freehold lands, tenements, and premises at Bradford-on-Avon, in the county of Wilts, together with the water right to the said premises belonging, together with the steam and other engines, boilers, mill wheels, driving gear, mill gear, and millwright work machinery, appliances, fixtures, and chattels of every description affixed or annexed to or connected with the manufactory, messuages, and hereditaments therein described, or which at any time or times thereafter during the continuance of the said security should be affixed or annexed to or connected with the same premises by the said parties of the first part, or either of them or their heirs, executors, administrators, or assigns, subject to redemption as therein mentioned. And the said indenture contained a usual power of sale of the said premises in case of default in payment of principal or any interest, and also an express power to sell all or any part of the steam and other engines, boilers, mill wheels, driving gear, mill gear, and millwright work machinery, appliances, fixtures, or chattels comprised therein separately from the freehold. And by an indenture dated the 17th of November, 1883, and made between the mortgagees of the first part, the said Chas. Spackman, Thos. T. Spackman, and Julius Spackman of the second part, George Ward and the said Thos. Taylor of the third part, and the plaintiff of the fourth part, the mortgagees by direction of the parties of the second part assigned the moneys secured by the said mortgage, and the benefit of all securities for the same to the plaintiff. And the mortagees also at the request of the like parties by direction of the parties of the third part conveyed and released, and the parties of the second part by the like direction each released, and the parties of the third part each confirmed to the plaintiff the premises aforesaid, subject to redemption as therein mentioned, whereby a new equity of redemption of the premises was created. And the said indenture contained an attornment and other clauses and covenants.

In the year 1897 the owner of the premises subject to the said mortgage became involved in financial difficulties, and executed a creditors' deed, of which deed the defendant was the trustee.

The defendant, as such trustee, had advertised for sale the whole of the fixed and moveable woollen cloth machinery, and effects, the fixed portion of which was claimed by the plaintiff as part of his mortgage security.

This was a motion to restrain the defendant, his servants and agents, from removing or disturbing any machinery or fixtures affixed to the said land and premises at Bradford-on-Avon, and from selling or disposing of any machinery or fixtures removed from the said land and premises by him.

Neville, Q.C., and *Vaughan Hawkins*, for the plaintiff.—The Bills of Sale Act, 1854, was the governing statute at the time of the mortgage, and there was no need for the mortgagee to register thereunder. *Ex parte Barclay, In re Joyce*, 22 W. R. 608, L. R. 9 Ch. App. 576, and *Ex parte Daglish, In re Wilde*, 21 W. R. 893, L. R. 8 Ch. App. 1072, turned on the right of a lessee to sever trade machinery put in by him. *Mather* v. *Fraser*, 4 W. R. 387, 2 K. & J. 536, shows that a mortgage of trade fixtures together with the freehold is not a bill of sale, and therefore does not require to be registered. This mortgage, therefore, is not a bill of sale. There is no decision that a conveyance which would be sufficient independent of any power

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

is invalidated as to trade fixtures in the absence of registration.

Farwell, Q.C., and *A. E. Russell*, for the defendant.—The rule in *Ex parte Barclay* is of general application, as appears from *In re Yates, Batcheldor* v. *Yates*, 36 W. R. 563, 38 Ch. D. 112, and there is no distinction for this purpose between freehold and leasehold. The terms of the mortgage show that the mortgagee did not rely on the trade fixtures passing as part of the freehold. The power to sell the trade machinery as part of the land makes the mortgage a bill of sale; that it is not an invalid power is shown by *In re Yates*, where the question turned on the Bills of Sale Act, 1878. Therefore unless the deed is registered it is void as to the machinery in a case like this. The trade machinery here is consequently the property of the mortgagor's trustee, and he can dispose of it as he pleases: *Small* v. *National Provincial Bank of England*, 42 W. R. 378, [1894] 1 Ch. 686.

Neville replied.

ROMER, J.—I do not see my way to granting an injunction. Since *Ex parte Daglish* and *Ex parte Barclay* it has been settled law that a mortgage of land containing a power to the mortgagee to sell trade fixtures separately from the land is a bill of sale as to those fixtures. It was said that those cases turned on the mortgage being by demise, but, in my opinion, the decisions were not limited to mortgages by demise, and when the reasons for them are looked at ought not to be so limited. The Bills of Sale Act, 1854, says in section 7 that the expression "bill of sale" shall include licences to take possession of personal chattels as security for any debt, and then it says that the expression "personal chattels" shall include fixtures, and you come at once under the Act when you are given power to seize fixtures. In my opinion, if you once gather from the deed that there is a special mortgage of fixtures the Act of 1854 applies. At any rate I am bound by *In re Yates*, and the same view as I take was taken by the Court of Appeal there. It was argued that the rights of a mortgagee of freehold were not interfered with, trade fixtures being part of the freehold, but after *Ex parte Daglish* and *Small's case* it is too late to reopen that question. A mortgage of land and chattels, where the chattels are mortgaged *qua* chattels, is a bill of sale, and, unless it is registered, the mortgagee cannot assert his rights over the chattels.

Injunction refused.

Solicitors for the plaintiff, *Eyre, Dowling, & Co.*, for *C. J. Jones*, Trowbridge.

Solicitors for the defendant, *Russell, Son, & Cumming.*

Q. B. Div.
(Wills and Lawrance, JJ.) Nov. 11, 29.

HOLIDAY v. NATIONAL TELEPHONE CO. (LIMITED).(a.)

Negligence—Company—Independent contractor—Master and servant—Work to be done at a price to the satisfaction of company's foreman—Accident caused to stranger by negligence of contractor's workman—Work to be done not of a character hazardous to public—"Casual, collateral, or incidental negligence"—Liability of company.

Where a company contracts with an independent contractor that certain work which the company is lawfully authorized to do in a public street shall be done by him to the satisfaction of their foreman, the company is not liable for a casual negligent act of such contractor or his servant in the performance of the work, causing injury to a third party.

Semble, *where, however, the work to be done by such contractor is from its character necessarily attended with risk to the public, unless special precautions are taken to insure their safety, the company cannot relieve itself of the responsibility of taking such precautions by employing an independent contractor.*

This was an appeal by the defendant company from a decision of his Honour G. Pitt Lewis, Esq., Q.C., sitting as deputy-judge at the City of London Court, who had entered judgment for the plaintiff with £25, the agreed amount of the damages claimed in an action for personal injury based on the admitted negligence of a person alleged by the plaintiff to be a servant of the company.

The question for the decision of the court was (1) whether the workman, by whose negligent act the mischief was caused, was a servant of the company or an independent contractor; and (2) if he were found not to be a servant of the company, then whether the company were nevertheless to be held liable because they had contracted with him to do work for them in the performance of which a third party was injured.

The facts and the argument sufficiently appear from the judgment.

Mattinson, Q.C., and *H. H. Lawless*, for the appellants, the defendant company, submitted that the workman was an independent contractor, and the nature of the work which he contracted to do, not being of a hazardous character to the public, and the accident being due solely to the workman's folly, the company were not liable.

Lincoln Reed, for the plaintiff.—Every element of service was to be found in the contract under which the workman agreed to do the work for the company, except that he was to be paid so much for the job and not by the hour. That fact alone would not rebut the allegation that he was a servant of the company and render him an independent contractor for whose negligence the company was not liable. The company in either case had no power to shift the obligation they were under to see that the public were not endangered by the way the work was performed, and, therefore, whether the workman was their servant or not, the plaintiff was entitled to succeed.

Cur. adv. vult.

WILLS, J.—This is an appeal from the learned deputy-judge of the City of London Court, who tried the case without a jury, and gave judgment for the plaintiff for an agreed sum of £25 under the following circumstances: The defendants were laying down some telephone wires at the Pavement, Clapham Common. They had broken up the footway of the street, and for the purpose of this case it was admitted that they had obtained the requisite consent of the vestry to do so, and were acting lawfully in so doing. They had laid down a number of tubes, into which were inserted bundles of telephone wires. The tubes, which were socketed each into the next, were then joined up to one another, and the joints made tight by rings of lead and soldered. The lead or soldering material was melted in an iron pot, which, with the fire underneath it, were on the footpath, and the soldering material was ladled out of this pot and run into the joints. The joints were below the surface of the ground, and it was necessary to get a flare from

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

a benzoline lamp. To get the vapour necessary to give the flare, heat must be applied to the lamp, and as heated benzoline vapour is highly elastic, and may be explosive if unduly confined, the lamp was furnished with a safety valve. The lamp that caused the accident was out of order, and the safety valve would not work, and it was conceded by the defendants that the workman ought to have known this, and that it was an act of negligence on his part to use it in its then condition and as he did. Wanting to heat it quickly, he dropped it into the molten metal, when it exploded, and injured the plaintiff, who was passing by. The general rule of the company was for themselves to dig the trench, lay the pipes, and fill in, except at the places where the joints were, these places being necessarily left open till the joints had been completed. To make the joints good the company usually employed a plumber, who was paid so much for each joint. In this case they sent to a man named George Highmore, who was a working master plumber, to do the requisite plumbing work, and he undertook to do so, and wrote to the defendants' manager on the 5th of December, 1896, as follows: "Dear Sir,—*Re* Lead cable joining. I beg to inform you that your price of 12s. per connection, bends included, has been accepted for the connecting with wiped joints, and seam the above cable to the satisfaction of the company's representative."

The only other evidence as to the position of Highmore was that it appeared that he had at least two men in his employ, and that at the time of the accident he had "got employment" at some gasworks and had said to his brother "You can take this job off me."

The course of business was for the defendants to send to George Highmore when they wanted connections made, and he came or sent a man, a second generally accompanying, and did the work personally as soon as he could, but there was no agreement for him to come at any specified time, and on the occasion in question Alfred Highmore came to do the work and came alone.

It was argued for the plaintiff that George Highmore was in the service of the defendants and that the defendants were liable for the negligence of the person who did the work under him or as his representative. We do not propose to discuss the question whether it makes any difference that Alfred Highmore did the work, and not George, and assume for the present purpose that the defendants' liability is the same as if George Highmore had done the work instead of his brother, but we think there was no evidence at all of the relation of master and servant between the defendants and George Highmore, and therefore none between the defendants and Alfred Highmore. They were under no obligation to find work for George Highmore, or to give him any particular job. All that they engaged was that, if they sent for him, and he did the soldering to their satisfaction, they would pay him so much per joint made. There is no evidence that they exercised any control at all over the manner in which he should set about or carry out the work, or interfered in any way whatever with what he chose to do. When the joint was being made the foreman was away, and only a labourer was left to fill in the hole when the work was done. The condition that it should be done to the satisfaction of the foreman stands upon precisely the same footing as the common condition in almost every building or engineering contract, that the work shall be done to the satisfaction of the persons for whom it is to be done, or his representative, and of course, if the work was badly done, he would order it to be done again.

The position of George Highmore appears to have been the very common one of a small master plumber, often, no doubt, working with his own hands, and making his own contracts when he could get them for repairs and the like, and he was no more the servant of the defendants than the gasfitter who is sent for to stop a leak of gas in a private house.

It was next argued that Highmore, though not actually a servant of the defendants, was so far under the control of their foreman that they must be liable for the consequences of the accident. This, however, seems to be an entire misconception of the evidence, as in no single particular was either of the Highmores ever interfered with or prevented from acting entirely upon his own initiative. It is true enough that if, although in no proper sense the servant of the defendants, Alfred Highmore had been actually directed by the foreman how to do the work, and required to do it in a particular fashion, and had submitted to and acquiesced in such dictation, there might have been evidence from which a liability on the part of the defendants might have been inferred on the ground that, though in fact the servant of another or not their servant, he had been treated as and acted as if he were the servant of the defendants. But in this case the evidence not only does not support, but negatives such a state of things. The learned deputy-judge said that the defendants "practically supervised" Highmore's work; that "they said at the beginning when and where the work was to be done, and they regulated the whole details. In consequence they practically supervised it." He went on to say that George Highmore "had not freedom of action to come and go when he pleased." We think there was no evidence to support this statement. There was nothing in his agreement to make joints at 12s. a joint to bind him to any time or to put him under any obligation beyond that of doing the work within a reasonable time after notice that it was ready for him. The judgment goes on to say that "in substance the defendants retained control of the works," and therefore they were liable. The phrase is too vague to be of much service—but it is incorrect so far as the mode of doing Highmore's work, which is the important matter for the present purpose, is concerned.

There remains but one other question. There are many cases in which a person who employs another to do work for him is not exempted from liability for accidents arising out of such work because he has employed an independent person and had not retained control over processes or details, nor even interfered in any way with the work at any stage. If a person orders a thing to be done which when done or as done is an interference with the safety or rights of another who, at the time he is injured, is in the exercise of his lawful rights, it is no answer to say that the person for whom the offending thing has been done has done it by virtue of a contract with someone independent of his interference or control—the "independent contractor" of the text-books. For example, a man has a hole dug for him into which a person lawfully passing near or over the spot falls without fault of his own and is injured. In a case of this sort the person ordering the work to be done is liable. He has interfered with the *status quo*, having no right as against his neighbour to do so, and his neighbour has suffered injury in consequence. So if a man puts up a sign projecting over a highway and it falls by reason of imperfect construction and someone is injured. The person to whom the thing which does the mischief belongs, and who has caused it to be put or who has maintained it, when it does the mischief is liable, no matter whom he employed to do it. The principle is this, that the

person for whom the work has been done has failed to see that something has been done which it was his duty to do, either by himself or by someone else for him. The man who disturbs or who fails to create a state of things which other people have a legal right to expect at his hands is liable for such disturbance or failure. The man who maintains an insecure weight hanging over the heads of passers-by, and fails to take care that it shall not expose them to danger, does so at his peril if an accident happens. This is what Lindley, L.J., has termed "casual or collateral" negligence, and, as he has pointed out, the difficulty lies rather in the application than in the enunciation of the principle: *Hardaker* v. *Idle District Council*, 44 W. R. 323, [1896] 1 Q. B., 335 at pp. 340, 341. In the present case there seems to us to be little difficulty. The act of Alfred Highmore in carelessly plunging into molten metal a lamp containing benzoline, and with the safety valve out of order, is about as typical an instance of negligence merely casual, collateral, or accidental as can well be conceived. It is certainly not less so than the dropping of a brick by a workman employed in building a bridge in *Reedie* v. *London and North-Western Railway Co.*, 4 Exch. 244.

We were much pressed with a decision of Bruce, J., in *Penny* v. *Wimbledon Urban District Council*, [1898] 2 Q. B. 212, 46 W. R. Dig. 138, in which he held that an urban council which had employed a contractor to do work in a street was liable for the negligence of the contractor who had left a heap of excavated soil on the highway unlighted and unprotected over which the plaintiff stumbled in the dark and was hurt. The ground of the judgment so far as this question is concerned was that there was necessarily danger to the public in the work done unless it were lighted; that the defendants must have known that they were ordering to be done what must be dangerous in itself and unless necessary precautions were taken, and that they were therefore bound to see that precautions were taken. Nothing less like the present case could well be imagined. No human being could anticipate such a piece of folly as that committed by Highmore, and if common care had been used there was no danger to anyone in the work ordered by the defendants to be done, nor anything calling for precautions to prevent the molten lead from flying about. In the ordinary course of events there was nothing to make the lead splash about or to constitute any source of danger to the public.

For these reasons we are unable to agree with the learned deputy-judge, and we must allow the appeal, and order judgment, with costs, to be entered for the defendants in the court below. The plaintiff must also pay the costs of this appeal.

Leave to appeal refused.

Solicitor for the company, *W. E. L. Gaine.*

Solicitors for the respondent, *Gibbs, White, & Strong.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.) — Oct. 25; Nov. 7.

THE QUEEN *v.* NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.
Ex parte THE NORTH-EASTERN SEA FISHERIES DISTRICT COMMITTEE. (*a.*)

Fishery—Fisheries Committee—Purchase of vessel for use of fishery officer—Expenditure—Power to impose restrictions and conditions—Sea Fisheries Regulation Act, 1888 (51 & 52 *Vict. c.* 54), *s.* 6.

Where a sea fisheries district has been created by an order of the Board of Trade under the Sea Fisheries Regulation Act, 1888, *and a joint committee has been constituted consisting of the representatives of several county councils and borough councils as well as other bodies, any one of the paying councils is not exempt from contributing to the expenses incurred by the committee in the purchase of a vessel for the use of their fishery officer unless the restrictions and conditions as to expenditure referred to in section* 6 *of the said Act are made, if not at the time of the original constitution of the committee, at least before any appointment by the committee of its fishery officer; and such restrictions and conditions cannot be imposed by one only of the contributing bodies, but must be agreed to by all.*

Rule for a *mandamus.*

In this case a rule *nisi* had been obtained for a *mandamus* directed to the County Council of the North Riding of Yorkshire commanding them to pay to the Fisheries Committee of the North-Eastern Fisheries District the sum of £572, being the proportion claimed as payable by them for the purpose of providing a vessel for the use of the fishery officer and for the cost of one year's working and maintaining of such vessel.

On the 9th of July, 1890, the Board of Trade, acting under the Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), which enables them so to do, made an order creating the North-Eastern Sea Fisheries District.

By this order it was provided that a local fisheries committee should be constituted for the regulation of the sea fisheries carried on within the said district. Such committee was to be a joint committee of the County Councils of Durham, of the North Riding of Yorkshire, of the East Riding of Yorkshire, and of the parts of Lindsey in Lincolnshire, and of several specified borough councils, and was to consist of forty members, twenty of them being appointed in certain proportions by the various county councils and borough councils, and twenty members representing the different fishing interests of the district appointed by the boards of salmon conservators and by the Board of Trade. These latter were to be appointed in each year before the 9th day of November. The former twenty were to be appointed by the councils in each year at the usual quarterly meeting of the said councils respectively held in the month of November. All members were to retire, and the new members were to come into office in each year on the 9th day of November.

The retiring members were to be eligible for reappointment.

It was provided that the North Riding was to be represented by four members.

The expenses of the committee were to be chargeable in certain specified proportions. It was provided that any council might make a regulation requiring the committee to submit to such councils once in each year an estimate of expenses proposed to be incurred by them under the Act.

Section 6 of the Act 51 & 52 Vict. c. 54, provides as follows: "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of bye-laws made by the committee."

In 1895 a fishery officer was appointed at a salary of £150 per annum, and his expenses and sums for travelling, and also the expenses incurred for the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

hire of vessels necessary to enable him to perform his duties were paid without exception. At the date of such appointment no restrictions or conditions in relation to expenditure had been made by the county or borough councils. On the 18th of January, 1898, it was resolved by the fisheries committee, affirming a resolution of a sub-committee, that a vessel should be purchased for the use of the fishery officer, and that precepts should issue for the payment of £2,860 by the contributory authorities. The precept was brought to the notice of the North Riding County Council at their meeting on the 27th of January, 1898, and at a meeting held on the 16th of March the county council instructed their representatives on the fisheries committee to oppose the purchase of the vessel. The county council on the 11th of May, 1898, refused to pay the £572, their proportion of the £2,860, and their resolution to that effect contained a paragraph that the expenditure for which they should be liable should not exceed £150 in any one year. The *mandamus* was sought to compel the payment of the full amount.

Lawson Walton, Q.C. (*G. A. R. Fitzgerald* with him), appeared to show cause against the rule.—The fisheries committee were not warranted in issuing their precept for such an amount, as the county council for the North Riding had not been consulted as to the purchase of a vessel. This was not an expenditure of the ordinary annual character, but was expenditure in the nature of capital. Section 6 of the Act does not contemplate that a financial responsibility of this sort can be thrown by the joint committee upon the individual bodies who are representative of the paying authorities. The restrictions or conditions mentioned in section 6 may be imposed by each of such authorities, and it is not necessary that they should be imposed when the fishery officer is first appointed or before the issue of the precept. The case of *Reg.* v. *Mayor of Plymouth*, 44 W. R. 620, [1896] 1 Q. B. 158, is not an authority to that effect. In the present case the objection has been raised within the proper time.

Asquith, Q.C. (*G. Blaiklock* with him), in support of the rule.—The claim put forward by the county council is altogether unmaintainable. The steps taken by the joint committee are clearly not liable to veto by the constituent bodies. The question here is confined to the true construction of section 6 of the Fisheries Act. The power to impose restrictions or conditions, therein referred to, is not a power that can be exercised by any one of the councils alone; if that were so there would be no uniformity of action. Whatever power is given by that section is given to the councils as a whole body. Further, the word "expenditure" in that section must be read as relating to what follows—namely, the appointment of a fishery officer, but the expenditure here objected to does not relate to such an appointment. We are here dealing with the expenditure to be incurred in the proposed purchase and equipment of a vessel. Further, section 6 refers to restrictions and conditions laid down at the time the original fishery committee is constituted, or at anyrate before the precept is made and issued. So far as the actual decision in the case of *Reg.* v. *Mayor of Plymouth* goes it is an authority in support of this contention.

Lawson Walton, Q.C., replied.

Cur. adv. vult.

Nov. 7.—Lord RUSSELL OF KILLOWEN, C.J.—This case comes before us upon the argument of a rule which has been granted by this court, calling upon the county council of the administrative county of the North Riding of Yorkshire to show cause why a writ of *mandamus* should not issue directed to them, commanding them to pay to the treasurer of the local fisheries committee for the North-Eastern Sea Fisheries District the sum of £572, being the proportion claimed as payable by that administrative county council in accordance with Part III. of the Order for the creation of the North-Eastern Sea Fisheries District, of a sum of £2,860, being the amount required by the committee for the purpose of providing a vessel for the use of their fishery officer, and for the cost of one year's working and maintaining of such vessel, demanded by the committee in pursuance of the precept of the 22nd of January, 1898. The decision of the question of whether the *mandamus* ought to go depends upon the proper construction of the Order of the Board of Trade creating the sea fisheries committee in question, and the provisions of the Sea Fisheries Regulation Act, 1888, under which that sea fisheries committee was founded.

I think it will be convenient first to call attention in general terms to the provisions of the Act, and I do so for the reason that so far as I am aware this is only the second case in which questions of the nature which I have now to consider have come up for determination in the courts. That Act is 51 & 52 Vict. c. 54, section 1 of which provides that "the Board of Trade may from time to time, on the application of a county council or borough council, by order, create a sea fisheries district comprising any part of the sea within which Her Majesty's subjects have by international law the exclusive right of fishing, either with or without any part of the adjoining coast of England and Wales," and by that order the limits of the district and the area chargeable for expense are defined. It is also "to provide for the constitution of a local fisheries committee for the regulation of the sea fisheries carried on within the district," and it further provides that the Board of Trade may from time to time on the like application vary the order so made, as by uniting two or more districts.

The only observation I desire to make, in passing, on that section, is that it is apparent that although what is aimed at is the comprehension within one scheme of what may be a considerable area, ruled over by different municipal or local authorities, yet it is not necessary that it should be so; the order may be made on application of one county council or of a borough council, and may, although it is not likely that it would, comprise only an area within the jurisdiction of a single body. Sub-section 2 provides that "the local fisheries committee for a sea fisheries district shall be a committee of a county council or borough council, or if two or more councils appear to be interested, a joint committee of those councils, with the addition in each case of such members representing the fishing interests of the district, including members representing any board of salmon conservators having jurisdiction within the district, as may be directed by the order creating the district, such number of fishery members not being in the aggregate less than the number of members of the county or borough councils provided by the order creating the district. The fishery members shall hold office for the same time as the members appointed by the county or borough council or councils." So that the composition is a composition of what may be called, in the strict sense of the word, representative members sent by the county council or by the borough councils, and shall consist also of members not so strictly representative in their character, but members representing any board of salmon conservators within the district, so far as they may be included by the order made, but with the stipulation that the number of—what I for this

purpose call—non-elective or non-representative members shall not exceed the number of the elective or representative members. Then sub-section 3 provides that "the law relating to committees and joint committees of county councils shall, subject to the provisions of the order constituting a local fisheries committee, apply to the local fisheries committee in like manner as if the powers and duties of that committee were powers and duties transferred by the Local Government Act, 1888, to the council or councils represented on the committee and delegated to the committee by the said council or councils." Then sub-section 4 provides that every order made by the Board of Trade shall be laid before Parliament, and if either House within thirty days resolves that either the whole or any part of the order ought not to be enforced then it is not to have force, but subject to any such resolution every order so made shall come into force at the expiration of thirty days. Then there is a provision in sub-section 5 which shows that this is not a purely voluntary scheme—namely, that in case a county council or borough council to whom application has been made by not less than twenty inhabitant ratepayers refuse to apply to the Board of Trade to create a sea fisheries district, then there may be a further application to the Board of Trade, and the Board of Trade may then proceed to constitute a sea fisheries committee by their order as if the application had been made by the council itself; but by sub-section 6 there is the provision that before making any order creating a sea fisheries district the Board of Trade is to cause the draft of the order to be circulated, is to hear objections to its provisions, and is to give notice of inquiry to be held by advertisement or otherwise. Then section 2 gives power to the sea fisheries committee to make bye-laws for the regulation of its fisheries.

Now I come to the sections which are mainly in discussion and controversy in this case. Section 6 says, "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of the bye-laws made by the committee." So this section, it will be observed, very properly and naturally recognizes that the restrictions or conditions as to expenditure shall rest with the contributing bodies—in other words, the members of the fisheries committee, who are sent there as representing boards of salmon conservators, or other bodies of that nature, have no voice in this matter. The conditions and restrictions as to expenditure are to rest with the council or councils—the county council in the one case, the borough council in the other, and these restrictions or conditions as to expenditure are, according to the clear wording of the section, to precede the appointment of the fishery officers. Such fishery officers are to be appointed as the fisheries committee think right, but conditions and restrictions may be laid down by the council or councils representing the areas that have to bear the charge, and those conditions and restrictions, if laid down properly and in time, may be observed by the fisheries committee. One of the important questions—indeed, the crucial question in the case—is, when those conditions and restrictions are to be imposed. Then section 10 provides that "the expenses of a local fisheries committee, so far as payable by a county council, shall, according as is provided by the order providing for the constitution of the local fisheries committee, be general or special expenses within the meaning of the Local Government Act, 1888, and if special expenses shall be charged in manner directed by the order." Section 11 provides that "an order providing for the constitution of a local fisheries committee may contain such regulations consistent with this Act with respect to the number and mode of appointment of the members of the committee, and with respect to other matters relating to the constitution of the committee, as may seem expedient to the Board of Trade." So it will be seen that while the Act in general terms points out what is to be the mode for obtaining the appointment of a fisheries committee and some general outline as to the constitution of that body and as to its functions, it leaves a great many matters to be filled in by the provisions of the order of the Board of Trade, which itself is the efficient Act for the constitution of the fisheries committee, and that order may contain such regulations, always consistent with the Act, in respect of the number and mode of appointment of the members of the committee, and in respect of other matters relating to the constitution of the committee as may seem expedient to the Board of Trade.

Now, application having been made to the Board of Trade, we must assume that all the proper steps were taken by the Board of Trade, and we must also assume that the order which was on the 9th of July, 1890, made by the Board of Trade constituting the North-Eastern Sea Fisheries Committee was a valid order, and within the jurisdiction given to the Board of Trade under the Act to which I have referred. But it is necessary that I should call attention in some detail to the provisions of the order. It recites that application has been made to the Board of Trade by certain councils. It then recites that certain other places in addition to the councils appear to be interested in the proposed district. It then further recites that they had caused a circulation to be made of the draft proposal, and had considered certain objections and so on made. Thereupon, by clause 1 of what I may call the enacting part of this order, the sea fisheries district is created and its boundaries are set out in detail. On that I need not dwell. Clause 2 deals with the constitution of the committee: "A local fisheries committee shall be constituted for the regulation of the sea fisheries carried on within the said district." Then it provides that such committee shall be a joint committee of the councils of Durham, of the North Riding of Yorkshire (that is the county council in question), of the East Riding of Yorkshire, and of various other places, including certain borough councils—South Shields, Sunderland, and so on; that it shall consist of forty members, two appointed by the County Council of Durham, four by the County Council of the North Riding of Yorkshire, four by the County Council of the East Riding, and so on, and various other provisions with which I need not deal, including the boroughs to which I have referred, representing altogether some twenty members, with the addition of twenty members representing the fishing interests of the district, and one from the Board of Conservators of the Tyne Fishery, another from the Wear Fishery, another from the Tees Fishery, and so forth, and fourteen members by the Board of Trade—that is to say, six boards of conservancy members and fourteen nominated by the Board of Trade. So that you have got the forty members altogether. "The members to be appointed by the councils shall be appointed in each year at the usual quarterly meeting of the said councils respectively held in the month of November." That will be found to be not unimportant. "The members to be appointed by the boards of salmon conservators and by the Board of Trade shall be appointed in each year before the 9th of November." Then comes this provision, which is also important. "All the members shall retire, and the new members

shall come into office in each year on the 9th day of November." I refer to that because it makes intelligible what at first sight did not seem to me so, in some of the observations of Vaughan Williams, J., in *Reg.* v. *Mayor of Plymouth*, where he spoke of the appointment each year, or the re-appointment each year of the fishery inspector. It would appear from the constitution of this body that, unlike most similar bodies, as to which the usual provision is that a certain proportion of them retire annually, it seems to be the scheme of the constitution of this body that they shall all retire, being capable of re-election, but that they shall all retire at the end of each year. So that there would seem to be, therefore, a moment of time when the fisheries committee did not exist. Therefore there does seem to have been ground for the language used by Vaughan Williams, J., in the *Plymouth case*, in which he spoke of the re-appointment annually of the fishery inspector. Clause 2 then goes on to say: "Provided that the first members to be appointed by the councils and by the boards of salmon conservators shall be appointed at the meeting of each body respectively held next after the coming into force of this order, and the first members to be appointed by the Board of Trade shall be appointed before the 1st of September next, and that the first members of the committee shall come into office on the 1st of September next, and shall retire on the 9th of November, 1891. Retiring members shall be eligible for re-appointment." Now I come to something that is more material. "Except as provided by section 6 of the Act"—that is the section which deals with restrictions which may be laid down as to expenditure by the council or councils—"no council shall make, vary, or revoke any regulations or standing orders respecting the quorum or proceedings of the committee hereby constituted, or as to the area within which it is to exercise its authority, provided that any council may make a regulation requiring the committee to submit to each council once in each year an estimate of expenses proposed to be incurred by them under the Act, and once in each year a printed abstract of their account for the preceding year, and to afford to any person or persons appointed for the purpose by the council access at all reasonable times to the books containing their accounts." Then it proceeds: "Subject to any restrictions or conditions, made under section 6 of the Act, the committee"—that is, the fisheries committee—"shall not be required to report its proceedings to any council, nor shall its acts or proceedings be submitted to any council for approval."

Now we come to deal with the only remaining clause which it is necessary to refer to, but which is the one dealing with the mode in which the burthen of expense is distributed and borne. "The expenses of the committee, other than those which may be required to be incurred under section 8 of the Act, shall be chargeable as follows:" two-twentieths by Durham, four-twentieths by the North Riding, two-twentieths by this authority, one-twentieth by that authority, and so on, till the entire twenty-twentieths are distributed. Now, it is important in this connection, therefore, to observe that it is not possible to increase the burden upon any one of those expense-bearing areas—that is to say, once the amount of the expenses has been determined, it is clear that that is an estimate not of expenses that have been incurred, but of expenses for a year to be incurred. Once that figure is determined, then the North Riding can only be charged with four-twentieth parts of that expense. And the object of that on consideration, of course, will be apparent. When we come to the consideration of that which is of the real consequence in this case namely, whether—after there has been an estimate of the expenses which the sea fisheries committee have come to the conclusion is necessary to be made or provided for in the coming year, in order to give effect to the objects of the Act, and to the objects for which they were created—it is possible for one of the councils, whether borough or county, to say, "We object to this item or that item in that expenditure, and we decline to be responsible to contribute our quota towards that expenditure"? Of course, if that contention were in the results found to be well founded, the consequences clearly would be that it would be in the power of one of these bodies, it may be, to defeat the whole operation of the Act, because it must be assumed that the estimate of the necessary expenditure was an estimate of what the committee, after careful inquiry, had arrived at the conclusion was necessary to be expended; and if one of the bodies upon whom the burden of expense falls says "I will not contribute my share," where is the provision by which his defalcation can be made good? There is none. As I pointed out, the quota of the other expense-bearing authorities or areas cannot be increased.

I have said all that is necessary both as to the provisions of the Act, and as to the order made under the authority of the Act, and now it is necessary, to bring the matter to the point, to state the facts in the order of time. The order of the Board of Trade was made on the 19th of July, 1890. The committee was appointed, and presumably elections have gone on, and estimates of expenses made, those expenses borne by the several constituent bodies, to use a brief expression, for 1891, 1892, 1893, 1894, 1895, and 1896. How far the *personnel* of the sea fisheries committee was altered we do not know, nor is it material to inquire. Either the same members were re-elected or fresh members elected annually in their place. But the fact is that the fishery officer, who is now acting for the sea fisheries committee, was appointed on the 10th of July, 1895, and having since been continued, in 1896 and 1897, in his appointment, must be taken to have been re-appointed at the beginning of each successive year; there has been no exercise of the power given to the county council or councils to make any restrictions or any conditions whatever, and it would seem, and certainly does seem, that upon the mere statement of those facts there is an end to any arguments tending to or endeavouring to show that the council of the North Riding is to escape liability, because the words are: "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of bye-laws made by the committee." Therefore it is clear that the restrictions and conditions are restrictions and conditions that must precede the appointment of such fishery officers, and it is equally clear that the appointment of such fishery officers as the sea fisheries committee deem expedient, embraces consequently such expenses of equipment, whatever direction that equipment may take, as shall enable that officer and those officers to discharge the duties entrusted to them, and cast upon the sea fisheries committee by the statute and by the order of the Board of Trade. That would really seem to me quite enough to end the case, but I think it may be well that I should examine the matter a little further. It will follow, if I am right so far, that the North Riding neither singly (if it could do so effectually, which I do not think it could) nor in concert with others, having made any restriction or conditions as regards the estimate for the year in

question, are bound to pay their quota as that quota is fixed by the Board of Trade Order.

On the 19th of January, 1898, the sea fisheries committee resolved, by their sub-committee, that it would be better to buy rather than to go on hiring a vessel for the use of their fishery officer. They made an estimate of the expenses, and arrived at the conclusion that that would involve the expenditure of £2,500 on the purchase of a vessel, and £360 for the maintenance of that vessel for one year, making a total of £2,860. That was merely the resolution of the sub-committee; it was not the act, therefore, of the sea fisheries committee itself. But apparently they had a further committee, called the expenses committee, or the executive committee, and the resolution or recommendation of the sub-committee came before them, and was approved of, and finally it comes before the sea fisheries committee as a collective body and was passed, so far as the evidence shows, unanimously. On the 22nd of January, 1898, a precept was issued by the sea fisheries committee to the County Council of the North Riding to pay its share, amounting to £572, and up to that point no objection whatever was made as to what the sea fisheries committee were proposing to do or to what they had done. And it is further to be observed that although clause 2 of the order constituting the committee gives to any council the right to make a regulation requiring the sea fisheries committee to submit to such council an estimate of the year's expenses proposed to be incurred, no such regulation has been made by the North Riding County Council, nor, so far as we know, by any of those councils. It seems to me, therefore, as plain as anything can well be, that this North Riding council cannot now say, "We object to this expenditure; we think this expenditure is unwise, and we decline to pay our part." To allow such a repudiation at such a stage would be to render the whole scheme contemplated by the Act and by the order unworkable, and would put it into the power of one council of a borough or a county to defeat the whole object. For instance, to illustrate again what I have previously adverted to, if the North Riding are right in this repudiation, where is the £572, which is part of the supposed necessary expenditure for this year, to come from? It cannot come from any of the other contributing bodies, for their quota of the total expenses is fixed by the order, and cannot be altered.

Now, following upon the issue of the precept, the North Riding council instruct their representatives to oppose the scheme, and accordingly a motion was made some time in the month of March in the sea fisheries committee which practically was for the purpose of endeavouring to undo the work of the council, but it was rejected by a large majority, It is not unimportant to observe the character of that resolution. At their meeting held on the 11th of May they passed this resolution: "Pursuant to the resolution adopted on the 16th of March, the requisite steps shall be taken to protect the ratepayers in the Riding from liability in respect of the expenditure incurred by the committee; that the amount being the total amount of the accounts recommended for payment by the finance committee be reduced by £572, being the amount of the precept of the sea fisheries committee, and that in pursuance of the Sea Fisheries Regulation Act of 1888, the county council restrict the expenditure to which it would be liable, to expenditure the contribution of which payable by the county council shall not exceed £150 in any one year." Now, see, therefore, what they propose. They say, "Although we have not *a priori*—that is to say, before the appointment or re-appointment of these fishery officers—laid down any restriction or condition, and although we have not even passed any regulation of our own body requiring the sea fisheries committee to furnish us with an estimate of the proposed expenditure, yet, the whole thing having been done and considered by the sea fisheries committee, we now object." They cannot be heard to say so.

I think, therefore, that this case is a very clear case. I quite agree that cases may be put as to which questions of more or less difficulty may arise, and it may, from the public and important character of this question, be well to say a word or two about them. It was argued before us that any one council might lay down restrictions or conditions, and that, to consider the case in the concrete, when they were sending their representatives and electing their representatives at the end of the year and before the beginning of the next, they might elect their representatives and say: We elect you subject to this restriction or condition—namely, that no expense shall be incurred by the sea fisheries committee which will involve a greater contribution on the part of the County Council of the North Riding than, say, £150. Would that be legal? Would that be within their compass? It seems to me it would not. It seems to me to be apparent that the time at which the conditions for the constitution of that body ought to be framed certainly is, if not at the original constitution of the sea fisheries committee by the agreement and assent of all the contributing authorities, certainly before any expense has been incurred by the committee by the appointment of its officers. Therein one is well founded by the express words of the Act itself. But assuming that objection is made before the appointment of the officers, it cannot be said that the objection of one of the constituent and contributing bodies is enough to create a restriction or condition within the meaning of section 6. It seems to me that there must be an agreement amongst all the bodies concerned, and that it does not lie within the power of any one of them to say: "This is a restriction which I insist upon being observed in the action of the sea fisheries committee, or else I do not come under a liability under the scheme." To admit of that interpretation of the statute would enable one body that took a short-sighted view, it may be, of its own interests, a body that thought that it was contributing more than it was gaining by the scheme, to defeat the whole scheme, and to prevent the operation of the Act which was intended to proceed upon this just principle, to give effect to what was believed to be a great public object in the preservation and regulation of our fisheries, and at the same time to construct an equitable scheme by which the burthen of carrying out that object should be borne by those who were interested in it. But to allow each one of the constituent or expense-bearing or contributing bodies to judge for itself what was the measure of its gain, and what ought to be the measure of its contribution, would, as it seems to me, wholly and entirely defeat the Act of Parliament. I think, therefore, that the precept has been properly issued, and the *mandamus* to enforce it must go.

WILLS, J.—I entirely agree in everything which my lord has said, and I probably should have said no more, except that the case is a very important one, and it raises points which have not been discussed before, and as I have penned a judgment I think I ought to deliver it.

The substantial question in the case is, What is the meaning of section 6, sub-section 1, of the Sea Fisheries Regulation Act, 1888. "The committee," that section says, "may appoint such fishery officers as they deem expedient" (which

means, I presume, as they deem it expedient to appoint), "subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed." The English is not very good, and the phraseology is not very accurate. No fisheries committee is appointed by a council or by councils. The meaning, however, is clear, and the phrase should be read: "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom members of a local fisheries committee are appointed." The fisheries committee, it is obvious from section 2, is to consist partly of members appointed by councils which will have to provide the funds, and partly of at least an equal number of members representing bodies of conservators or other interests who provide no funds. It was therefore reasonable to give some control over expenditure, to the paymasters. Accordingly, if there be but one council providing the funds, that council may impose restrictions as to expenditure, but if there be more than one council, how can any one council by itself impose restrictions on the expenditure, or on its own contribution? The two phrases come to the same thing, for if the one council can impose restriction on its own contribution, it thereby must impose a restriction on the total expenditure, which is a definite multiple of the contribution of each council. I cannot think this the meaning of the section, as it would put it in the power of any one council to cripple or destroy any effective work on the part of the committee. The restrictions must be imposed by the councils—that is, by the agreement of all the councils. This, I think, is made plainer by the enactment of section 1, sub-section 3, which says that "the law relating to committees and joint committees of county councils shall, subject to the provisions of the order constituting a local fisheries committee, apply to the local fisheries committee in like manner as if the powers and duties of that committee were powers and duties transferred by the Local Government Act of 1888 to the council or councils represented on the committee and delegates to the committee by the said council or councils." By section 81, sub-section 1, of the Local Government Act of 1888, it is provided that any county council or councils may join in appointing out of their respective bodies a joint committee to whom by sub-section 2 any county council taking part in the appointment, may delegate any power which such county council might exercise for the purposes for which the committee is appointed; and by sub-section 4, "subject to the terms of delegation, any such joint committee shall, in respect of any matter delegated to it, have the same power in all respects as the councils and courts appointing it, or any of them."

Now, it is quite plain that the terms of delegation spoken of must necessarily be the same in all the resolutions of delegation, or else the scheme would be unworkable, and in like manner the work of the fishery committee could not be carried on unless the restrictions or conditions relating to expenditure, if any, were identical in the case of each of the councils imposing them. Unless, therefore, there be unanimity on the part of the several councils concerned there can be no operative restrictions under section 6. In this instance there were none at all by any of the councils until the resolution of the North Riding council of the 11th of May, 1888, and as those restrictions were not concurred in by the other councils, they are, in my opinion, inoperative.

It was urged upon us that the provision contained in the order of the Board of Trade that any council may make a regulation requiring the committee to submit to such council once in each year an estimate of expenses proposed to be incurred by them under the Act, and once in each year a printed abstract of their accounts for the preceding year, and to afford to any person or persons appointed for the purpose by the council access at all reasonable times to the books containing their accounts, would be fruitless unless the council could, after examining the estimate and accounts, pass an effective resolution to limit the expenditure. But that consequence does not follow. Any reasonable or well-considered objection to the nature or extent of proposed expenditure coming from any of the contributory councils would be sure to meet with careful attention by the committee, and the consideration of estimates and accounts by the several councils would enable them to request their appointed members to represent to the committee the objections entertained. I am well aware that cases of apparent hardship may be conceived as possible under this legislation, but the answer is that all legislation of this kind is practical, and can rarely so much as aim at completeness or perfection, and I have no doubt that the good sense of the various bodies represented on the committee and of the members of the committee itself may safely be trusted to enable the important work of the committee to be done with a due regard to the various interests represented, and without injurious friction or serious injustice to anyone concerned. By the order of the Board of Trade all the members of the committee go out of office every year, and therefore the opportunity occurs once a year of changing the *personnel* of the committee, and of imposing any restrictions upon expenditure as to which the councils interested may be unanimous. This provision probably is a sufficient safeguard against things going seriously wrong in the matter of expenditure or anything else.

For these reasons I am of opinion that the rule for a *mandamus* should be made absolute.

Rule made absolute.

Solicitors against the rule, *Lowe & Co.*

Solicitors in support of the rule, *Hicks, Davis, & Hunt.*

House of Lords.

From C. A. (England). July 14, 1898.

REVELSTOKE v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Stamp duty—Foreign security issued in the United Kingdom—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (6) (i.).

The bond of an American railway company, payable to bearer, contained a clause on the face of the bond: "This bond shall not be valid for any purpose unless authenticated by the certificate hereon indorsed of the trustee. . . ." This instrument had been executed in the United States and delivered to a trust company, which was to act as trustee; but the certificate was unsigned, and the instrument was transmitted in that state to London, where the certificate was signed as required, and the bond issued to the holders.

Held, that the bond was a marketable security both made and issued in the United Kingdom within the

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

meaning of section 82, *sub-section* 1 (6) (i.), *of the Stamp Act*, 1891.

Decision of the Court of Appeal (46 *W. R.* 98, [1898] 1 *Q. B.* 78) *affirmed.*

This was an appeal by the plaintiff from an order of the Court of Appeal (A. L. Smith, Rigby, and Collins, L JJ.), reported *sub. nom. Baring* v. *Commissioners of Inland Revenue*, 46 W. R. 98, [1898] 1 Q. B. 78, affirming a judgment of the Divisional Court.

Both the Divisional Court and the Court of Appeal had held that the bond was issued in the United Kingdom within the meaning of the sub-section.

Cohen, Q.C., Bray, Q.C., and *Willes Chitty*, for the plaintiff.—The bond was issued in New York. The statute speaks of the original issue. There was no act to be done by the new company to validate the bonds. The bondholders could require the certificate from Barings.

Sir R. Finlay, S.G., and *Danckwerts*, for respondent, were not called upon.

Earl of HALSBURY, L.C. — I confess that it appears to me that there is not much difficulty in determining this case. In my opinion this marketable security was both made and issued in London. It is to my mind immaterial to consider the origin of this document, or the place in which it was written, or where the process of its manufacture originally commenced. The document is a document which when completed became undoubtedly, within the meaning of the statute, a marketable security, and the marketable security, when thus completed, is for the first time delivered to a person who is entitled to receive it in London. I think that was an issue of that marketable security to that person in London. It was, therefore, I think, issued in London. It was also, however, in my opinion, made in London. The earlier history of the transaction is immaterial. We are dealing now with a taxing Act which imposes the necessity of placing a stamp upon particular instruments of the character designated and described by the statute itself. The statute has given a test of what is a marketable security, and any document which has that character and is issued in London or made in London is liable to that tax. I think that this document was issued in London. Was it made in London? Its commencement was in another country, but it cannot be denied that at the time when it first reached this country it did not fill the character of an instrument to which the Act has affixed the necessity of a stamp being applied. It is admitted that when it got to London, it for the first time fell into the category to which the statute applies. It required a particular signature; and be it observed that we are here not dealing with those wider questions of the contractual relations between the parties, we are dealing with a taxing Act which affixes to a particular instrument of a particular character the necessity of having a stamp. For the first time in London this instrument gets that character by a signature affixed in London. I am wholly unable to understand why, when for the first time it assumes that character and falls into the definition which the Act of Parliament gives, which renders it liable to stamp duty, one should do more than look into the instrument itself and see whether it has first assumed that character of a marketable security, in this country. For my own part I think the case extremely plain, and that the instrument was both made and issued in this country, and I decline to go into the earlier history of the transaction, to see who was a party to the first part of it, and who was a party to the second part. To my mind it is enough to say that this document first assumed that character in this country, and in that character was for the first time "issued" in this country to the person entitled to receive it. Under those circumstances it appears to me, quite independently of the early history of the matter, that it fills the character which the Act of Parliament contemplated as that of documents which were to be subject to the stamp duty. Therefore, though I cannot agree with all the reasons given by the judges below, I think that the judgment of the Court of Appeal was substantially right, and that this appeal ought to be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. In my opinion these bonds were both made and issued in this country within the meaning of the Stamp Act. I think that they were "made" when the finishing touch was put to them and they became by the addition of the certificate valid and operative instruments as "marketable securities." It seems to me that they were then for the first time "issued" as marketable securities. Before that addition was made the bonds on the face of them bore the statement that they were not valid for any purpose. I cannot understand how any document can be issued as a marketable security which proclaims on the face of it that it is not a marketable security at all.

Lord MORRIS concurred.

Lord SHAND. — I am of the same opinion. I think that there is much room for the argument that these bonds were issued in the state in which they were issued in America, because they were documents which were there given over or delivered by debtors practically to their creditors in fulfilment of obligations previously undertaken. The bond in question might have been delivered to the appellant himself, but instead of that the bonds were handed to trustees to be held for the appellant and other bondholders in fulfilment of obligations. But the point on which my judgment turns in the case in this, that when the bonds were so handed and issued to the creditors entitled to them, or to trustees for their behoof, they were not marketable securities. They became marketable securities only after they arrived in England, when they were made marketable by the certificates there signed; and we therefore have an issue here of a document essentially different from that which it had been in America. What had been an unmarketable security was made a marketable security, and then for the first time issued as such in England. It appears to me that, in these circumstances, the clause of the statute applies, and that the stamp duty which the Crown insists upon became due. In short, I agree practically with what was said by Smith, L.J.: "If when the certificate was indorsed in London by Mr. Merritt it then and there became a marketable security, and was not a marketable security until that period, it became then a marketable security issued in the United Kingdom." On that ground I am of opinion that the judgment ought to be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

Solicitor for the respondents, *F. C. Gore*, Solicitor of Inland Revenue.

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Dec. 7, 8, 12.

ELLAM v. H. F. MARTYN & CO. (a.)

Patent—Infringement—Threat of legal proceedings—Injunction — Breach — Contempt of court — Costs—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

C., trading as M. & Co., had been restrained by injunction—in an action brought by E. against M. & Co. — from publishing, either verbally or otherwise, any statement to the effect that an injunction had been granted against E. restraining him from infringing certain letters patent, and also from threatening E. or any of E.'s customers with any legal proceedings or liability in respect of the manufacture, sale, or purchase of a certain machine. After the order M. & Co. circulated amongst E.'s customers a pamphlet prepared by the A. B. Co., which stated in effect that M. & Co. were the special agents of the A. B. Co., who were the exclusive makers of the machine in question under the license of the patentee, and who intended to prosecute all infringers of their patents.

On motion to commit C. to prison for contempt of court for a breach of the injunction, Romer, J., ordered C. to pay the costs of the motion. On appeal,

Held, by Lindley, M.R., *and* Vaughan Williams, L.J. (dissentiente Chitty, L.J.), *that the injunction was not so plainly worded to prohibit what C. had done, as to justify a judicial decision that a breach of the injunction had been committed.*

Per Lindley, M.R.—*The court will not strain the language of an injunction even to meet a case which would have been prohibited if foreseen.*

Appeal of the defendants from a decision of Romer, J.

On the 22nd of July, 1898, Romer, J., upon the motion of the plaintiffs, which was treated as the trial of the action, granted an injunction in the following terms: That the defendants, H. F. Martyn & Co., their servants and agents, be perpetually restrained from publishing, either verbally or by circular, letter, notice, or otherwise howsoever any statements that, or to the effect that, injunctions have, or an injunction has, been granted against the plaintiffs restraining them from infringing certain letters patent, No. 12,013 of the year 1887, granted to one Herbert John Allison, or any other letters patent, and also from threatening the plaintiffs or any of the plaintiffs' customers with any legal proceedings or liability in respect of the manufacture, sale, or purchase of the duplicating machine known or described by the defendants as the "Genuine Edison Mimeograph."

After the order the defendants circulated amongst the plaintiffs' customers a pamphlet headed "The Genuine Edison Mimeograph," and printed on the outside were the words: "H. F. Martyn & Co., special agents for the A. B. Dick Co., exclusive makers for the world under authority of Mr. T. A. Edison." On the back of it was printed a notice as follows:

"From the office of the A. B. Dick Co., Chicago, June 24, 1896. To whom it may concern. Public notice is hereby given that we are the exclusive makers for the world of the Edison Mimeograph, and all supplies for same, under our authority so to do through the inventor, Mr. Thomas A. Edison. We further declare it to be our intention to prosecute all infringers of our patents. So-called Edison Mimeographs and supplies made by other parties we stamp as fraudulent imitations of goods made by us, and such imitation stuff is not made with any authority either through us or through Mr. Edison.

"(Signed) A. B. DICK CO."

The plaintiffs moved for leave to issue a writ of attachment against the defendant Thomas H. D. Cooke, trading as H. F. Martyn & Co., or in the alternative to commit him to prison for contempt of court.

Romer, J., on the 18th of November, 1898, made no order except that the respondent should pay the costs of the motion. He thought that the respondent had committed a breach of the injunction, though not intentionally.

The defendants appealed.

Moulton, Q.C., and *J. C. Graham*, for the appellants.

T. Terrell, Q.C., and *A. J. Walter*, for the respondents.

Cur. adv. vult.

Dec. 12.—LINDLEY, M.R.—The question in this appeal is whether the defendant has committed a breach of the injunction. [His lordship stated the facts, and continued:] The learned judge has come to the conclusion that the defendant has been guilty of a contempt of court by infringing the injunction against threats. The question is of some importance. I am unable to agree with the learned judge. To threaten is one thing; to circulate threats by someone else is another and different thing. *Primâ facie*, at all events, the statement is true. Evidence may be adduced to prove that the circulation of threats by someone else is only a cloak to conceal threats really made by the person who circulates them. But there is no evidence in this case to show that the statement made by the defendant is untrue. He says in his affidavit that the pamphlet complained of was prepared by the A. B. Dick Co. in America, and was sent by them to him as their agent to circulate. He further says that the pamphlet was not one of the documents complained of on the motion for an injunction. The A. B. Dick Co. were not parties to that action, nor are they parties to the application to commit the defendant. The court will not for a moment tolerate a breach of an injunction, but will always enforce observance of its orders, and will not allow itself to be tricked or trifled with. But this very circumstance renders it incumbent on the court not to strain the language of an injunction, even to meet a case which would have been prohibited if foreseen. To imprison a man is a very serious matter, and although the defendant has not been imprisoned, still the order made against him (i.e. that he pay the costs of the application to commit him) is only justifiable on the ground that he has disobeyed the injunction of the court, for which disobedience he might probably have been imprisoned if the judge had thought proper to make an order for his committal. I cannot bring myself to say that the injunction is so clearly worded as to extend to circulating the threats contained in the pamphlet. The A. B. Dick Co. are not myths; they are real traders; the defendant is their agent: the threats circulated are their threats, not his. He does not threaten; they threaten, and make their threats known by him. That he might be restrained from circulating the threats is very likely, and I will assume that he could. I have, moreover, no doubt that these threats, which are sent to the plaintiffs' customers, are a serious injury to the plaintiffs. But, for all that, in my

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

opinion, the injunction as worded does not so plainly prohibit what the defendant has done as to justify me in holding judicially that the defendant has been guilty of a breach of the injunction. The order appealed from ought to be discharged, but without costs, for the defendant has unquestionably done that which was eminently calculated to lead to an application for his committal, and that which Romer, J., and one of my brothers think is a breach of the injunction. Under these circumstances, although the defendant succeeds, he cannot reasonably complain of the application made against him, and no injustice is done in not giving him any costs.

The order will therefore be discharged without giving the defendant costs either here or below.

CHITTY, L.J.—I differ, though with regret. Romer, J., by ordering the defendant to pay the costs of the motion to commit him, as he has done, adjudged that there was a breach of the order for which he might have been sent to prison. In the exercise of his discretion Romer, J., has thought it right to make the more lenient order that he should pay the costs only. But his opinion was clear—first, as to the injunction granted; and, secondly, as to the breach. He says that the defendant must not actively by his own conduct threaten, and that in his opinion he has threatened the plaintiffs or the plaintiffs' customers with legal proceedings for liability in respect of the manufacture, sale, or purchase of the machine referred to in that order and, in his opinion, the order as it stands, is not restricted to legal proceedings by the defendant or liability at the suit of the defendant. It means what it says. Now I take the order and read it, and I am unable to find any ambiguity in it. Reading it as you must read it, without any assistance by reference to the pleadings or the like, there being no pleadings in the case, and having nothing to refer to except the order itself, the order on the face of it refers to no other document which can be read for the purpose of limiting or expounding or explaining the words that are actually found. The material part of the injunction is from threatening the plaintiffs, or any of the plaintiffs' customers, with any legal proceedings or liability. That is not an injunction directed to threats that the defendant himself will take any legal proceedings or attempt to impose liability. The injunction is general in terms. As Romer, J., has said (and I agree with him in this) it is not restricted to threats made by the defendant himself that he will take the steps which are here restrained. The gist of the injunction is threatening the plaintiffs' customers. In my opinion the document which has been issued is a breach. I agree that it is not a threat by the defendant himself that he will take proceedings, but it is a threat in my opinion that other persons—namely, the A. B. Dick Co.—will take proceedings founded upon their patent. I think it is quite plain that what has been done is within the mischief of the injunction, but I say that merely to state expressly my opinion that I do not go upon any question of construing the injunction so as to make it wider. I take the injunction just as it stands, and I agree with Romer, J., that there is a breach.

Something was said during the argument with reference to the 32nd section of the Patent Act of 1883. It was said that the injunction was granted obviously simply under that section. I think that argument cannot be maintained. There is nothing to show that the defendant against whom the injunction went was a person who claimed to be a patentee. I quite agree that the language of the injunction follows the language of the section. There may have been other just grounds to make the injunction in this form. It is a settled rule that you cannot question the validity of the order on a motion to commit, but if the order is wrong in terms then the court may allow on such a motion the matter to stand over, in order that the defendant sought to be committed can get the order set right if he is in a position so to do. The result, in my judgment, is simply this: I think there is a plain order and a plain breach.

VAUGHAN WILLIAMS, L.J.—I agree with the judgment of the Master of the Rolls. According to my reading of this order it is an order based upon the 32nd section of the Act of 1883, and under those circumstances, if that is the meaning of the order, in my judgment there is no breach of it.

Appeal allowed.

Solicitors, *Ingle, Holmes, & Sons; Pritchard, Englefield, & Co.*

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 30.

In re RITSON.
RITSON *v.* RITSON. (*a.*)

Partnership—Assets—Deposit of title-deeds by partner to secure partnership debt—Devise of real estate—Sufficiency of partnership assets to pay debts in full—Real Estate Charges (Locke-King's) Act, 1854 (17 & 18 *Vict. c.* 113), *s.* 1.

A testator who was a partner in a firm of shipbuilders had deposited at a bank the title-deeds of a real estate belonging to himself to secure the partnership overdraft. By his will he specifically devised the real estate. The partnership assets were, at the testator's death, sufficient to pay the firm's debts.

Held, affirming Romer, J. (46 *W. R.* 478), *that the charge only extended to the debts of the partnership, and that, as the partnership assets were sufficient to pay these, no part thereof was a charge on the real estate of the testator comprised in the memorandum of charge.*

Appeal of the defendants from Romer, J. (reported 46 W. R. 478).

The testator, John Ritson, who died on the 15th of September, 1897, was in partnership with his brother as timber merchants and shipbuilders.

In August, 1896, the testator had deposited the title-deeds to certain rent-charges belonging to him with a bank to secure the partnership overdraft, signing at the same time a memorandum of deposit; he also gave an undertaking to execute a legal mortgage if called upon to do so.

By his will, dated the 21st of June, 1897, the testator devised and bequeathed all his real and personal estate to trustees upon trust for his wife for life and on her death upon trust as to certain real estate, which included the real estate charged to the bank, for his son absolutely, and as to all the residue of his real and personal estate upon trust for his (the testator's) children equally.

At the testator's death both his private account and the partnership account were largely overdrawn at the bank, but the assets of the partnership were more than sufficient to cover all their debts.

The executors took out a summons for the determination of certain questions arising in the administration of the estate. The chief question raised by the summons was whether such part of the amount

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

due from the partnership to the bankers, secured by the said memorandum, as was payable by the estate of the testator, ought to be paid out of the real estate mentioned in the memorandum, or out of his share in the partnership assets.

Romer, J., held that the charge only extended to the debts of the partnership, and not to the private overdraft of the testator; and that as the partnership assets were sufficient to pay these, the partnership debt to the bank was payable thereout, and was not a charge on the real estate comprised in the memorandum.

The defendants, three of the younger children of the testator, appealed.

Farwell, Q.C., and *Christopher James*, for the appellants.—The real question is whether Locke-King's Act applies to partnership property. Was the debt of the firm payable out of the real estate or out of the personal estate, the assets of the partnership? We have not to show a charge on the personal estate, but a loss on the personal estate.

They referred to section 9 of the Partnership Act, 1890.

Neville, Q.C., and *R. F. Norton*, for the respondents, were not called upon.

LINDLEY, M.R.—I do not think that any member of this court has any doubt about this case. I agree with Romer, J., that when the case is really understood Locke-King's Act has nothing to do with it.

The case is simple. There is a partnership with joint debts and one of the partners gives to a bank a separate security on his separate estate for the joint debt of the firm. That partner dies, and when he dies it is ascertained that the joint assets are amply sufficient to pay the joint debts. The joint debts, notwithstanding the charge, which is immaterial, have to be paid out of the joint assets if there are enough. What the estate of the deceased partner is concerned with is what remains after payment of the joint debts including the guarantee. The order made by Romer, J., is quite right. It is worth reading—"This court doth declare that the memorandum of deposit dated the 15th of August, 1896, in the said summons mentioned extended to the debts and overdrafts of the partnership business carried on by the testator and Thomas Smith Ritson only, and not to the private debt or overdraft of the testator. And it being admitted that the assets of the said partnership business were sufficient for the payment of all partnership debts, including that due to the bank, this court doth declare that such last mentioned debt is payable out of such partnership assets and not out of the assets of the testator, and that no part thereof is a charge on the real estate of the testator comprised in the said memorandum."

That appears to me to be absolutely right, and following his line of thought in his judgment he is quite right when he says, "The case therefore is not one 'between the different persons claiming through or under the deceased person' within the words of section 1 of Locke-King's Act." And then he goes on to say that it would be very different if the joint estate were not sufficient to pay the debts in full. The judgment is absolutely right and the case is not within the scope of Locke-King's Act, or within the language of it.

CHITTY, L.J.—I am of the same opinion, and really for the reasons given by the Master of the Rolls and by Romer, J. The debt was the joint debt of the firm, and the assets of the firm in the hands of the surviving partner were more than sufficient to pay the debt. What was the interest of the deceased in the partnership assets? It was merely to take his share of the surplus property, the balance remaining after payment of the debt. The result is that there was no charge on the testator's estate at all; and I agree that within the meaning of the Act there are no persons claiming through or under the deceased person. The whole fallacy appears to me to be this: that the testator's estate is assumed to consist of that of which it does not consist at all.

VAUGHAN WILLIAMS, L.J.—I entirely agree. The Act is intended to apply where there are different persons claiming through or under the deceased person. It seems to me that the Act can have no application unless there is such a difference. There is no such difference here, and if the partnership estate is solvent there is no question of any incidence of this kind on the personalty in the distribution of this estate. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for all parties, *Speechly, Mumford, & Rodgers*, for *Hayton & Simpson*, Cockermouth.

From Chan. Div.
(Lindley, M.R., and Chitty, L.J.) Nov. 30.

CUMMINS v. PERKINS. (a.)

Receiver — Married woman—"Equitable execution"—Jurisdiction—Costs "payable out of married woman's separate estate, but not otherwise"—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.

A married woman, in an action unsuccessfully brought by her, was condemned in costs, to be taxed and paid to the defendants "out of the plaintiff's separate estate, but not otherwise." The only separate estate to which the plaintiff was entitled was a reversionary share in some property left to her by her sister's will. The share having come into possession, Kekewich, J., on the application of the defendants, and before the certificate of the defendants' costs had been issued, appointed a receiver of the plaintiff's share.

Held, by the Court of Appeal, *on the authority of* Kearns *v.* Leaf, 12 *W. R.* 462, 1 *Hem. & M.* 681, *that, apart from the Judicature Act*, 1873, *s.* 25, *there was jurisdiction in the court to appoint a receiver of the married woman's separate estate for the protection of the fund out of which the costs were directed to be paid.*

Decision of Kekewich, J., ante *p.* 138, *affirmed.*

Appeal of the plaintiff from the decision of Kekewich, J., *ante* p. 138.

In 1897 Elizabeth Cummins, a married woman, suing in respect of her separate estate, had brought an action against her former solicitors for damages by reason of a sale alleged to have been made by them at an undervalue of her reversionary share under the will of her sister Sarah Ann Ellis, deceased.

The action came on for trial on the 22nd of July, 1898. By the judgment it was ordered that two bills of costs delivered by the defendants to the plaintiff should be taxed, and that the amount to be certified as due on the taxation should, subject to the defendants' right of set-off in respect of their taxed costs of the action, be paid within twenty-one days after service of the present order and the taxing-master's certificate in pursuance thereof by the party from whom to the party to whom the same should be certified to be due, unless the court should, upon

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

special circumstances to be certified by the taxing-master, otherwise order upon application to be made within one week after the date of the certificate by the party liable to pay such amount; then it was ordered that the action should be dismissed and that the plaintiff should pay the defendants their taxed costs of the action, such costs to be payable out of the plaintiffs separate estate, but not otherwise.

The only property which the plaintiff possessed consisted of her said share in her sister's estate. The share had recently fallen into possession. The judgment had been passed and entered, but owing to delay the taxations had not been completed nor the taxing-master's certificate issued, and the defendants moved before Kekewich, J., for the appointment of a receiver of the plaintiff's said share, on the ground that the trustees of the will were about to distribute the estate, and that unless a receiver were appointed the defendants would lose the benefit of the judgment.

Kekewich, J. (see *ante* p. 138), appointed a receiver without salary of the plaintiff's share in her sister's estate to the extent of £270, the amount of the defendants' bill.

The plaintiff appealed.

Benshaw, Q.C., and *Peterson*, for the appellant.—Until a creditor is in a position to issue legal execution, he cannot issue equitable execution. There is no jurisdiction in the courts to grant protection to a creditor pending an action. [LINDLEY, M.R.—Is not this a charge on the lady's reversion?] We submit not. *Robinson* v. *Pickering*, 16 Ch. D. 371, and on appeal 29 W. R. 385, 16 Ch. D. 660, shows that a married woman cannot be restrained pending an action from dealing with her separate estate. Ord. 42, r. 17, shows that legal execution cannot issue here, because there is no certificate for costs; therefore, so far as this is process for execution, no execution can issue and no receiver can be appointed. Then the question arises, Is a charge created by the Married Women's Property Act? We submit not. If it were so, the Act itself would create a charge, and the words in the judgment might be disregarded; then it would merely be an order that a married woman do pay costs, and those costs must come out of her separate estate. This is not a charge, but is restrictive, merely indicating the property subject to execution on the order of the court. At most it could only be a right to be paid out of a particular fund. It really resolves itself into a question of construction on the Act, and the Act does not create a charge; therefore the order made by Kekewich, J., is wrong.

They referred to *Harris* v. *Beauchamp*, 42 W. R. 451, [1894] 1 Q. B. 801; *Holmes* v. *Millage*, 41 W. R. 354, [1893] 1 Q. B. 551; and *In re Shephard, Atkins* v. *Shephard*, 38 W. R. 133, 43 Ch. D. 131. [LINDLEY, M.R., referred to *Kearns* v. *Leaf*, 12 W. R. 462, 1 Hem. & M. 681.]

Warrington, Q.C., and *Waggett*, for the respondents, were not called upon.

LINDLEY, M.R.—In this case it appears to me the order is founded on perfectly intelligible and sound principles. There is a judgment against a married woman for the payment of costs not yet taxed, and those costs are by the judgment to be payable out of her separate estate. It appears that she has no separate estate except the share to which she is entitled in her sister's property under her sister's will. The judge was of opinion that this fund was in danger, that is to say, that this lady was in a position to and would, get it, and that if she got it the creditor would not recover his costs. Thereupon the judge did that which I think he had ample jurisdiction to do; he appointed a receiver to protect that property and to preserve it in order that it may be applied in accordance with the judgment which the defendants have obtained. It is said that is wrong. It is said that this is equitable execution, and there has been some discussion upon that footing; but we must bear in mind this is a case in which we are dealing with equitable estates, and a judgment that money is to be paid out of a particular estate. When once you have got that, quite independently of the Judicature Act, 1873, s. 25, the authorities which were very familiar thirty-five or forty years ago show plainly enough that if you have a right to be paid money out of a particular fund you could obtain in equity protection to prevent that fund being dissipated contrary to your right. It is very true you might not have had a specific charge so as to give you priority or anything of that kind, but the courts settled after a long series of decisions—there was a great fight about it at one time, but it was settled—that you could get an injunction, and if an injunction it followed on principle that you could get a receiver in a proper case to protect a fund from being misapplied. That is the principle on which the judge has gone, a perfectly sound principle even without invoking section 25 of the Act. But the introduction of that section does not curtail the powers of the court to grant injunctions. It expands it. It has not revolutionized the law, but it has enabled the court to grant injunctions and receivers where it used not to do so before. I will not go so far as to say where it had no jurisdiction to do so; that would be going a little too far; but where in practice they never did, as, for example, in trespass and in cases of first mortgagees who were out of possession. Very well; what is the wrong in this? Absolutely nothing at all. It appears to me, therefore, that the appeal fails and must be dismissed with costs.

CHITTY, L.J.—I am of the same opinion. The receiver has been appointed for the protection of the fund out of which according to the judgment the costs, when the taxation is completed, are to be paid. It seems to me that that falls within the principle of the case which the Master of the Rolls referred to during the argument, *Kearns* v. *Leaf*. No doubt that was a case of contract, but I see no difference between a case of contract and a case of an order of the court to pay. I agree that it does not create a special charge so as to involve any question of priorities, but it does give a right to have the fund protected out of which alone the payment is to be made. Wood, V.C., says such a species of interest in the fund as would entitle the plaintiff in the case before him to interfere and save the property from being wasted. That is the principle on which I think the order of Kekewich, J., was properly made, and ought to be maintained. I agree that the Judicature Act, s. 25, has to some extent enlarged the powers of the court; but upon this occasion I do not think it necessary to enter into any discussion of the particular effect that that section has.

Appeal dismissed.

Solicitors, *A. W. Mills; Chester, Mayhew, Broome, & Griffiths.*

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) Nov. 19.

CITY OF LONDON BREWERY CO. v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Stamp duty—Mortgage—Security for the repayment of money to be thereafter lent or paid—Additional or substituted security—Trust deed for securing debenture stock—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *sub-section* 1; *s.* 88, *sub-section* 1; *schedule.*

A trust deed of 1897 *for securing irredeemable* 3½ *per cent. debenture stock of a company provided as follows: That the issue of the stock should in the first instance be limited to* £300,000; *that a further issue might be made of* £540,000, *making altogether* £840,000; *that such further issue should only be made for the purpose of redeeming or paying off an already existing* 4 *per cent. debenture stock secured by a trust deed of* 1892; *and that the* 4 *per cent. debenture stock to be redeemed or paid off should be transferred to the trustees of the deed of* 1897.

Held, first, that the deed of 1897 *was a security for the repayment of money to be thereafter paid within the meaning of section* 86, *sub-section* 1, *of the Stamp Act,* 1891, *and that, by virtue of section* 88, *sub-section* 1, *it was chargeable with duty on the total amount of* £840,000; *secondly, that it was chargeable (under the heading Mortgage, Bond, Debenture, Covenant) with* ad valorem *duty at the rate of* 2*s.* 6*d. per cent., as being a principal or primary security, and not merely with* ad valorem *duty at the rate of* 6*d. per cent. as being an additional or substituted security.*

Appeal from a judgment of a Divisional Court (Grantham and Channell, JJ.) upon a case stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891.

The instrument as to which the opinion of the commissioners was required was a trust deed for securing debenture stock. It was dated the 6th of May, 1897, and was made between the City of London Brewery Co. of the one part, and certain trustees of the other part. After reciting that there was then outstanding £500,000 debenture stock of the company constituted and secured by a trust deed dated the 20th of February, 1892, and made between the same parties, and reciting the determination of the company to issue further debenture stock, to be called irredeemable 3½ per cent. debenture stock, ranking after the former debenture stock, and to be constituted and secured in manner thereinafter provided, it was witnessed as follows: By clause 2 the company acknowledged that it was indebted to the trustees in the sum of £300,000, carrying interest at the rate of 3½ per cent. per annum. By clause 3 the stockholders were to be regarded as the beneficial owners of their respective shares of the stock. By clause 5 it was provided that, as and when the stock or any part thereof ought to be paid off in accordance with the provisions of the deed, the company should pay to the stockholders or to those whose stock ought to be paid off the full nominal amount of the stock held by them respectively, with such premiums, if any, as should be payable in respect thereof, and such payment should operate in satisfaction of the amount of the stock, and in the meantime until the stock was paid off the company should pay the stockholders interest at the rate of 3½ per cent. By clause 7 the stock was limited in the first instance to £300,000, but the company was to be at liberty to issue further irredeemable 3½ per cent. debenture stock, entitled *pari passu* to the benefit thereof, subject to the following provisions, that is to say: "(a) Such further irredeemable 3½ per cent. debenture stock shall not exceed £540,000 in amount, making with £300,000 stock above mentioned a total of £840,000. (b) Such further stock shall only be issued for the purpose of redeeming or paying off the 4 per cent. debenture stock of £500,000. (c) Whenever it is proposed to issue any of the said further irredeemable 3½ per cent. debenture stock, the company must notify in writing to the trustees or trustee the amount of the proposed further issue, and must satisfy the trustees or trustee that, by arrangement with the holders of a corresponding amount of 4 per cent. debenture stock, or by reason of notice of redemption having been given, the company is in a position to pay off or redeem a corresponding amount of 4 per cent. debenture stock, and must provide to the satisfaction of the trustees or trustee for the application of such further debenture stock, or of the proceeds thereof, to such redemption or payment and for the transfer of 4 per cent. debenture stock to be redeemed or paid off, and the securities for the same, to the trustees or trustee hereof, and for the purposes of this clause the corresponding amount aforesaid is to be calculated on the basis that not more than £108 of the further irredeemable 3½ per cent. debenture stock is to be issued in respect of every £100 of the 4 per cent. debenture redeemed or paid off. (d) The company must, before any of the said further debenture stock is issued or offered for subscription, execute and deliver to the trustees or trustee an acknowledgment of indebtedness for the amount of the further proposed issue, duly stamped, and framed in accordance with clause 2 hereof, and until such acknowledgment is so executed, stamped, and delivered no part of such further stock is to be entitled to the benefit hereof." By clauses 8 and 9 the company conveyed, by way of mortgage, certain freehold and leasehold properties to the trustees subject to the 4 per cent. debenture stock and the securities for the same. By clause 10 the company charged in favour of the trustees all its other assets, present and future. By clause 12 the security constituted by the deed was to become enforceable in the event of the company making default in payment of any principal or interest under the deed and in each and every of four other named events.

Up to the time when the instrument was presented to the commissioners for their opinion, no acknowledgment of indebtedness referred to in clause 7 (d) had been executed or delivered.

The commissioners were of opinion that the sum of £840,000 mentioned in clause 7 was the limit of the total amount secured by or to be ultimately recoverable under the trust deed within the meaning of section 88, sub-section 1, of the Stamp Act, 1891. They therefore charged the instrument with the duty chargeable under the head "Mortgage, &c.," in the first schedule to the Stamp Act, 1891, by reference to section 86, sub-section 1, of that Act, and they assessed such duty at £1,050, being 2s. 6d. for every £100 of the amount secured.

The company being dissatisfied with the assessment so far as regards £675, part of the duty assessed, being the amount attributable to the sum of £540,000, the commissioners stated this case. The questions for the opinion of the court were (1) whether the instrument was chargeable with the duty of £1,050; (2) if not, with what duty it was chargeable.

The Divisional Court held (1) that the trust deed was a security for the repayment of £840,000 advanced or to be advanced within the meaning of section 86, sub-section 1, and section 88, sub-section 1, of the Stamp Act, 1891, notwithstanding that

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

certain preliminaries must necessarily be complied with before the issue of any further stock in excess of £300,000; but (2) that, in respect of £500,000, the deed was a substituted security, and was therefore only liable to the *ad valorem* duty of 6d. per cent. under the heading "Mortgage, Bond, Debenture, Covenant," in the first schedule to the Stamp Act, 1891.

The commissioners appealed, and the company gave notice by way of cross-appeal.

By section 86, sub-section 1, of the Stamp Act, 1891, it is enacted as follows: "For the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; and includes . . . (*c*) any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally or for the benefit of creditors specified who accept the provision made for payment of their debts, in full satisfaction thereof, or who exceed five in number."

By section 87, sub-section 3, "A transfer of a duly stamped security, and a security by way of further charge for money or stock added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security."

By section 88, sub-section 1, "A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited."

By the first schedule to the Act a mortgage, bond, debenture, or covenant, where it is "the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money," is chargeable with *ad valorem* duty at the rate of 2s. 6d. per cent.; where it is "a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped," it is chargeable with *ad valorem* duty at the rate of 6d. per cent.

Sir R. B. Finlay, S.G., and *Danckwerts*, for the Commissioners of Inland Revenue.

Bosanquet, Q.C., and *M. M. Macnaghten*, for the City of London Brewery Co.

Cur. adv. vult.

Nov. 19.—A. L. SMITH, L.J., read the following judgment: The two questions which appear to me to arise in this case are, first, whether a deed bearing date the 6th of May, 1897, is "a security by way of mortgage for the repayment of money to be thereafter paid," within the meaning of section 86, sub-section 1, of the Stamp Act, 1891, and is thus liable under the first schedule of that Act to a stamp duty of 2s. 6d. for every £100 of the amount secured; and, secondly, whether, if it be such a security, it falls within any of the provisions of that Act so as to be exempt from such liability.

By a deed dated the 20th of February, 1892, the respondents, the City of London Brewery Co. (Limited), conveyed by way of mortgage to trustees for debenture stockholders in that company all its freeholds and leaseholds, in trust to secure to such stockholders the amount of not exceeding £500,000, with interest thereon at the rate of 4 per cent., and by this deed it was provided that the company might give to these stockholders six months' notice expiring at any time after the 1st of January, 1913, to redeem the stock held by them at the price of £108 for every £100. In the year 1897 the company was desirous of issuing a further amount of debenture stock which should carry 3½ per cent. interest, and upon the 6th of May, 1897, the indenture which is the subject-matter of this case was executed between the company and trustees on behalf of stockholders. The trustees under this deed are the same persons as under the deed of 1892; but this seems to me to be an accidental circumstance, and not material to this case. By the deed of 1897, after reciting that the £500,000 debenture stock of the company constituted and secured by the trust deed of 1892 was then outstanding, and that the company had determined to issue further debenture stock to be called irredeemable 3½ per cent. debenture stock ranking after the former debenture stock, it was witnessed that the company thereby acknowledged that it was indebted to the then trustees in the sum of £300,000 carrying interest at the rate of 3½ per cent.; that the stockholders were to be regarded as the beneficial holders of their respective shares of this stock; that, as and when the stock or any part thereof ought to be paid off, the company would pay the same to the stockholders at par; that in the first instance the issue of this 3½ per cent. irredeemable stock should be limited to the amount of £300,000, but that a further issue of the stock, not exceeding £540,000, making, with the £300,000, £840,000, might take place; that such further issue of £540,000 stock should only be used for the purpose of redeeming or paying off the £500,000 4 per cent. stock; and that this further issue of £540,000 was only to take place when the company was in a position to pay off or redeem a corresponding amount of the 4 per cent. debenture stock. This deed of 1897 also provided for the transfer of the 4 per cent. debenture stock to be redeemed and paid off, and the securities for the same, to the trustees of the deed of 1897, and that, before any of this £540,000 debenture stock was issued by the company, they should acknowledge to the trustees their indebtedness for the amount of the proposed issue in the same manner as by the deed provided as regards the issue of the £300,000. It is also provided by the deed that the security thereby constituted should become enforceable on the happening of five different events, which are particularly set forth in the deed, and by it the freeholds and leaseholds of the company are conveyed to the trustees, and a floating charge is also given by the company in favour of the trustees for the stockholders on the general assets of the company; and it is provided that, when "all the stock entitled to the benefit of the trusts herein contained and for the time being issued has been paid off or satisfied, and upon payment of all costs, charges, and expenses incurred by the trustees or trustee in relation to these presents, the trustees or trustee shall, at the request of the company, reconvey or reassign to the company,

subject to the security (if any then subsisting) of the holders of the 4 per cent. debenture stock, or their trustees or trustee, the mortgaged premises, or such parts thereof as may remain vested in the trustees or trustee hereof, freed and discharged from the trusts herein contained, or otherwise release the mortgaged premises from this security."

These being the material facts, it is first argued by the company that this deed of 1897 is not a security by way of mortgage for the repayment of money to be thereafter paid. It is a security by way of mortgage; for, although the £840,000 is called irredeemable 3½ per cent. debenture stock, the properties of the company conveyed by the deed to the trustees to secure the same are redeemable upon the happening of the named events. The deed, therefore, contains a clause enabling the company in certain events to redeem, which imports a mortgage. It is clearly not an absolute assignment by the company. Then, is it a security "for the repayment of money to be thereafter paid"? It is a deed to secure the repayment to the holders of the 3½ per cent. stock of moneys paid by them, which repayment by the company is secured to them by means of the machinery of trustees. In my opinion, this deed is what it describes itself as being—namely, a mortgage deed, and comes within the provisions of section 86 of the Stamp Act, 1891. There is, I think, no need for the Crown to resort to sub-section (c) of section 86, though I think that sub-section would have availed, if it had become necessary to rely upon it. I agree with what Mr. Danckwerts for the Crown pointed out—namely, that, if the deed of 1897 is a mortgage within the Act as regards the £300,000, then section 88, sub-section 1, also imposes the duty upon the £540,000, the difference between the £300,000 and the £840,000.

I now come to the second branch of this case, which is whether upon the facts relating to this mortgage deed of the 6th of May, 1897, it is exempt from the 2s. 6d. stamp duty per £100 upon the £840,000, and is liable either to no duty or at the most to a duty of 6d. per £100 upon the £840,000.

There are many points made as to this on behalf of the company.

First, it is said that the deed of the 6th of May, 1897, is not "the only, or principal, or primary security for the payment or repayment of money" (see Schedule I. under heading "Mortgage, Bond, Debenture, Covenant" of the Act of 1891), and therefore is not liable to a duty of 2s. 6d. for every £100 secured thereby.

Now, what is the security the stockholders take as regards this issue of the 3½ per cent. stock? It is argued for the company that, inasmuch as by the deed of 1897 the security of the deed of 1892 is kept alive and transferred to the trustees of the 1897 deed, and it is so kept alive and transferred to the trustees to protect the stockholders under the deed of 1897 against any mesne incumbrances which might have been created upon the property of the company between 1892 and 1897, that the deed of 1897 is not the "only, or principal, or primary security for the payment or repayment of money." What security would the stockholders of the 3½ per cent. stock have as regards that issue were it not for the deed of 1897? Were it not for this deed, the stockholders of 1897 would have nothing to do with the deed of 1892, which demonstrates that the deed of 1897 is the only, or principal, or primary security for this 3½ per cent. stock; and this point therefore fails the company.

I come to the next point, which is that the deed of 1897 is an "additional security," so far as £500,000 of the £840,000 is concerned, and that, therefore, under clause 2 of Schedule I. of the Act under the heading "Mortgage" this £500,000 is only liable to a duty of 6d. for every £100 of this £500,000. It must be remembered that the stockholders of the 4 per cent. stock provided for by the deed of 1892 are under no obligation whatever to take the 3½ per cent. stock provided for by the deed of 1897. They need take none of it. They might, if they pleased, continue as they were under the deed of 1892. The issue of the 3½ per cent. stock and the security given for it by the deed of 1897 was a new matter, though the property of the company with some addition is again pledged as security for this stock, subject to the rights, if any, of the 4 per cent. stockholders thereto. This 3½ per cent. stock might be sold to the public upon the open market; as to this fact my brother Grantham was under a misconception. The only connection, if it can be called a connection, which the 3½ per cent. issue has with the 4 per cent. issue is that the 3½ per cent. stock could not be issued unless and until the company had put itself in a position to pay off a corresponding amount of the 4 per cent. stock. How is this deed of 1897 an additional security to the stockholders of the 4 per cent. stock, or, indeed, to anyone else? To the 3½ per cent. stockholders it is their only security. It seems to me that whatever security the 4 per cent. stockholders had under the deed of 1892 remains as it was before, and they take no rights under the deed of 1897, unless they enter into the new adventure and take the new stock by reason of a new bargain, and that no additional security is given to the 4 per cent. stockholders by the deed of 1897. The giving the holders of the 4 per cent. stock the opportunity of obtaining a new stock carrying 3½ per cent. by a new bargain is not giving them an additional security for their 4 per cent. stock, nor is the giving them the possibility of being paid off their 4 per cent. stock earlier than it otherwise might have been, an additional security within the meaning of the Stamp Act, 1891. Nor is the deed of 1897 a substituted security. It is not a security substituted for the security for the 4 per cent. stock. It is a security given for a new stock which an old stockholder may take or not as he likes. If he does so, he has then only the security of the 1897 deed to rely on.

For the reasons above, I am also of opinion that the deed of 1897 is not a "transfer" of the deed of 1892, nor is it a security by way of further charge, and it does not therefore come within the meaning of section 87, sub-section 3, of the Stamp Act; and this point of the company is also untenable.

I have now covered all the points raised in argument by the company, and answer the questions put to us thus: that the instrument is chargeable with the duty of £1,050 in accordance with the assessment of the commissioners, and I am of opinion that the Crown succeeds, and that this appeal must be allowed.

RIGBY, L.J., read the following judgment: The trust deed of 1897 is a security for a perpetual annual payment to the registered irredeemable debenture stockholders of an annual sum calculated at the rate of £3 10s. for every £100 of the debenture stock held by them respectively. If the annual payments are regularly made, and the company continues to carry on business, a state of things which may continue for an unlimited period of time, no other sum whatever will become due, but the position of stockholders will be analogous to that of holders of consols who are only entitled to a perpetual annuity redeemable in certain circumstances. The deed, however, provides a machinery by which the stockholders in certain events may become entitled to be paid in satisfaction of their stock either the nominal par value of the stock, or in the case of a winding-up of the company its market value

for the time being. By clause 5 of the deed the company covenants, as and when the stock or any part thereof ought to be paid off, to pay the stockholders or those whose stock ought to be paid off, the full nominal amount of the stock held by them respectively, with such premiums, if any, as shall be payable in respect thereof. The nominal par value may be, and probably will be, a different thing from the price at which the stock is issued, and the market value at the time of winding up may be altogether different both from the nominal par value and the issue price. In calculating the sum to be paid in satisfaction of the stock, the issue price, which is the only sum passing from a subscriber to the company, is not treated as a factor. I not see how it is possible to treat this as in any sense a transaction of borrowing and lending. It is one of sale and purchase of an annual sum with a superadded right on the part of the purchaser to have, in certain defined events, a lump sum, to be ascertained according to the events, paid to him in lieu of further annual payments. If the subject-matter had been property of any other description than stock having a nominal value in the books of the company, it never could have been doubted that this was the nature of the bargain, and the fixing of a nominal value to the property dealt with seems to me in no way to affect the substance of the transaction. If for the support of the claim of the commissioners it had been necessary to bring the deed within the special definition of "mortgage" contained in the Stamp Act, 1891, I should have felt great difficulty. Turning to the definition in section 86 of the Act, and dealing first with the introductory words explaining the meaning of the word "mortgage" for the purposes of the Act, it may, I think, be assumed that the security is a security by way of mortgage; but it clearly is not for the payment of a definite and certain sum, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable. I think it equally clear that it is not a security for the repayment of money to become due on an account current. It is, indeed, money to become due, but it is to become due by virtue of the express covenant to that effect contained in the trust deed, coupled with the payment of the issue price. The only remaining words of the introductory part of the section are, "the repayment of money to be thereafter lent, advanced, or paid," and, if the case cannot be brought within these words, I do not see how the security can be a mortgage within the meaning of the Act. Now, the price paid for the stock cannot in any usual or ordinary sense of the term be said to be "advanced" any more than the price paid to a tradesman for goods bought in his shop can be said to be advanced to him. It is, of course, paid, but it is paid out and out, without thought on either side of repayment, though something more or less approximating to it in average circumstances is to become due from the company. I have, therefore, great difficulty in bringing the case within the introductory words of the section defining the term "mortgage."

It was argued on the part of the Crown that the deed falls within the description of sub-section (c) of section 86, and I am of opinion that it does, but it seems to me that this will not suffice to make the deed a "mortgage" within the Act. Sub-sections (a) to (g) are not to be taken as though they were parallel clauses extending the introductory words defining the meaning of "mortgage" and adding cases not included within them. They only add by way of greater precaution and to avoid misapprehension an extensive, though possibly not exhaustive, list of the various sorts of instruments which, if they answer the requirements of the introductory words, will be "mortgages" within the meaning of the Act. To treat them as operating independently of the introductory words would be altogether to deprive of effect in most, if not all, cases the very words which are inserted to give the meaning of "mortgage." If it were necessary to decide the point, I should be strongly inclined to be of opinion that the trust deed of 1897 is not a mortgage within the meaning of the Act.

It is, however, a security containing (clause 5) a covenant by the company to pay in the events specified the lump sum payable to the respective stockholders, and I consider that the name "debenture" is properly attributable to it: see *Levy* v. *Abercorris Slate and Slab Co.*, 36 W. R. 411, 37 Ch. D. 260, and cases therein referred to. The stamp duty payable upon it as a debenture is 2s. 6d. in the £100 on the amount with which it is to be charged with duty, and this has to be determined by section 88 of the Act. The security is a security for the payment by the company under clause 5 of money to be paid by them, and the total amount secured or to be ultimately recoverable extends and is in every case, except that of the company being wound up when the market value of the stock is above par, limited to the sum of £840,000. It is therefore available as a security for the whole of that sum, and it is with duty on that sum that the deed is to be charged at the rate of 2s. 6d. per £100. The duty so reckoned is £1,050, the sum assessed by the commissioners.

I agree with all that A. L. Smith, L.J., has said as to the question of this being a collateral, or auxiliary, or additional or substituted security within the meaning of the schedule. The only security taken by the stockholders is under the trust deed of 1897, although by that deed provision is made for keeping alive the security in favour of paid-off 4 per cent. stockholders under the deed of 1892. This last-mentioned security would have disappeared altogether but for the provisions of the deed of 1897, and, to the extent to which it operates when kept alive, is as much part of the security of 1897 as any part of the security created for the first time by that deed.

COLLINS, L.J.—I agree. I am of opinion that this deed certainly comes within one or other of the provisions of the sections.

Appeal allowed and cross-appeal dismissed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the company, *Western & Sons.*

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — July 27, 1898.

WALL v. LONDON AND NORTHERN ASSETS CORPORATION. (a.)

Company—"Amalgamation" with other company—Sale of assets—Legality of consideration—Meeting—Closure—Refusal to put amendment.

A clause in a company's memorandum of association empowering the company to "amalgamate" with other companies, authorizes a sale to another company, for shares in the purchasing company, of all the selling company's assets, except certain shares already held by it in the purchasing company.

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

The majority of a general meeting of a company is entitled, after allowing a reasonable hearing to the minority, to pass a resolution closing the debate.

When a general meeting is called for the single purpose of confirming or rejecting a particular resolution, an amendment altering the terms of the resolution is irrelevant, and ought not to be put by the chairman.

Appeal from Stirling, J.

The London and Northern Assets Corporation (the defendant company) was established for the purposes of raising money by share capital and acquiring and holding bonds, stocks, obligations, and securities, and generally carrying on a financial business. The particular purposes stated by the memorandum of association were as follows: "To sell, lease, convert into money, barter, or otherwise dispose of any portion of the assets, estate, and effects of the company, and for such purposes to carry on, work, or develop any property or business of any kind in which the company may be interested, or to concur with others in so doing, or employ others so to do, as may be found expedient, and in consideration or part consideration for any dealing with the property of the company under this clause to accept either cash or shares, debenture stock, mortgage debentures, debentures, or other security of any company, partnership, or person with whom this company may have dealings, and to divide any assets of the company among its members in specie" (clause 3 (*i*)); "To amalgamate with any persons, companies, or firms carrying on business of a like or similar nature, or to acquire any such business or an interest therein either by purchase or otherwise, and to accept payment as may be found expedient" (clause 3 (*o*)).

The capital of the defendant company consisted of 100 founder's shares and 50,204 ordinary shares of £2 each, £1 10s. paid. The founder's shares conferred certain advantages as to interest over the ordinary shares, but not as to capital.

Another company, the London and Northern Debenture Corporation, was carrying on a business similar to that of the defendant company, and for some time the two companies had been acting by one board of directors.

In February, 1898, the directors of the defendant company entered into an agreement for the sale to the debenture corporation of all the defendant company's assets except 3,315 ordinary shares and ten founder's shares in the purchasing company; the consideration for the sale being the issue to the shareholders of the company of 59,736 fully-paid shares of £1 in the debenture corporation, and £1,255 either in cash or in shares of the debenture corporation. Each holder of a founder's share in the defendant company was to get more than the holder of an ordinary share. The defendant company was at once to go into voluntary liquidation. The whole agreement was made conditional on the approval thereof before the 15th of March, 1898, by resolutions duly passed and confirmed at extraordinary general meetings, of the two companies respectively.

On the 22nd of February, 1898, a meeting of the defendant company was held, and a resolution approving the contract and authorizing the directors to carry it into effect was proposed. At the adjourned meeting, on the 22nd of March, a resolution that the debate should forthwith close was carried, and the original resolution was then put and carried. At a meeting held on the 6th of April to confirm the resolution the plaintiff sought to move an amendment, of which he had given the chairman notice, to add these words to the resolution: "Subject to the purchasers agreeing to allow any individual or any body of dissentient shareholders to have their share of the assets agreed to be sold, in lieu of the London and Northern Debenture Corporation shares due to them." This amendment the chairman declared out of order, and refused to put. On a show of hands the resolution was carried, and on a poll being demanded, the majority for the resolution was 25,593 to 10,866.

The plaintiff, who was the holder of three founder's shares and 1,800 ordinary shares in the defendant company, and of one founder's share and four ordinary shares in the debenture corporation, then, on behalf of himself and all other shareholders except those who had voted for the resolutions, commenced an action against the defendant company and its directors, claiming a declaration that the resolutions and the agreement for sale were void. The plaintiff moved for an interlocutory injunction to restrain the defendants from acting on the resolution passed and confirmed on the 22nd of March and the 6th of April, 1898. The defendant company gave an undertaking not to distribute any shares they should receive under the agreement otherwise than in accordance with the rights of the shareholders of the defendant company, and Stirling, J., made no order on the motion.

The plaintiff appealed.

W. H. Cozens-Hardy, for the appeal, contended that the agreement was *ultra vires* and the meetings irregular.

He referred to *In re Bank of Hindustan, China, and Japan, Higgs' case*, 13 W. R. 937, 2 Hem. & M. 657, at p. 666; *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q. B. 622; *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan*, 16 W. R. 1107, L. R. 6 Eq. 91; the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), ss. 14, 15; Buckley on Companies (7 ed.), p. 426; *Menier* v. *Hooper's Telegraph Works*, 22 W. R. 396, L. R. 9 Ch. App. 350; *Kaye* v. *Croydon Tramways Co.*, 46 W. R. 405, [1898] 1 Ch. 358, at p. 374; *Griffith* v. *Paget*, 25 W. R. 523, 821, 5 Ch. D. 894, 6 *ibid.* 511; *Hopkins* v. *Prescott*, 4 C. B. 578; *Baker* v. *Hedgecock*, 36 W. R. 840, 39 Ch. D. 520 *Hattersley* v. *Earl of Shelburne*, 10 W. R. 881; and *Simpson* v. *Palace Theatre Co.*, 69 L. T. Rep. 70.

Jenkins, Q.C., and *W. F. Hamilton*, for the defendant company, referred to the Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 37; Lindley on Companies (5th ed.), p. 891; Buckley on Companies (7th ed.), p. 426. [They were then stopped.]

Barnard Lailey, for the directors.

[CHITTY, L.J., referred to Palmer's Company Precedents (7th ed.), p. 1162.]

W. H. Cozens-Hardy, in reply, referred to Palmer's Company Precedents (7th ed.), p. 1156.

LINDLEY, M.R.: I think that in this case the decision of Stirling, J., is quite correct, and that the portion of it which relates to the distribution of shares need not be disturbed. If there is any fault to find with Stirling, J.'s, judgment, it is that he has too much minimised the effect of sub-clause (*i*) of clause 3 of the company's memorandum of association.

The London and Northern Assets Corporation had nothing in the shape of an undertaking to work; it had not a railway, or a tramway, or a canal, or a factory, or anything of the sort. It was a financial company, its object being to speculate in shares and other securities; and its assets consisted of various investments which appear on the balance sheet, and to which Mr. Cozens-Hardy called our attention. [His lordship read clause 3 (*i*) of the memorandum, and proceeded:] The assets at the

time in question consisted, amongst other things, of certain investments, and amongst the investments were 3,315 ordinary shares and ten founder's shares in the London and Northern Debenture Corporation. The London and Northern Assets Corporation entered into an agreement with the London and Northern Debenture Corporation, and the agreement they made was this: to sell all their assets, minus those shares, to the debenture corporation. Now, suppose the assets corporation had been selling its assets to another company in which it held no shares, I cannot conceive why such a sale should not have been within the powers conferred by clause 3 (*i*). The only way of making out that it is in any way improper, is to say that the exception from it is a mere trumpery exception beneath notice; but I am not prepared to hold that the exception of over 3,000 fully-paid shares is to be so treated. If, then, that is the right view, what has been done appears to me distinctly to come within the clause I have referred to. But I am not prepared to say that it does not also come within clause 3 (*o*), the valuation clause. [His lordship read that clause, and proceeded:] There is no very precise meaning to be given to the word "amalgamate" when you talk about amalgamating a company with companies, persons, or firms. I do not doubt that "amalgamation" includes the case put by Lord Hatherley in *Higgs' case*, and by Lord Davey in *New Zealand Gold Extraction Co.* v. *Peacock*. I have no doubt that it includes an arrangement involving the formation of a new company for carrying on the businesses of the two which amalgamate. But, while I have no doubt that it includes that case, I do not think it is confined to that. How a company can amalgamate with companies, persons, or firms is not quite clear, unless it does, in some form or other, sell its assets to them or to a new company, not for money—that would not be amalgamation—but for shares in the purchasing company. Therefore, if you want a still larger power of transferring assets than clause (*i*) gives, I think you get it under clause (*o*). It appears to me, therefore, that on this point the real foundation of the argument for the appellant fails, and that what has been done is not *ultra vires* of the company.

Another point was made by Mr. Cozens-Hardy, who argued the case with his usual ability—viz., that the consideration for the purchase is illegal. The consideration was this: Clause 1 of the agreement says that the vendor shall sell and the purchaser shall purchase all the assets except the 3,315 ordinary shares and the ten founder's shares, and the consideration for that shall be the sum of £60,991, which shall be satisfied as to £59,736 by the allotment to the vendor or his nominees of 29,868 fully-paid ordinary shares of £2 each in the purchasing company (or, if the capital has been sub-divided, an equivalent amount in ordinary shares), and the balance of £1,255 in cash or fully-paid ordinary shares, at the option of the vendor or his nominees. There is nothing at all there which is illegal. The agreement goes on in this way. In the distribution between the members of the assets corporation of those shares and of the shares of the purchaser retained by the selling company, each holder of a founder's share shall receive six and a-half shares of £2 each, or thirteen shares of £1 each, in respect of each founder's share, and the residue of the shares and cash shall be divided among the holders of ordinary shares in proportion to the number of shares they hold. It is said that that distribution, of what I will call the purchase-money, is inconsistent with the memorandum of association of the assets corporation. I do not know whether it is inconsistent or not, and Stirling, J., has not said whether it is or not, but has reserved that point to be disposed of at the trial. Taking the view I do, that the transaction is not tainted with illegality, I think, on the authority of *Griffith* v. *Paget*, that the learned judge was perfectly justified in saying that at anyrate it did not affect the validity of the agreement. I am not prepared to say whether or not the proposed distribution can be carried out. It may be, as is contended, that you must put back the founder's shares. But that does not concern the vendor as vendor. At anyrate it does not taint the agreement with illegality. Therefore, as to that part of the case also, I think Stirling, J., has done all that is necessary. He has said, as it were, that the distribution to the holders of founder's shares should not be proceeded with at present; and after the explanation given by Mr. Jenkins I see no necessity for altering even the terms of the judgment. That disposes of the substance of the case.

Then Mr. Hardy urged various other points of irregularity at the meetings which I shall dispose of very shortly, because I do not think they are matters with which this court has anything to do. The only new point is this one about the closure. It appears that there was a discussion at the meeting, and that, having heard the views, I do not say of all who opposed, but of one or two of them, the majority came to the conclusion that they had heard enough, and need not hear more, and the chairman then applied the closure. It is said that that calls for the interference of this court. I do not think it does at all. I think it would be a very bad precedent if we were to say that we should interfere in such a case as this. I am quite aware that an important distinction is made by Lord Eldon in *Const* v. *Harris*, Turn. & R. 496, at p. 525, in which he said: "I call that the act of all which is the act of the majority, provided all are consulted, and the majority are acting *bonâ fide*—meeting not for the purpose of negativing what anyone may have to offer, but for the purpose of negativing what, when they are met together, they may on due consideration think proper to negative. For a majority of partners to say, 'We do not care what a partner may say; we, being the majority, will do what we please,' is, I apprehend, what this court will not allow." I think that principle is as important now—perhaps more important now than it was sixty or seventy years ago. But that does not mean that a minority who are bent on obstructing business by talking for ever are not to be put down. The majority must not be tyrannical, but here there is no reason for supposing that there was anything tyrannical in the conduct of the majority. The appeal must be dismissed with costs in the usual way.

CHITTY, L.J.—I am of the same opinion. I think also that the agreement may be supported under clause (*i*). The company had nothing which in ordinary language would be called an undertaking. It had not a mine or even a business. It had not, as far as I can see, any goodwill whatever. But the nature of its operations is shown by the earlier words describing the objects of the company, and by the balance-sheet which has been referred to, and which, in point of fact, shows how this company has been worked. Those operations were buying and then selling again bonds, stocks, obligations, and securities. No doubt the object was to make a profit in that way. Clause (*i*) enables them to sell any portion of their assets, estate, and effects. They had no undertaking to sell; and what they have sold is a portion of the assets, estate, and effects. The exception from that sale is not made merely for the purpose of saying that there is an exception—it is a substantial one; and it is of no avail to say that it includes only

that which could not have been sold to the purchasing company. With regard to the "amalgamation," I agree that the term has no fixed meaning in point of law. You have to look to see how the term is used in the particular document you are construing. I referred during the argument to Palmer's Company Precedents, not as an authority, but for the purpose of seeing how a gentleman well versed in the ordinary business of forming and amalgamating companies, and dealing with the matter from the lawyer's point of view, treats the subject. I find that among the various kinds of amalgamation he speaks of he gives precedents, as for an amalgamation, of that which is really a sale and transfer. In the present case there is a sale of the assets of the company, with the exception I have mentioned, and, I think, an amalgamation in this sense, that the purchasing company gives its own shares to the company which was selling. That seems to me to be in the ordinary and the reasonable sense an amalgamation. In strictness I do not see how you can amalgamate two corporations having a separate existence. You cannot do it. It has been suggested by Mr. Cozens-Hardy that the right way is to form a third company. I agree so far; but that is not an amalgamation. That is the two companies transferring their business to a new entity; and then the original companies vanish out of existence. The term cannot be, in any strict scientific sense, explained. In this particular memorandum (clause 3 (*o*)) there is power of amalgamation, not with companies, but "with any persons." Now, how can a company amalgamate with a person, in any reasonable sense of the term "amalgamate," unless you put upon it a wider meaning than Mr. Cozens-Hardy is willing to do? I think it is unnecessary to pursue that matter farther. I quite agree with what the Master of the Rolls has said, and with Stirling, J.'s, judgment, that, having regard to clause (*o*)—and I do not reject clause (*i*)—this transaction is within the authority or power conferred by the memorandum.

Then as to the point turning upon the consideration. The consideration to be paid by the purchasing company consists of the shares and moneys and debentures mentioned in the agreement. In that clause there occurs the statement of how the consideration is to be distributed among the members of the selling company. In my opinion there was irregularity in putting in that clause. It forms no part of the bargain between the two companies, and I think that is a clause in which the purchasing company has no interest; it concerns only the selling company and its shareholders. Stirling, J., has reserved, and we propose to reserve, the question how far that clause can be given effect to. We cannot treat this as the trial, and therefore we cannot decide that question now. It may be that the vendor company will think fit to wind itself up. The undertaking given by the defendants in the court below, though it differs in form from that given in *Griffith* v. *Paget*, is substantially enough for the purpose.

As to the irregularities which Mr. Cozens-Hardy put to us very strongly, it appears to me that this court ought not to interfere in the internal affairs of this company upon any such grounds as these. As to the closure, if we laid it down that the chairman, supported by the majority, could not put a termination to the speeches of those who were desirous of addressing the meeting, I think we should be allowing a small minority, of even one or two members, to tyrannize over the majority. The case is put by Mr. Cozens-Hardy as the tyranny of a majority; but if we accepted the propositions he advanced we should be putting this weapon into the hands of the minority, that at these ordinary meetings, to which all shareholders may come, any one might delay business indefinitely, even after the mind of the meeting was really made up. That appears to me a perfectly extravagant result. In this particular case there appears to have been nothing arbitrary and nothing vexatious in the conduct of the majority. I am not saying, of course, that the majority must not listen for a reasonable time to reasonable arguments which are brought forward.

There is only one other point. Mr. Cozens-Hardy said that it was wrong of the chairman, at the meeting held for the confirmation of the original resolution, to refuse to put the amendment which the plaintiff then moved. I think he was quite right to refuse, because the meeting was called for one purpose only, to confirm or reject the original resolution, and any amendment moved upon such an occasion would, if objected to, be wholly irrelevant; the single purpose of that meeting being to say, Aye or No, is the original resolution to stand?

COLLINS, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors, *A. E. Greville; Baker, Blaker, & Hawes.*

High Court of Justice.

Chan. Div. North, J. } Feb. 1-5, 8-12, 15; Aug. 4, 1898.

JORDESON *v.* SUTTON, SOUTHCOATES, AND DRYPOOL GAS CO. (*a.*)

Nuisance—Injunction—Gas company—Statutory powers—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15) *s.* 29—*Gasworks Clauses Act,* 1871 (34 & 35 *Vict. c.* 41) *s.* 9.

A gas company was authorised by its Special Acts (which incorporated the Gasworks Clauses Acts, 1847 *and* 1871), *to purchase certain land and to erect gasholders thereon; these Acts contained no provision for compensation to persons injuriously affected thereby.*

Held, that the Gas Co. was not thereby entitled to erect works in such a way as to interfere with the rights of the owner of the adjoining land to light and support.

Action.

In excavating in order to erect a gasholder on the gas company's land a subsidence in the plaintiff's adjoining land and houses was caused, and the gasholder when erected to its full height would block the plaintiff's ancient lights.

The defendant gas company was, in 1867, by a special Act, registered and incorporated under the Joint-Stock Companies Acts, 1846 and 1856, and the Companies Act, 1862. The Gas Works Clauses Act, 1847, was incorporated with these Acts.

By another special Act of the defendant company passed in 1873 (36 & 37 Vict. c. lxxv.), which by s. 3 incorporated the Gas Works Clauses Act, 1871, the company was authorized (section 4) to purchase the land where the gasholder was situate, and by section 6 it was empowered to erect, maintain, and from time to time alter and enlarge retorts, gasholders, receivers, etc.

Both the gas company and the contractors employed by the gas company were made defendants to the action; and the plaintiff claimed damages as against both defendants for the injury done to his land and

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

buildings by subsidence; and as against the defendant gas company an injunction to restrain the company erecting a gasholder to such a height as to obstruct the plaintiff's ancient lights.

Upjohn, Q.C., and *Dighton Pollock*, for the plaintiff.—The main defence is that the defendant company had a statutory power, and a statutory duty to exercise that power, but there was no obligation to place the gasholder in the particular site selected by the company.

They referred to the Gas Works Clauses Act, 1847, s. 29; the Gas Works Clauses Act, 1871, s. 9; *Metropolitan Asylum District* v. *Hill*, 29 W. R. 617, 6 App. Cas. 193; *Geddis* v. *Bann Reservoir Proprietors*, 3 App. Cas. 430, 26 W. R. Dig. 259; *London and North-Western Railway Co.* v. *Evans*, 41 W. R. 149, [1893] 1 Ch. 16; *Normanton Gas Co.* v. *Pope*, 32 W. R. 134; *Shelfer* v. *City of London Electric Lighting Co.*, 43 W. R. 238, [1895] 1 Ch. 287; *Clowes* v. *Staffordshire Potteries Waterworks Co.*, 21 W. R. 32, L. R. 8. Ch. App. 125, and *Attorney-General* v. *Gas Light and Coke Co.*, 26 W. R. 125, 7 Ch. D. 217.

Haldane, Q.C., *Macnaghten, Q.C.*, and *Boome*, for the gas company.—The case is like *London, Brighton, and South Coast Railway* v. *Truman*, 34 W. R. 657, 11 App. Cas. 45.

They also cited *Rex.* v. *Pease*, 4 B. & Ad. 30; *Vaughan* v. *Taff Railway Co.*, 8, W. R. 549, 5 H. & N. 679; *Bedford* v. *Dawson*, L. R. 20 Eq. 353, 24 W. R. Dig. 236; *Hammersmith and City Railway Co.* v. *Brand*, L. R. 4 H. L. 171, 17 W. R. H. L. Dig. 14, 16; *Emsley* v. *North-Eastern Railway Co.*, [1896] 1 Ch. 418, 44 W. R. Dig. 148; and *Kirby* v *Harrogate School Board*, [1896] 1 Ch. 437, 44 W. R. Dig. 144.

Rawlins, Q.C., and *Bardswell*, for the contractors.

Upjohn replied.

Cur. adv. vult.

Aug. 4.—NORTH, J.—It was said first of all on behalf of the defendants that the construction of the tank and the erection of the gasholder are acts to do which the gas company has statutory powers with a statutory duty to exercise those powers, and that such powers cannot be released and no easement can be acquired in derogation of them. A number of railway cases were cited in support of this; but as Lord Halsbury points out in *London, Brighton, and South Coast Railway Co.* v. *Truman*, the railway Acts are carefully distinguished from permissive legislation such as that authorizing the erection of a hospital. A railway may be made whether it is a nuisance or not, but not so a hospital, which can only be built and maintained if no nuisance will be thereby created.

If the defendants are right the plaintiff can get no compensation. [His lordship referred to *Hammersmith and City Railway Co.* v. *Brand* and the remarks of Bowen, L.J., in *London and North-Western Railway Co.* v. *Evans*, [1893] 1 Ch. 16, p. 28, and of Lord Herschell in *Bradford Corporation* v. *Pickles*, [1895] 1 Ch. 145 at p. 152; and to *Normanton Gas Co.* v. *Pope*; and *Consett Waterworks Co.* v. *Bilson*, 43 W. R. 122.]

Another argument strongly pressed by Mr. Haldane was that the gas company owed a duty to the public, and that the preambles of its Acts show that the powers given to it are for the public benefit. Private and individual interests should therefore, it is argued, give way. The above-mentioned observations of Bowen, L.J., and Lord Herschell answer this, as do those of Lord Cranworth and Lord Campbell in *Broadbent* v. *Imperial Gas Co.*, 5 W. R. 272, 7 De. G. M. & G. 436 at p. 462, 7 H. L. Cas. 600 at p. 610, 8 W. R. H. L. Dig. 4. But there is a conclusive answer to the argument that the Acts confer a right and duty to perform these acts upon this particular site. The Act nowhere requires anything to be done which must necessarily injure the plaintiff. If the gasholder had been smaller and further from the plaintiff's land, it might not interfere with his right to light or support, and the gas company has not shown that it cannot carry out its duties without interfering with the plaintiff. The rights and powers conferred on the gas company, however, are strictly qualified, as is shown by section 29 of the Act of 1847, and section 9 of the Act of 1871. The interference with the plaintiff's land, in my opinion, amounts to a nuisance.

A further point was that no prescriptive right could be gained against the gas company, and *Staffordshire and Worcestershire Canal Proprietors* v. *Birmingham Canal Proprietors*, L. R. 1 H. L. 254, 15 W. R. H. L. Dig. 22; *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, 32 W. R. Dig. 112; and *Mulliner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611, were relied upon. But in the present case the houses had been standing more than thirty years when the gas works in question began to be erected, and, *primâ facie*, had gained by prescription a right to support founded upon an implied grant. The right to light depends upon section 3 of 2 & 3 Will. 4, c. 71 (which creates an absolute right to access of light after an actual enjoyment of twenty years), and as Lord Westbury pointed out in *Tapling* v. *Jones*, 13 W. R. 617, 11 H. L. Cas. 290, such right does not rest on any presumption of grant or fiction of licence.

Then, as to the contractors. I fail to follow the argument that there can be no negligence unless there is a neglect of duty; and they owed no duty to the plaintiff. They excavated on the company's land, and the result of this excavation was wrongfully to remove part of the plaintiff's soil and to cause the land above to subside and damage his buildings.

As to the relief, I must grant an injunction to restrain the erection of a gasholder by the defendant gas company exceeding 68 feet in height—the evidence showing that the erection of a gasholder to the height of 68 feet would not materially affect the lights of the plaintiff; and as the trench is finished and no further subsidence has taken place, £340 damages in respect thereof, against all the defendants.

Solicitors, *Bell, Brodrick, & Gray*, for *Laverack & Son*, Hull; *Collyer-Bristow, & Co.*, for *Stamp, Jackson, & Birks*, Hull; *Jaques & Co.*, for *Samuel Wright & Co.*, Bradford.

Chan. Div. } Romer, J. } Dec. 7, 8, 21.

In re SMITH.

SMITH *v.* SMITH. (*a.*)

Will—Construction—Order of payment to beneficiaries—Pecuniary legacy—Devise of mortgaged land free from mortgage—Gift of residue—Real Estate Charges (Locke-King's) Act, 1854 (17 & 18 *Vict. c.* 113).

S., by his will, after giving four pecuniary legacies, made several specific devises freed and discharged from any mortgages there might be at the time of S.'s death on the respective properties devised; and S. declared that if he should sell any of certain houses comprised in certain of the said devises, his trustees should out of his residuary estate stand possessed of a sum equivalent to the proceeds of sale on similar trusts to those declared

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

of the house. S. then gave to his trustees all other his real and personal estate upon trust to pay an annuity to each of his sons, and out of the balance of the income of his said residuary estate to pay off incumbrances upon his said estate, and after payment off thereof to assign his said residuary estate to his said sons equally. S. afterwards sold one of the houses for £9,800. S.'s estate proving insufficient for payment in full to the beneficiaries under his will,

Held, (1) *that the pecuniary legacies were charged on the entire residue, and had priority of all payments directed to be made out of the residue;* (2) *that the annuities were given to the sons in their capacity of residuary legatees, and were therefore not payable until the mortgage debts on the specifically devised realty and the sums representing houses sold were paid;* (3) *that the £9,800 was to be treated as an ordinary legacy made payable out of residue;* (4) *that as between the devisees of mortgaged realty and the pecuniary legatees, the rule in* Lutkins *v.* Leigh, *Cas. temp. Talb.* 52, *that the pecuniary legatee had priority over the devisee, must be applied, the testator having negatived the application of Locke-King's Act and the amending Acts.*

Porcher *v.* Wilson, 14 *W. R.* 1011, *followed.*

Smith *v.* Smith, 10 *Ir. Ch. Rep.* 89, 461, *not followed.*

Further consideration and two summonses.

The above-named testator by his will dated in 1885 gave to each of his sons George Thomas Smith and Henry Doggett Smith and to each of his daughters Alice Florence Smith and Ada Maude Smith the sum of £100; and he gave to the said Henry Doggett Smith "my freehold house and garden with the meadow thereto adjoining situate at Harrow . . . freed and discharged from any mortgage there may be thereon at the time of my death"; and he devised unto and to the use of certain persons, their heirs, executors, administrators, and assigns, thereinafter called his trustees, two leasehold houses in the City of London and also his leasehold house in Nichol-square, and also his freehold house at Haggerston freed and discharged from "any mortgage there may be on the said houses at the time of my death" upon trust for his daughter Annie L. Jones, her husband and children, appointees, and next-of-kin as therein mentioned; and gave to his trustees his leasehold houses, No. 61, Cheapside, and another house in the City of London (but free from any incumbrances that there might be thereon at the time of his death), upon trust for his daughters Alice F. Smith and Ada M. Smith, their husbands and children, appointees, and next-of-kin as therein mentioned. And the testator then declared as follows: "If I shall sell any of the said houses hereinbefore given to my trustees upon trust for my daughters, then my executors and trustees shall out of my residuary estate stand possessed of a sum equivalent to the price I may have sold such house for and on similar trusts to those declared concerning any such house as may have been sold." Then the testator by his will gave to his trustees "all other my real and personal estate . . . upon trust to pay to each of my sons George Thomas Smith and Henry Doggett Smith an annual sum of £250 . . . and out of the balance of the income of my said residuary estate to pay off the incumbrances upon my said estate, and upon trust as soon as all the incumbrances upon my estate shall have been paid off to assign my said residuary estate to my said sons G. T. Smith and H. D. Smith equally."

And by a codicil dated in 1887, after reciting the said gift of residue upon trust to pay the said annuities of £250 each, and out of the balance to pay off the incumbrances upon the testator's estate, and as soon as the incumbrances upon his estate had been paid off to assign his residuary estate to his said sons equally, the testator varied the said trust of the said G. T. Smith's annuity and share in particulars not material for this report.

The testator in his lifetime sold the said house, No. 61, Cheapside, given to his trustees in trust for his said daughters Alice Florence and Ada Maude as aforesaid, for the sum of £9,800.

The testator's estate proving insufficient for payment in full of the legacies bequeathed by his said will, questions arose as to the order of payment of the beneficiaries thereunder.

The pecuniary legacies given by the testator, other than annuities, with certain interest thereon, remained due, and it will be seen that the sums involved in the questions of priority, which now came up for decision, were the following — namely, (1) the pecuniary legacies; (2) the £9,800, proceeds of the house sold; (3) the mortgage debts; (4) the annuities.

Mulligan, Q.C., and *A. J. Allen*, for the plaintiffs, George Thomas Smith and others in same interest.—The testator merely excludes the application of Locke-King's Act, and the prior law, as settled since *Lutkins* v. *Leigh*, Cas. temp. Talb. 52, and *Hamilton* v. *Worley*, 2 Ves. jun. 62, consequently applies. Annuities are payable before incumbrances on real estate specifically devised, as against the specific devisees. The legacies have priority here, and the annuities come before the £9,800.

Levett, Q.C., and *Rowden*, for parties interested in the proceeds of house sold.—The £9,800 must be treated as a pecuniary legacy.

Neville, Q.C., and *Church*, for the defendant Mrs. Jones.—The point has nothing to do with Locke-King's Act. *Smith* v. *Smith*, 10 Ir. Ch. Rep. 89, on appeal 461, governs this case.

Farwell, Q.C., and *Ball*, for the defendant H. D. Smith.—The cases are given in White & Tudor's L. C., 7th ed., p. 33. *Porcher* v. *Wilson*, 14 W. R. 1011, governs this case.

They also cited *Burley* v. *Armstrong*, 12 Ir. Ch. Rep. 270.

Levett, Q.C., referred to *Johnson* v. *Child*, 4 Hare 87, p. 94, and argued that the Irish cases were wrong.

Mulligan, Q.C., cited *Wythe* v. *Henniker*, 2 My. & K. 635; *Buckley* v. *Buckley*, 19 L. R. Ir. 544, p. 565, 36 W. R. Dig. 4; and *Greville* v. *Browne*, 7 W. R. 673, 7 H. L. Cas. 689, p. 696.

[*Levett, Q.C.*, cited *In re Brooke, Brooke* v. *Brooke*, 24 W. R. 959, 3 Ch. D. 630.]

Whinney, for another defendant.

ROMER, J.—The first question I will deal with concerns the four pecuniary legacies given at the beginning of the will. *Greville* v. *Browne* finally decided that where legacies are given generally, and there is a gift of the residue of the real and personal estate, the legacies are charged upon the entire residue. In the will before me the residuary devise takes the form of a gift of all other the testator's real and personal estate. In other cases, however, it has been held that a gift of the testator's real and personal estate not otherwise disposed of has the same effect as a gift of the residue. But, apart from these cases, in the will before me the testator has been his own interpreter, for in his codicil, after referring to his will, he says: "And whereas by my said will I have given to my trustees the residue of my real and personal estate," and then proceeds to make some alteration in the trusts. So that this case is, in my opinion, governed by *Greville* v. *Browne*, and the legacies are charged on the residue. It follows that all provisions made in

the will for payments out of the residue proper are intended to be provided out of the testator's estate not specifically devised or bequeathed after satisfying the four legacies. Now, the mortgage debts on the specifically devised real estates are by the will expressly directed to be paid out of the residuary estate (see the clause immediately following the trusts of residue for the two sons). And by this direction, so far as it gave a beneficial interest in the residue to the devisees, I gather from the will the testator meant these debts to be paid out of the residuary estate proper—that is to say, the estate after satisfaction of the four legacies. Of course, the mortgagees as creditors would have a prior right to any beneficiaries to be paid, but, so far as they should exercise their rights and obtain payment out of residue, the four legacies would, on the doctrine of marshalling, with which I shall hereafter have more particularly to deal, be entitled to stand in their shoes. And the same remarks as to their being payable out of residue proper, apply to the sums which by the will have to be provided to take the place of the houses specifically devised in trust for his daughters in case the testator sold them in his lifetime. And even more strongly the remarks apply to the annual sums of £250 each directed to be paid to his two sons. In my opinion, therefore, the four legacies must be paid in priority to those mortgage debts, sums representing houses sold, and the two annual sums of £250 each.

I will next deal with the question as to the position of the two sons in respect of the two annual sums of £250. Now, nothing is said in the will expressly as to any order of payment out of the residue proper of the above-mentioned mortgage debts and sums representing houses sold. But on this will and codicil it appears to me to be assumed by the testator that these debts and sums will have been paid before anything goes to the two sons. The sons are made residuary legatees, and it appears to me that the two annual sums are only given to them in their capacity of residuary legatees, and as part of the machinery for allowing the true residue to be divided between them. After directing his trustees out of his residuary estate to pay the two annual sums, the testator proceeds to direct that "out of the balance of the income" of his residuary estate the trustees are to pay off the incumbrances on his residuary estate, and that when these incumbrances are paid off, then the residuary estate is to be divided between the two sons. Clearly the two annual sums would cease when the residue was divided, and in my judgment the two sums are only intended to be paid to them as residuary legatees. And this view is supported by the wording of the codicil, where, as regards the share of one of the two sons, the testator treats the £250 as being equivalent to the income of the residue up to the time that residue is divided. I think, therefore, the sons cannot claim to be paid anything in respect of the annual sums until the mortgage debts on the specifically devised realty, and the sums representing houses sold, are paid.

This brings me to the last question, which concerns the relative rights of the specific devisees of realty in respect of the mortgage debts and those claiming the sum equal to the price at which one of the testator's houses was sold by him in his lifetime. Now, in the first place I may say that in my opinion the last-mentioned sum is to be treated as an ordinary legacy made payable out of residue. I cannot see any sufficient reason for treating it differently merely because if the house had not been sold the devisee of it might have taken it subject to mortgages. I have therefore to consider what is the right of a devisee of real estate charged with a mortgage debt of the testator to have that debt paid off out of residue as against a pecuniary legatee. Now, after *Lutkins* v. *Leigh*, and before Locke-King's Act, it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was under the will entitled as against a residuary legatee to have the mortgage debt paid off out of residue. And if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held that on the doctrine of marshalling the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty. It is difficult to justify this rule on principle. Seeing that the testator intended the mortgage debt to be paid off out of his residuary estate, it might have been supposed that the pecuniary legatees could not claim to be repaid by the devisee merely because the debt had been paid as contemplated out of the proper fund. Or the courts might have been expected to hold that the devisee to the extent of the mortgage debt and the pecuniary legatee to the extent of his legacy were equally objects of the testator's bounty, and that the mortgage debt and legacy should therefore abate rateably in case the residuary estate could not pay both in full. But the courts became bound by the rule above adverted to, however difficult it might be to justify it, and the time for questioning it has long since passed. See, for example, observations of Sir James Wigram when Vice-Chancellor in *Johnson* v. *Child*, 4 Hare, at p. 94, where he pointed out that he was bound by the authorities Of course a testator might by express provision in his will negative the application of the rule, but unless he did so the rule was applied. The effect of Locke-King's Act was to benefit the pecuniary legatee, and not to prejudice any rights he previously had in equity. So that if a testator by his will negatived the application of the Act without directing that the rule should not apply, then, of course, the rule had to be applied. Accordingly, in *Porcher* v. *Wilson*, where a testator provided expressly for payment of his debts out of his residuary personal estate (but without mentioning his mortgage debts), the rule was applied by Wood, V.C. In that case, as the law then stood, before the amending Act of 1877, the provision was held to negative the application of the Act, and the debts to be paid out of the residuary personal estate were held to include mortgage debts. And the decree in that case expressly provided that the mortgage debts were primarily payable out of the personal estate, but when the question of marshalling came before the court, it was declared that the devisees of the mortgaged estate were not entitled to have the mortgage satisfied out of the personal estate until the pecuniary legatees were satisfied. It seems to me impossible to distinguish the case now before me from the above authorities. All that the testator has really done by his will is to negative the application of Locke-King's Act and the amending Acts as to the mortgage debts, by expressly providing for payment of those debts out of his residuary estate. I cannot gather from the will that he has expressly or by necessary inference provided that the rule as to marshalling is not to apply, or that the mortgage debts are to be paid in priority to the pecuniary legatees, or that the devisees of the mortgaged realty are to be considered as legatees to the extent of the mortgages so as to share rateably with the pecuniary legatees in case of deficiency of the residuary estate. I ought to say a few words about the case of *Smith* v. *Smith*, 10 Ir. Ch. Rep. 89, 461. Speaking with all respect, I cannot follow the grounds on which that case was decided. It seems to have been decided, and especially on appeal, on the ground that the will there negatived (as it no doubt did as the law then stood) the appli-

cation of Locke-King's Act. But the courts do not appear to have seen that, assuming Locke-King's Act did not apply, the question of marshalling then arose, and ought, on the authorities I have referred to, to have been decided in favour of the pecuniary legatees. That case seems to me inconsistent with the English authorities, and if it is to be supported at all must be taken as a decision on the wording of the will there in question that the testator had by necessary implication negatived the application of the rule as to marshalling. Speaking for myself, I can only say that I should not have gathered from the provisions of that will that the testator had negatived the application of the rule. It follows, summing up the results of this judgment, that the order of payment of the various sums I have been dealing with must, in my opinion, be as follows: (1) the four pecuniary legacies, (2) the sum representing the price of the house sold, (3) the mortgage debts, and (4) the annual sums given to the sons out of residue.

Solicitors, *Hughes, Hooker, & Co.; R. Oliver; Sole, Turner, & Knight.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 8, 10; Dec. 20.

In re MUNDY AND ROPER'S CONTRACT. (*a.*)

Settled land — Vendor and purchaser — Settlement — Jointure and portions created by prior settlement — Resettlement — Compound settlement — Title — Power of tenant for life to convey free from jointure and portions — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 20, 50.

By deed dated the 15*th of March,* 1861, *the O. Estate was settled to the use of C. F. M. for life, with remainder to the use of his first and other sons successively in tail male. By a settlement dated the* 7*th of August,* 1865, *in exercise of a power reserved to him by the previous deed, C. F. M., on his marriage, appointed a rent-charge to his wife, and portions to his younger children, both secured by terms of years. By a disentailing assurance of the* 28*th of January,* 1889, *the O. Estate was disentailed. By a settlement dated the* 30*th of January,* 1889, *C. F. M. and his son appointed the O. Estate to the use of C. F. M. for his life, with remainders over. The life estate was not expressed to be in restoration or continuation of any estate in C. F. M.*

Held, that the settlement of the 30*th of January,* 1889, *was not a settlement complete in itself, but, with the deeds of* 1861, 1865, *and* 1889, *formed a compound settlement within the meaning of the Settled Land Act,* 1882; *and that, therefore, C. F. M. could sell the O. Estate freed from the jointure and portions charged thereon.*

In re Marquis of Ailesbury and Lord Iveagh, 41 *W. R.* 644, [1893] 2 *Ch.* 345, *approved.*

Appeal of the vendor, on a vendor and purchaser summons, from Kekewich, J.

By the summons, C. F. Massingberd Mundy, who was tenant for life of the Ormsby Estate, asked that trustees for the purposes of the Settled Land Acts might be appointed of the compound settlement hereafter mentioned, and that it might be declared that a contract of sale into which he had entered relating to a part of the settled property was binding upon the jointress and portionists respectively under the said compound settlement, and that he could make a good title to the property without the concurrence of the jointress, portionists, and trustees of the respective terms.

The history of the settlement was as follows: By a settlement of the 15th of March, 1861, the Ormsby Estate was, in exercise of a power contained in a disentailing deed, appointed and conveyed to the use of C. J. H. Mundy during his life, with remainder to the use of trustees for a term of 500 years to secure to Elizabeth Susan Mundy, in case she should survive C. J. H. Mundy and M. J. Massingberd (as happened), the yearly rent-charge of £800 by way of jointure in bar of dower, with remainder to a trustee for the term of 1,000 years to secure payment of portions up to £8,000 (which were subsequently raised), and subject thereto to the use of C. F. Mundy for life, with remainder to the use of his first and other sons successively in tail male. The settlement also gave powers to C. F. Mundy to appoint to any woman whom he might thereafter marry a yearly rent-charge of £500 by way of jointure; to charge the estate with a sum of £8,000 for portions for his younger children; and to create terms of years to be vested in trustees upon the usual trusts for the purposes of securing and raising such jointure and portions respectively.

In 1863 C. J. H. Mundy assumed the surname of Massingberd Mundy.

By a settlement of the 7th of August, 1865, made upon the marriage of the said C. F. M. Mundy (formerly C. F. Mundy) with Louisa Charlotte Bigge, C. F. M. Mundy in exercise of the power reserved to him by the above-mentioned settlement, appointed an annual rent-charge of £500 by way of jointure to his said wife in case she survived him, and created a term of 300 years to commence from his death to secure the payment of said jointure; and he also charged the estate with the payment of £8,000 as portions for the younger children of the said marriage in such shares as he should by deed or will appoint, and created a term of 1,000 years to commence from his death to secure the raising of such portions.

C. J. H. M. Mundy died on the 19th of February, 1882.

By a disentailing assurance of the 28th of January, 1889, C. F. M. Mundy and C. D. M. Mundy, his eldest son, disentailed the Ormsby Estate.

By a settlement of the 30th of January, 1889, made in exercise of a general power of appointment in the last-mentioned disentailing assurance, C. F. M. Mundy and C. D. M. Mundy appointed the Ormsby Estate to the use of C. F. M. Mundy during his life with remainders over. The life estate so limited was not expressed to be in restoration or continuation of any estate in C. F. M. Mundy.

Elizabeth Susan M. Mundy died on the 1st of January, 1892.

By a deed-poll of the 16th of July, 1897, C. F. M. Mundy, in exercise of the power reserved to him in the settlement of the 7th of August, 1865, appointed the sum of £8,000 in certain proportions among his four younger children.

On the 6th of August, 1897, C. F. M. Mundy entered into the contract of sale above referred to.

On investigating the title the purchasers required the concurrence of the jointress and the younger children. The vendor then took out a summons under the Settled Land Acts, 1882 to 1890, and the Vendor and Purchaser Act, 1874, for a declaration as above stated.

Kekewich, J., held that a new settlement had been created by the settlement of 1889, and that, therefore, there was not a "compound settlement," and the

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

vendor could not sell under the Settled Land Acts free from the charges.

The vendor appealed.

Cozens-Hardy, Q.C., and *Martelli*, for the appellant.—The settlements of 1861, 1865, and the two deeds of 1889 constitute one compound settlement. The decision of Stirling, J., in *In re Marquis of Ailesbury and Lord Iveagh*, 41 W. R. 644, [1893] 2 Ch. 345, was correct, and the tenant for life can sell this property free from the jointure of his wife and the portions of his younger children. The charges cannot come into operation until the life estate ends, and the latter is therefore not postponed to them. Mere absence of words of confirmation and restoration is not enough to negative our contention that there is here a compound settlement. The object of the Settled Land Act, 1882, was not, as the judge thought, to incorporate in a settlement usual and proper powers: Lord Macnaghten's speech in *Lord Henry Bruce* v. *Marquis of Ailesbury*, 41 W. R. 318, [1892] A. C. 356, at p. 364.

They also referred to Hood and Challis' Conveyancing and Settled Land Acts (5th ed.), pp. 193, 225; Wolstenholme's Settled Land Acts (7th ed.), p. 289.

W. A. Peck, for the respondent.—The words at the end of the settlement of 1889 were necessary to provide for the possibility of the death of one of the parties to whom the power was given. In order to make a compound settlement available, the tenancy for life must be created by the first instrument, and if it has been dealt with it must be restored in the last. The words in section 20 (2) (i.) are "having priority to the settlement," and not to the life estate. In the *Ailesbury case* the Marquis Ernest had had a life estate created by the earliest deed and coming down through all the deeds, and Stirling, J., said once a compound settlement always a compound settlement; see also Davidson's Precedents in Conveyancing (3rd ed.), vol 3, introd. and pp. 394-6. Key & Elphinstone (5th ed.), vol. 1, p. 631, in a precedent of a disentailing deed of freeholds, insert the words "in restoration, continuation, and confirmation of the estate for his life limited to him," &c.; see note on that precedent, as to the old life estate being kept alive. There is no reported case in which the words about restoration, &c., are omitted. In this case the deed of 1889 settled the land and none of the previous deeds did. If the other side is correct, if a man seised in fee simple subject to a jointure dies having devised the land in strict settlement, the tenant for life can convey freed from the jointure; which the fee simple owner himself could not have done. The Settled Land Acts give much wider powers of dealing with settled land than the previous Settled Estates Acts did. The deed of 1889 constitutes the settlement, and if the machinery of the Acts had not been used it would have been only one of the instruments creating the settlement. Supposing the deed of 1889 had been a will instead of a deed, it could not have been suggested that the tenant for life under the will could override these priorities.

He referred to *In re Du Cane and Nettlefold's Contract*, 46 W. R. 523, [1898] 2 Ch. 96.

Cozens-Hardy, Q.C., replied.

Cur. adv. vult.

Dec. 20.—The written judgment of Lindley, M.R., and Chitty, L.J., was delivered by

CHITTY, L.J.—On this appeal there are two questions which hang together. The first is whether the vendor, who is tenant for life in possession, can, by his conveyance under the Settled Land Acts, discharge the land from the jointure limited to his wife if she should survive him, and from the portions charged on the land in favour of his younger children, but not raisable till after his death. The terms of years and other rights limited for the purpose of securing the jointure and portions are included in this question. The second is whether the deeds of 1861, 1865, and 1889 together constitute "the settlement" or "a settlement" within the meaning of the Settled Land Act, 1882. The vendor contends that they do, and accordingly asks the court to appoint trustees of that settlement in order that they may receive and give a good discharge for the purchase-money. Kekewich, J., has decided both the questions against the vendor, and has consequently declined to appoint trustees.

The broad policy on which the Act is founded is laid down by the House of Lords in *Lord Henry Bruce* v. *Marquis of Ailesbury*, 41 W. R. 318, [1892] A. C. 356. The object is to render land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself and of all interested therein including the tenants, and not merely of the persons taking under the settlement. The Settled Land Act, 1882, has a much wider scope than the Settled Estates Acts. The scheme adopted is to facilitate the striking off from the land of the fetters imposed by settlement; and this is accomplished by conferring on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with the land by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to transfer their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale by shifting the settlement from the land to the purchase-money which has to be paid into court or into the hands of trustees. The Act of 1882 and the subsequent Acts ought, then, to be construed by the court with regard to these broad principles, and in a spirit of wise and reasonable liberality.

I am free to confess that I am struck at the outset with the consideration that, if the judgment appealed against stands, there is a blot in the Acts. The purchaser required that the jointress and the younger children should join in the conveyance for the purpose of releasing their rights; but with this requisition it was impossible to comply. The portioners, or some of them, are infants. The result, then, is that if the requisition is upheld, the land is practically unmarketable. The 20th section of the Act of 1882 has been so often stated that it is unnecessary to set it forth again. The deed of conveyance by the tenant for life is effectual to pass the land conveyed, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (1) all estates, interests, and charges having priority to the settlement; and (2) all such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed. The third exception is, for present purposes, altogether immaterial. The second is important as showing an express restriction on the power of the tenant for life. We find in it a principle. Mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life. The same principle is maintained in the 3rd sub-section of section 50 in favour of an assignee for value of the estate or interest of the tenant for life. The exception in sub-section 2 (ii.) of the 20th section has, however, no direct application

to the present case, because no money has been raised under the jointure term or the portions. Indeed, as already intimated, no money is raisable under either of them till after the death of the vendor.

The first exception is important. If the settlement consists solely of the deed of 1889 then the jointure and the portions have priority to the settlement, and the vendor's conveyance will not discharge the land from them. If the settlement consists of the deeds of 1861, 1865, and 1889, the jointure and portions will not have priority to that settlement, and they will be discharged subject to compliance with the provisions of the Acts as to the appointment of trustees of that settlement and notice to them or waiver of notice. The purchaser raises no objection on the ground that there were no trustees for the purposes of the Act at the time of the sale. I turn now to the 2nd section of the Act of 1882, the 1st sub-section of which for the present purpose may be shortly stated thus: "Any deed . . . or other instrument or any number of instruments, whether made . . . before or after or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement or as the settlement as the case requires." The right interpretation of the words "stands for the time being limited to or in trust for any persons by way of succession" is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that according to the natural and ordinary meaning of the words they include the case of a jointress and portions for younger children limited to arise on or after the death of a tenant for life and to the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land and they succeed to their interests in the land on or after the death of the tenant for life. I state this proposition generally and without reference to the Acts imposing a duty on successions; but such Acts, if referred to, would support this proposition. It may be that conveyancers when they employ the phrase that the lands stand limited to uses often mention only the leading estates in the land—viz., the estates of freehold—and refer to jointures and portions as charges or incumbrances to which the freehold estates or some of them are subject. Such a mode of reciting title is often sufficient for the purpose which it is intended to serve. But it is quite correct in point of law to set out among the limitations to which the land stands limited the limitations in favour of the jointress and the portioners and the terms for securing them, and this is often done by conveyancers. There is an illustration of what I am saying in the deed of 1889. To the proposition that the words of the section "stands limited to or in trust for any persons by way of succession" ought to be restricted to freehold estates there are two ready answers: First, the subject-matter of the settlement may be leaseholds for years. This is shown by the words of the definition itself, which speaks not of land but of "any estate or interest in land." And, secondly, by the 58th section, which in its enumeration of the persons having the powers of a tenant for life mentions (sub-section 4) "a tenant for years determinable on life not holding merely under a lease at a rent."

I proceed now to state the title shortly. The deed of 1861 was a settlement under which the vendor took a life estate with powers to jointure and charge portions in the usual way. The deed of 1865 was executed by the vendor on the occasion of his marriage, and he thereby executed his powers of jointuring and charging portions. The deeds of 1889 were a disentailing deed by the vendor and his eldest son, followed by a resettlement. The resettlement contains a correct recital showing how the lands "stood limited" immediately before the execution of the disentailing instrument. It will suffice to state the title from this recital following its main lines, but slightly abbreviating its language. According to the recital the lands then "stood limited (*a*) to the use that the vendor's mother, Elizabeth Susan Mundy, should receive during her life a yearly rent-charge of £800, with powers of distress and entry (she died in 1892); (*b*) to the use of trustees for a term (created by the deed of 1861) of 500 years to secure that rent-charge; and subject thereto (*c*) to the use of trustees for a term (created by the deed of 1861) of 1,000 years upon trust for raising £8,000 for the portions of the younger brother and three sisters of the vendor, all of whom had acquired vested interests in the £8,000; and subject thereto (*d*) to the use of a trustee named by the vendor for a term of 1,000 years to receive £10,000 by deed, dated the 5th of June, 1861, charged by the vendor in his own favour on the lands, pursuant to a power conferred upon him by the deed of settlement of 1861 already mentioned and which sum was subsequently raised by mortgage and was then repayable to the persons named; and, subject thereto (*e*) to the use of the vendor for his life; and subject thereto (*f*) to the use of trustees for a term of 300 years, to commence from the vendor's death, created by the marriage settlement of 1865 to secure to the vendor's wife a jointure rent-charge of £500 a year for her life in case she should survive the vendor (she is still living) and to commence from his death; and subject thereto (*g*) to the use of trustees for a term of 1,500 years to be computed from the vendor's death (created by the marriage settlement of 1865) to secure £8,000 for the portions of the vendor's younger children, no part of which had then become vested; and subject thereto (*h*) to the use of the vendor's eldest son in tail male, who was then living and of age. Such being the state of the title immediately before the execution of the disentailing deed and the resettlement of 1889, it is plain that the vendor as tenant for life in possession had, immediately upon the commencement of the Settled Land Act, 1882, become entitled, by virtue of that Act, to a power (which continued to subsist in 1889) to sell the land discharged from the jointure of his wife and the portions for his younger children, and for the terms to secure the same respectively. He had also the power of leasing and other powers conferred on a tenant for life by that statute. I may here mention that he had also extensive powers of leasing annexed to his life estate by the deed of 1861.

The resettlement of 1889 was executed to give effect to a general family arrangement. The parties to the deed were the vendor, his eldest son, the vendor's mother the jointress, the vendor's younger brother and three sisters, or the representatives of such of them as were dead, the vendor's wife, and trustees for the purposes of the resettlement. The nature of the family arrangement is stated in a recital to the following effect: (*a*) That the vendor's eldest son, with the consent of the vendor as protector, should bar his estate tail; (*b*) that they should concur in a resettlement in manner after expressed; (*c*) that the trustees of the resettlement should have power to pay off the existing mortgages for £16,000 and £10,000, and to borrow and secure the necessary money on a first mortgage of the lands; (*d*) that the vendor should have power to borrow not exceeding £5,000 on the lands; binding himself in that event to assign certain life policies; (*e*) that the

vendor's mother and wife should postpone their respective jointures in favour of persons claiming under mortgages to be created under clauses (*c*) and (*d*); (*f*) that all persons legally or beneficially interested in the £8,000 portions of the vendor's younger brother and three sisters should concur in releasing the lands therefrom to the intent that the same and the term for securing the same might determine and in lieu thereof the rent-charges thereafter reserved should be secured to the two sisters then living for their lives and the life of the survivor; (*g*) that an immediate income of £150 should be provided for the vendor's eldest son in manner after expressed, to be increased to £200 in the events after mentioned; (*h*) that the lands should be limited to the several uses and subject to the several powers and in manner after expressed.

The disentailing deed was in the usual form. The vendor so far as related to his estate for life granted, and his son, with the vendor's consent as protector, granted and disposed of the lands to the grantee to uses for such uses as the vendor and his son should jointly appoint and subject thereto to the old uses, trusts, and powers so as to restore the same.

The resettlement of 1889 was so framed as to carry into effect the family arrangement recited. It is unnecessary to state further the operative part of the deed beyond saying that the power of joint appointment was executed and that subject to the other provisions indicated by the recital the lands were limited to the use of the vendor for life so that upon the execution of the deed he again became tenant for life in possession. But this life estate was not in terms limited to him in restoration of his old life estate. The object of this restoration is well known; it was to keep alive the old powers annexed to the life estate (see 3 Davidson's Precedents, 3rd ed., p. 594, *et seq.*). Regard being had to the limitation in the disentailing deed in default of appointment, it would appear to have been thought unnecessary to restore the old life estate because the powers to jointure and appoint portions had already been exercised by the vendor by the deed of 1865, and as to the leasing powers in the deed of 1861, it was thought unnecessary to keep them any longer on foot, seeing that the vendor as tenant for life under the resettlement had ample powers of leasing by virtue of the Settled Land Acts. But however this may be, the old life estate was not restored. The resettlement did not, and could not, affect the portions limited for the vendor's younger children and the term to secure them, nor, save as to the limited postponement agreed upon, did it affect the jointure of the vendor's wife or the term whereby it was secured.

The result thus far appears to me to be this: Treating the life estate of the vendor (as I think it must be treated) as a new life estate arising under the resettlement, the land now stands limited to the vendor for life, and after his death to the use of his wife for her rent-charge and for the portioners with their respective terms by way of succession within the meaning of the definition contained in section 2, sub-section 1, of the Act of 1882; and the settlement consists of the deeds of 1861, 1865, and 1889. This result is in accordance with Stirling, J.'s, decision in *In re Marquis of Ailesbury and Lord Iveagh*. The judgment in that case has been criticized by some learned writers particularly in regard to the jointure of Maria the Dowager Marchioness. But I think the judgment was right and founded on the true view of statute. It was held that the settlement was made the up of the series of deeds beginning with the deed of 1796 and ending with the deed of 1885, and that, treating these deeds as the settlement, the vendor, who was tenant for life in possession under the deed of 1885 only, had power to bind the jointure of the Dowager Marchioness which arose under the earlier deeds of the series—viz., those of 1796, 1826, and 1833, and also to bind the jointure of Lady Evelyn Riddell which arose under the intermediate deed of 1863. It was no doubt a circumstance in that case that by the deed of 1885 the life estate of the Marquis Ernest under the deed of 1863 was restored to him; and this circumstance in connection with sub-section 4 of section 2 relating to the time of the settlement taking effect was relied upon by the learned judge. But this circumstance would not have carried the compound settlement further back than the deed of 1863. He held, however, that the Savernake Estate stood limited to uses in favour of various persons by way of succession under or by virtue of the series of deeds, and that the Marchioness Maria was one of the persons taking under the series of deeds, although she did not take by way of succession to the vendor. This was a broad view of the Act; but I repeat that in my opinion it was the right view.

Holding however, as I do, that there is a settlement consisting of the four deeds, within the definition, there is a point which ought not to be overlooked. The resettlement of 1889 expressly appoints trustees of the settlement thereby made for the purposes of the Settled Land Acts. I think that the vendor could have sold the land and discharged it from the limitations thereby made, but, of course, subject to the jointure and portions of his wife and younger children which upon such a sale would stand in priority to that settlement; and that the trustees thereby appointed could have given a valid discharge for such purchase-money. I see no inconsistency in holding that there may be at the same time a more comprehensive settlement consisting of several deeds or a less comprehensive settlement constituted by one of the deeds only. The language of the 2nd section, sub-section 1, "any instrument or any number of instruments" whereby the land "stands for the time being limited" justifies this conclusion. Had I been of a different opinion on this point I might have found some difficulty on the main questions involved in our present decision. The point, however, was decided by Stirling, J., in *In re DuCane and Nettlefold's Contract*, 46 W. R. 523, [1898] 2 Ch. 96. In his judgment in that case, he said (at p. 105) that it is quite plain that one instrument may constitute a settlement, although it is to be admitted that several instruments may under the same definition also constitute a settlement. I agree with his reasoning and with his decision on this point.

There is also another but quite distinct point which arises on this title. As already stated the vendor being tenant for life under the settlement of 1861 became entitled on the commencement of the Act of 1882 to sell the land discharged from the jointure and portions of his wife and younger children, and this statutory power remained vested in him beyond all question down to the date of the execution of the disentailing deed. How and by what means has this power been divested? It seems to me clear that the statutory power is not a power annexed to the estate of a tenant for life in any such sense as that in which powers were considered to be annexed to an estate by any method of conveyancing arising out of the private deeds of the parties. It is a power vested by the Act once for all in a tenant for life, which remains vested in him, is incapable of being assigned or released and continues exercisable by him notwithstanding any assignment by him of his estate. This is the effect of the 50th section of the Act of 1882, which runs thus: "(1) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by

operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement. (2) A contract by a tenant for life not to exercise any of his powers under this Act is void."

It may be that if the settlement consists merely of a life estate in A. with remainder to B. in fee and A. surrenders his life estate to B. the power is gone under the doctrine of merger—and that such a case is not within the section because where the settlement is thus brought to an end and exhausted there is no reason why such a power should continue after the absolute fee simple is vested in possession. I say may be, because it is not necessary to consider such a case which does not arise upon the facts before us.

Reading the declaration of uses declared by the resettlement with the disentailing deed according to the settled law on that subject, how does the present case stand? By virtue of the grant made by the vendor and his son by the disentailing deed the common law estate passed to the grantee to uses; and by virtue of the declaration of uses in the resettlement the grantee to uses stood seised to the use of the vendor for life. The old life estate of the vendor alone was sufficient to support the use in favour of the vendor. But apart from these technical points I still ask the question how, upon such a transaction as that manifested by the disentailing deed and resettlement of 1889, can it be said in the face of the 50th section that the statutory power of sale which the vendor had at the time when he executed those deeds is gone or extinguished? In my opinion the 50th section applies, and the statutory power of sale remains unaffected.

The order will be: (1) Discharge Kekewich, J.'s, judgment; (2) declare the vendor has power to discharge the land from the jointure portions, &c., as in *In re Marquis of Ailesbury and Lord Iveagh*, but retain that part of Kekewich, J.'s, declaration which relates to the vendor's sisters; (3) appoint trustees of the compound settlement constituted by the deeds of 1861, 1865, and 1889. Take trustees of 1889 deed, unless some objection.

VAUGHAN WILLIAMS, L.J.—I agree, but I confess, with great hesitation, for in a case in which an estate in fee simple is settled in the ordinary way with a succession of limitations consisting of a life estate, estate tail, &c., with the ordinary power of creating terms to secure a jointure and portions for younger children, I doubt very much whether the terms to secure jointure or portions or the interest thereby secured, are limitations by way of succession within the meaning of section 2 of the Settled Land Act. This doubt is not based upon any question of the applicability of the words "stand limited" to the estate created by a term of years, but is based upon the consideration that such a term does not come into operation in succession in relation to the freehold limitations, estate tail, and estates in remainder and reversion which exhaust the whole fee. Such terms are in fact mere charges overriding the successive limitations and coming into operation contemporaneously with those limitations. Or to express this doubt by another example, I doubt whether land would continue to stand limited by way of succession in a case where a settlement created a life estate with remainder in fee, with power to the tenant for life to jointure and create terms to secure jointures and portions, and the tenant for life died after creating such terms and the remainderman became tenant in fee in possession subject to the terms. I mean that I doubt if in such case the terms and the reversion which has become vested in the remainderman as an estate in possession constitute a limitation by way of succession. But having regard to what was said in the House of Lords as to the policy of the Act, Chitty, L.J.'s, judgment has persuaded me that we ought to construe section 2 of the Act in the way he has done although we may be putting a somewhat unnatural meaning on the words. I am not, however, influenced in this by the presence in section 58, sub-section 1, of clause iv., because I think that clause was inserted merely to prevent an old conveyancing device to render difficult the suffering of a recovery to bar an entail being effective to avoid the application of the Settled Land Act by the absence of a life estate.

Appeal allowed.

Solicitors, *Jull, Godfrey, & Danvers*, for *Thimbleby & Son*, Spilsby; *John Hextall*, for *A. G. Fletcher*, Donington.

From Q. B. Div.
(A. L. Smith, Rigby, and Collins, L.JJ.) Dec. 19.

GREENWOOD AND ANOTHER v. FRANCIS. (a.)

Principal and surety—Co-sureties—Co-sureties constituted principal debtors—Giving time by one co-surety—Contribution.

The plaintiffs and the defendant gave a joint and several bond to secure the repayment of an advance made to a company upon a second mortgage, and by the bond it was agreed that the plaintiffs and defendant, as between themselves and the mortgagee, should be taken to be principal debtors, and that they should not, nor should either of them, be released by reason of time being given to the company, or by any forbearance, act, or omission of the mortgagee or his assigns. The company was subsequently wound up and a new company formed to take over the business, subject to the mortgages, and the plaintiffs, without the assent of the defendant, paid off the mortgage debt due under the bond to the mortgagee, who was pressing for payment, obtained a transfer of the second mortgage to themselves, the new company covenanting to pay to them the principal sum thereby secured, and entered into an agreement with the new company that the mortgage should not be enforced or the mortgage money called in for six months. The course adopted by the plaintiffs in dealing with the mortgage security was in the best interests of all concerned. In an action by the plaintiffs to recover from the defendant his proportion of the amount so paid by them under the bond,

Held, that the plaintiffs were entitled to recover.

Appeal of the defendant from the judgment of Day, J., at the trial of the action without a jury.

The facts and arguments are fully stated in the judgment.

Neville, Q.C., H. Reed, Q.C., and *Montague Lush*, for the defendant.

Mattinson, Q.C., G. Cave, and *Firminger*, for the plaintiffs.

Cur. adv. vult.

A. L. SMITH, L.J., read the following judgment: This is an action by the plaintiffs Mr. Greenwood and Mr. de la Fontaine to recover from the defendant Captain Francis a third part of the sum of £5,000 and interest thereon, which the three had jointly and

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

severally guaranteed to the firm of Ind, Coope, & Co. (Limited), and which sum the plaintiffs have had to pay to that firm. When the facts of the case are ascertained, in my judgment it is by no means so complex a case as for some time during the arguments it appeared to be.

In the month of February, 1897, the Victoria Mansions Restaurant Co. (Limited), of which company the plaintiffs and the defendant were directors, were desirous of raising a loan upon second mortgage of its premises, there being at the time a first mortgage thereon of £12,000. Ind, Coope, & Co. were willing to make an advance of £5,500 provided the company would give a second mortgage for that amount and that the three directors, the two plaintiffs and the defendant, would jointly and severally guarantee the repayment upon the 5th of July, 1897, to them by the Restaurant Co. of the sum of £5,000, being part of the proposed loan, with interest at 5 per cent. thereon. Accordingly, upon the 6th of February, 1897, this second mortgage was given by the Restaurant Co. to Ind, Coope, & Co., and a joint and several bond of the plaintiffs and defendant was also given by them to Messrs. Ind, Coope, & Co. to further secure the repayment of their loan, and by this bond it was expressly agreed and declared that as between the Restaurant Co. and the three obligors the latter were only sureties for the Restaurant Co., but as between the three obligors and Ind, Coope, & Co., the former should be taken to be principal debtors, and that they should not, nor should either of them, be released from their or his liability under the bond by reason of time being given to the Restaurant Co. or their assigns, or by reason of any collateral securities for moneys intended to be thereby secured, or by any forbearance, act, or omission of Ind, Coope, & Co. (Limited) or their assigns, or by any other matter or thing whereby the three obligors, or either of them, would be so released but for this provision. This bond having been thus given, matters rested until the month of July in that year. By this time the Restaurant Co. were in difficulties, and upon the 17th of July, 1897, a resolution was passed to voluntarily wind up the company, the defendant Captain Francis being in the chair upon that occasion, and upon the 9th of August, 1897, a supervision order was made by Byrne, J. At this date Ind, Coope, & Co. were pressing for repayment of their loan, and had instructed their solicitors to commence an action against Messrs. Greenwood, de la Fontaine, and Francis for the recovery of the £5,000 and interest guaranteed by them unless they (Ind, Coope, & Co.) received payment of their open account, which then amounted to about £1,000. That the position of the Restaurant Co. was at this time critical, as was also the position of the three obligors of the bond, no one can doubt, and what next happened was this. The Restaurant Co. (Limited) (which I shall hereafter call the old company) by its liquidator, upon the 24th of August, 1897, entered into a contract with a Mr. Carter for and on behalf of an intended company (which I shall call the new company), whereby it was contracted that the old company should sell to the new company its goodwill, lease, and benefit of contracts for the sum of £2,000, and also its stock-in-trade for a sum not exceeding £1,200, subject to the two mortgages of £12,000 and £5,500 respectively. By this contract it was agreed between the old company, through its liquidator, and Mr. Carter, for the intended new company, that before the date of the completion of the purchase the old company should pay off and obtain a transfer to Messrs. Greenwood, de la Fontaine, and Francis, directors of the old company, or some of them, of Ind, Coope, & Co.'s second mortgage, and should also obtain an agreement by such directors with the new company that they would not require the payment of the principal moneys due upon the second mortgage for the space of twelve months from the date of completion. It appears to me upon the evidence that the contract of the 24th of August, 1897, was a contract made between the old company, through its liquidator, and Mr. Carter, on behalf of the new company, and was not a contract made by Mr. Greenwood and Mr. de la Fontaine, as suggested by Mr. Neville for Captain Francis when he opened the appeal. This contract did not bind Mr. Greenwood nor Mr. de la Fontaine unless they afterwards should agree to be so bound. The evidence shows that the only agreement Mr. Greenwood entered into was a subsequent agreement of the 29th of September, 1897, with the new company, and there is evidence that Mr. de la Fontaine concurred in this last agreement. Captain Francis undoubtedly did not agree thereto, for he was of opinion that, as Messrs. Greenwood and de la Fontaine were simple contract creditors of the old company, which he (Captain Francis) was not, they would obtain an advantage over him by participating in any balance there might be left in the hands of the liquidator of the £2,000 paid by the new company after payment thereout of the overriding charges due by the old company, and he desired that Mr. Greenwood and Mr. de la Fontaine should pool what they might receive thereout so that he (Captain Francis) might participate therein, and this Messrs. Greenwood and de la Fontaine refused to do. What Mr. Greenwood did agree to, and the evidence shows that Mr. de la Fontaine concurred therein, was as follows: The agreement is in writing, and is addressed to "The New Victoria Mansions Restaurant Company (Limited) and Mr. F. H. Carter," and is dated the 29th of September, 1897. It runs thus: "Gentlemen,—On completion of the purchase this day of the lease, goodwill, &c., of the Victoria Mansions Restaurant (Limited), I have seen the contract dated the 24th of August, 1897, as entered into by the liquidator with Mr. Carter, and in consideration of your consenting to allow the completion to proceed before the transfer of the Ind, Coope mortgage as agreed has actually taken place, I hereby undertake with you and each of you that the transfer of the said mortgage to Messrs. Ind, Coope, & Co. shall be carried out within one calendar month from this date and Messrs. Ind, Coope, & Co. discharged. Also, I agree that the said mortgage when so transferred shall not be enforced or the mortgage money called in before the expiry of six calendar months from the date of such transfer, and I hereby keep you and each of you indemnified against any enforcement of the said mortgage by Messrs. Ind, Coope, & Co. until such transfer, saving as to the covenant that spirits, &c., be purchased from them.—HUBERT J. GREENWOOD." Besides the payment of £2,000 to the liquidator of the old company by the new company, a further condition upon which the new company became purchasers was that it should undertake to reduce the amount due upon the first mortgage by £1,000, which was done. Upon the 18th of October, 1897, Mr. Greenwood and Mr. de la Fontaine were called upon to pay to Ind, Coope, & Co. the £5,000 and interest due under their bond of guarantee, and they did so, and by deed of that date made between Ind, Coope, & Co., the new company, Mr. Greenwood, and Mr. de la Fontaine, Ind, Coope, & Co. transferred to Messrs. Greenwood and de la Fontaine the second mortgage for £5,500, and the new company therein covenanted with Messrs. Greenwood and de la Fontaine to pay to them the principal sum of £5,500 on the 5th of January, 1898, together with the sum of £135 7s. 4d., and by this deed it is expressly provided that "nothing herein

contained shall be deemed or construed to release, or give any time or indulgence to the old company, or Captain Francis, or prejudice any right or remedy of the transferee Greenwood or de la Fontaine against them or either of them, or against the mortgaged premises, the covenant by the new company being intended as an additional security only for the mortgage debt and interest." On the same day, the 18th of October, 1897, Ind, Coope, & Co. assigned and transferred to Mr. Greenwood and Mr. de la Fontaine the principal sum of £5,000 secured by the bond of the 6th of Febuary, 1897, and the said bond, and the full benefit and advantage thereof. Such are the somewhat long facts of this case.

Before I deal with the law applicable thereto, I will say that I do not doubt that what was done by the liquidator, by Mr. Greenwood, and by Mr. de la Fontaine was in the best interest of all concerned, and in my judgment Day, J., was well warranted in finding, as he did, that this was so, and the evidence as to this is all one way. The evidence of Mr. Ellis as to the advisability of doing what was done is cogent, and in particular his statement that to sell the property out and out to some other purchaser in September, 1897, as is now suggested on behalf of Captain Francis should have been done, would in the circumstances which then existed have been disastrous. The evidence of Mr. Ellis is wholly uncontradicted by any evidence whatever, and it is left to counsel for Captain Francis to suggest in argument what ought to have been done and to say that what Mr. Greenwood and Mr. de la Fontaine did was done for their own private purposes and not in the interests of all. Mr. Greenwood and Mr. de la Fontaine having paid to Ind, Coope, & Co. the £5,000 and interest covered by the joint and several bond of themselves and Captain Francis, now ask Captain Francis to pay to them his share of the loss thus sustained—that is, one-third of the £5,000 and interest so paid; and what is his answer? Now as to the law, Captain Francis first of all says that he and the plaintiffs were co-sureties together to secure to Ind, Coope, & Co. repayment by the old company of the £5,000 and interest advanced to it by them, and that by a binding contract time has been given to the principal debtor for the payment off of this £5,000 and interest, and that he is thereby released from the payment of the one-third of this £5,000 and interest; and this is how the case is first presented to us, which certainly requires investigation.

Now, assuming that this had been a case of a principal creditor suing a surety upon default made by the principal debtor, by whom and to whom must time by binding contract be given so as to discharge the surety? It is obvious that it must be by the principal creditor to the principal debtor, for who apart from the principal creditor could make such a contract? The principles upon which a binding contract to give time by the principal creditor to the principal debtor without the consent of the surety discharges the surety are familiar to all lawyers, but as to this I will read the well-known passage in the judgment of Blackburn, J., in *Polak* v. *Everett*, 24 W. R. 365, at p. 366, 1 Q. B. D. 669, at pp. 673, 674. That learned judge says: "It has been established for a very long time, beginning with *Rees* v. *Berrington*, 2 Ves. Jun. 540, to the present day, without a single case going to the contrary, that, on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing, he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship—namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity it is established that this discharges the surety altogether." I have never before heard of defences which would be defences by a surety against a principal creditor being attempted to be set up in a case of sureties suing a co-surety for contribution, and no authority has been cited to show that this can be done. What principles of equity are there to intervene to prevent one surety suing his co-surety at law to indemnify him from that part of the loss which the latter was bound to participate in and which the former has been compelled to pay? What defences a surety has against his co-surety when sued for contribution are no more and no less than the defences one principal may have against another principal, and this alone would, I think, suffice to determine this case against Captain Francis apart from points made by his learned counsel which I must deal with. It cannot be said upon the facts of this case that Ind, Coope, & Co., the principal creditors, have given time to the old company, the principal debtors. Then how do the principles of equity relating to the discharge of a surety by the giving of time arise? It is said that Mr. Greenwood and Mr. de la Fontaine were assignees of Ind, Coope, & Co., and that, though sureties, they thus became the principal creditors and had given time by the agreement of the 29th of September, 1897, to the assignees of the old company—that is, to the new company, who had thus become the principal debtors. Whether this suggestion is well founded or not I do not stop to discuss nor to decide, for it is not necessary to do so, for there is this clear answer to it. By the bond under which Mr. Greenwood, Mr. de la Fontaine, and Captain Francis became, as Captain Francis says, sureties, though in reality they became principals between themselves, Ind, Coope, & Co. were expressly empowered by Captain Francis, as well as by his co-obligors, to give time to the old company, and if Mr. Greenwood and Mr. de la Fontaine are to be taken as being assignees of Ind, Coope, & Co., and thus had become principal creditors, they would have the same rights as Ind, Coope, & Co., one of which was to give time to the old company, and this is what Captain Francis himself, under his own hand and seal, has agreed might be done without affecting his liability under the bond to either Ind, Coope, & Co. or their assigns. Again, if it be said that the new company is assignee of the old company, still, if giving time to the new company is giving time to the old company, which I do not decide, the observations I have above made about the giving of time in this case being expressly permitted by the bond without discharging the surety apply. Again, to meet a further suggestion of counsel for Captain Francis, I agree that, if this had been an action by a principal creditor against a surety, and the surety could have shown that the contract of the surety with the principal creditor without his assent had been altered by the principal creditor, that would have wholly discharged the surety in such an action upon the plain ground, as Lord Watson tersely puts it in *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596, at p. 603, 35 W. R. Dig. 167, that the surety could not be made liable for default in the performance of a contract which he had not guaranteed. But this defence has no application to a case where one surety is suing another for contribution, the one having been compelled to pay the whole amount guaranteed to the principal creditor. One last word. It is said for Francis that the plaintiffs have wasted his security. In my opinion, this is not established in fact, and, if it had been, it would only have given Captain Francis, as

one principal against another principal, a right to recover what damages he could establish he had sustained by the wrongful act of the other; it gives him no right to be released *in toto* from contributing the one-third of the £5,000, which is the defence he sets up in this action. In my judgment, Captain Francis's defences entirely fail. There is a small matter about a small item which the parties must settle between themselves, for it is really no part of this appeal. The appeal must be dismissed, with costs.

RIGBY, L.J., read the following judgment: The plaintiffs in this case, being sureties for the debt to Ind, Coope, & Co. (Limited), secured by the bond of themselves, and the defendant, their co-surety, have paid that debt, and upon such payment became entitled to and have actually had executed to them an assignment of the bond. This assignment, whether the bond debt is or is not to be deemed at law to have been satisfied by the payment of the debt, entitles them to stand in the place of Ind, Coope, & Co., and to use all their remedies in order to obtain from their co-surety, the defendant, indemnification for the advance made by them. It is not now necessary to use the name of Ind, Coope, & Co., but the remedies in this action are those of Ind, Coope, & Co., subject to the proviso that the plaintiffs are not entitled to recover from the defendant more than the just proportion—in this case one-third of the whole debt paid with interest and expenses—to which, as between the plaintiffs and defendant, the defandant is liable: see the Mercantile Law Amendment Act, 1856, s. 5. Now under the bond Ind, Coope, & Co. were entitled to treat the plaintiffs and defendant as principal debtors. The right of action is, therefore, independent of any questions which might otherwise arise between Ind, Coope, & Co. as principal creditors and the plaintiffs and defendant as sureties. There might, of course, be a counter-claim for any loss actually occasioned to the defendant by any wrongful action of the plaintiffs. The only ground upon which such a claim could be based would be that the plaintiffs have wrongfully depreciated their mortgage security so as to injure the defendant. This being so, I do not think it necessary to go into the other questions raised in the action beyond saying that I am of opinion that it is not established by the defendant that the plaintiffs by their dealing with the mortgage security have in any way depreciated the value of that security so as to give the defendant a right of action against them. I think, indeed, that they took a reasonable and proper course with reference to the mortgage security.

COLLINS, L.J., read the following judgment: The plaintiffs in this case are suing their co-surety on a claim for contribution of his share of the sum which they have paid to the creditor in satisfaction of the guaranteed debt. They are also suing as assignees of the creditor on the bond by which they and the defendant became co-sureties for the old company. This is not a case where the sureties acting together have agreed to pay off the creditor and take an assignment of his securities for the common benefit. The action of the plaintiffs was taken in their own interest and against the protest of the defendant, and in view of this fact I think that questions of some nicety might have arisen when their rights as assignees of the creditor on the contract of guarantee came to be considered but for the fact that that instrument constitutes the co-sureties in all respects principal debtors as between themselves and the creditor, and debars them from relying on defences, such as giving time to the principal debtor, &c., which in ordinary cases might suffice to discharge a surety. It is unnecessary to consider, therefore, whether they in fact placed themselves in such a relation towards their co-surety as to enable him to set up against them acts which, if done by the principal creditor under an ordinary contract, might have released the surety; nor whether, if they did stand in such relation, their dealings with the two companies, the old and the new, were such as to amount to a giving of time to the principal debtor or variation of the terms of the guaranteed contract such as might discharge a surety; nor whether, if a defence on such grounds would have defeated their claim as assignees of the bond, they nevertheless could have set up their claim for contribution. None of these points arise for determination, and I desire to give no opinion upon any of them. When these matters are eliminated their rights are to be determined simply in view of the fact that they are liable to contribute equally to the discharge of the obligation assumed, and are all equally entitled to the benefit of any securities held for the same. There cannot, therefore, I think, be any higher duty on the plaintiffs than that they should bring into account such sum as they ought with reasonable care to have realized out of the securities which they held for the common benefit. I quite agree that the course they did take was the most prudent they could have adopted and has had the effect of mitigating the loss which was otherwise inevitable. I think, therefore, that the judgment of Day, J., was perfectly right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Warren, Murton, & Miller.*

Solicitors for the defendant, *C. R. Sawyer & Ellis.*

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Dec. 14.

In re CIVIL, NAVAL, AND MILITARY OUTFITTERS (LIMITED). (*a.*)

Company — Winding up — Official receiver's report — "Further report" — Allegation of fraud — Order for public examination — Jurisdiction — Companies (Winding-up) Act, 1890 (53 *&* 54 *Vict. c.* 63), *s.* 8, *sub-sections* 2, 3, 7.

In the winding up of a company the further report of the official receiver, made under section 8, *sub-section* 2, *of the Companies (Winding-up) Act,* 1890, *must allege that fraud has been committed by some specified person or persons in the promotion or formation of the company, and must set out such facts as the basis of his opinion as will warrant the judge in calling upon such person or persons to undergo public examination.*

Ex parte Barnes, 44 *W. R.* 433, [1896] *A. C.* 146, *discussed and explained.*

Appeal from Wright, J.

By section 8 (1) of the Companies (Winding-up) Act, 1890, where the court has made an order for winding up a company, the official receiver shall submit a preliminary report to the court as to the position of the company.

By sub-section 2, "The official receiver may also, if he thinks fit, make a further report, or further reports,

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company, in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court."

By sub-section 3 the court may direct any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, to attend before the court to be publicly examined.

In the winding up of the above-named company the official receiver made a further report on the 16th of July, 1898, and found that fraud had been committed by the persons named in the schedule in the promotion or formation of the company, or in relation to the company, since the formation thereof. The appellant, H. P. Long, and ten other persons were named in the schedule, and Long was described as a promoter of the company.

After consideration of the further report an order was made in chambers for the attendance of Long before the court for public examination as to his dealings with the company.

The other material facts sufficiently appear from the judgments.

On appeal to the judge, Wright, J., affirmed the order.

H. P. Long appealed.

Herbert Reed, Q.C., and *Cabubé*, for the appellant.—If the official receiver does not know the facts, he may examine as to them by virtue of section 115 of the Companies Act, 1862, first of all. A vendor to a company, who is concerned in or "interested in" the promotion of the company, does not necessarily "take part in" the promotion—following the words of the statute.

They referred to *Ex parte Barnes*, 44 W. R. 433, [1896] A. C. 146.

Sir R. Finlay, S.G., and *Ingle Joyce*, for the official receiver.—In *Ex parte Barnes* the Court of Appeal held that it was necessary that there should be a charge of fraud, and the House of Lords held that it was necessary that the person charged should be concerned in the promotion of the company: these two conditions are fulfilled in the present report. All the conditions imposed by the Legislature for the validity of such an order as this have been fulfilled in this report.

They referred to *In re New Travellers' Chambers (Limited)*, 43 W. R. 282, [1895] 1 Ch. 395.

Reed, Q.C., replied.

LINDLEY, M.R.—I do not think there is any difficulty in coming to a proper conclusion in this case. The appeal is against an order made by Wright, J., refusing to discharge an order made *ex parte* for the examination of Mr. Long under section 8 of the Companies (Winding-up) Act, 1890. That section has been read and commented upon so often that I need not read it at length. It has been the subject of a great deal of litigation in this court, and even in the House of Lords; and in the case of *Ex parte Barnes*, to which we have been referred, a construction has been put upon the section which of course we all accept. Now, there are two questions which have to be determined on this section. *Ex parte Barnes* has removed one point in controversy, which was, what is the "report" referred to in clause 2 of the section, where it says "The official receiver may also if he thinks fit make a further report," and "the court may," in clause 3, "after consideration of any such report direct," and so on. *Ex parte Barnes* has made it plain that the report referred to is what is called the further report, and not what is called the preliminary report. That was a struggle that had to be settled. Now we have the further report, and clause 2 says what the official receiver may state in such further report. [His lordship read sub-sections 2 and 3, and continued:] Then clause 7, which is very important, must be read in connection with those two; and the great advantage of the decision in *Ex parte Barnes* in the House of Lords is this: that it has shown how those three clauses are to be woven together so as to produce one harmonious whole, and make the Act work, and work justly. On the one hand this section is one of the most beneficial sections to be found in the whole of the Companies Acts; and it is so beneficial that attempts were made to stretch it to lengths which were hardly just to the person who had to undergo the ordeal of a public examination; and attempts were made to extend this section so as to give the judge jurisdiction to order examinations upon reports which, in the judgment of every court to whom the question had been submitted, were insufficient for the purpose. That was the kind of report the House of Lords had before it in *Ex parte Barnes*.

The result of *Ex parte Barnes* appears to me tolerably plain. There must be a report stating the manner in which the company was formed, and whether, in the opinion of the official receiver, fraud has been committed by any person proposed to be examined. That is not found in the Act; it is put in by the House of Lords in *Ex parte Barnes*. And the House of Lords were led to put it in by construing clause 3 in connection with clauses 2 and 7. Now, if a report were in such a shape as to comply literally and textually with the language I have just read, stating the manner in which the company was formed, and that, in the opinion of the official receiver, a fraud had been committed by A., B., or C., and there could not be seen from the report any connection between A., B., and C. and the manner in which the company was formed, although the textual and literal language of the section might be complied with, I should hesitate very long before I said that such a report as that was the kind of report mentioned in the section. I doubt whether any judge could judicially and properly act on such a report as that. But, on the other hand, if the official receiver reports that A., B., or C. have been guilty of fraud in connection with the formation of the company, and you look back into his report and see, not whether the charge against him is proved—that is not the function of the report at all—but whether there is such a basis for that opinion as, in the opinion of the judge, warrants him in calling upon the man to undergo examination—to my mind that is all the report need do. That appears to me to be the fair and true outcome of the language of the Act and the decision in *Ex parte Barnes*.

At the end of this report the official receiver says this: He is of opinion "that fraud has been committed by the persons named in the schedule hereto in the promotion or formation of the company or in relation to the company since the formation thereof"; and then in the schedule occurs the name of Mr. Long, who is described as one of the promoters. So that you have here, as I read it, that the official receiver is of opinion that fraud has been committed by Mr. Long in the promotion or formation of the company or in relation to the company since the formation thereof. The last part I do not myself attach much importance to. Now, is Mr. Long so connected in the narrative relating to the formation of this company as to afford a basis for that opinion?

In my opinion there is ample basis for it, and it is to be found in paragraphs 2, 4, 5, 15, and 18. I am not going to say that this report is in a form in which I should like to see it. It is not. A very little trouble would have made it plainer. In the first place, I think the language of paragraph 2 is objectionable. It says: "The promoters of the company were the contract company." When you read the whole of the report you see what that means. The contract company brought out this particular company. Then it goes on: "The persons concerned in the promotion of the company" were several people, among them being Mr. Long. What does "concerned" mean? It is not found as a fact that he "took part in the promotion of the company"—which is the language of the Act of Parliament. Of course there was a discussion at once about the meaning of the word "concerned." It was said that he was concerned in some other way, and was not taking part. I do not so understand it. I understand the finding is that he was concerned in taking part in the definite formation of the company. Then it goes on to say that the contract corporation obtained an option of taking over the assets of the Cater Co., which is what Mr. Long had to sell, for the sum of £35,000. Then it sets out that with regard to Cater & Co. (this is paragraph 5), it has transpired that the contract company were introduced by Mr. Rhys, who afterwards became a director of the company, to Mr. Harry Long, and as commission or remuneration for the introduction Mr. Rhys was to be entitled to one-half of the net profits made by Mr. Long in the sale to the company. Now put those two facts together. Mr. Long was going to sell these assets to the Civil and Military Co. for £35,000, and he is going to give Mr. Rhys half for the introduction. What is the value of what he is going to sell? £35,000? The thing is absurd on the face of it. Then from paragraph 16 it appears that in 1895 these precious assets were sold at a valuation under the sanction of the court for £8,554. I do not say that nothing had taken place in the interval; I daresay there had. This report does not state minutely what the effect of the trading in this precious company was from the time when the assets were bought for £8,554, and sold for £35,000, of which half was to go to Mr. Long and half was to go to the gentleman I have named. But I will go on. It is stated in paragraph 18 that there were separate agreements between the original vendors and the promoters—by which I understand as regards this matter Mr. Long and the contract company—which provided for the Civil, Naval, and Military Outfitters (Limited) acquiring the businesses. Now put those facts together, and consider whether there is not some basis for the opinion of the official receiver that fraud has been committed by Mr. Long in the promotion or formation of this company. I do not say that it is a charge which, if proved in this way, would authorize a court of civil jurisdiction to compel Mr. Long to make good the profits which he has made; still less do I say that there is such a charge as Mr. Long should be called upon to meet in a court of criminal jurisdiction. The question we have to consider is whether this report is so flimsy, so sketchy, and so unfair, that Wright, J., exceeded his jurisdiction, or exercised a wrong discretion in saying that Mr. Long was a proper person to be publicly examined under the Act of Parliament.

In my judgment, although the report might be plainer, it did give Wright, J., ample jurisdiction to make the order, and he exercised his discretion in the way in which I myself should have exercised it. I therefore think that this appeal wholly fails, and must be dismissed with costs.

CHITTY, L.J.—I am of the same opinion, and will add but little after what has fallen from the Master of the Rolls, with whose reasons I agree.

The first question is whether there was jurisdiction to make the order. The report is in the narrative form, stating the facts and matters which the official receiver desires to bring to the notice of the court, and his opinion, as required by section 8 of the Companies Act in conformity with the 69th rule of the rules made under the Winding-up Act of 1890. What the statute requires in this further report is that he should state the manner in which the company was formed. That he has done. Then he is to state his opinion, which he has done, that fraud has been committed by some persons in the promotion or formation of the company. I stop there, because that is sufficient for the present purpose. I agree that if there was a report by the official receiver merely stating the manner in which the company had been formed, and then, without there being any connection between the facts as stated, and the opinion, which came, as it were, suddenly at the end of his report, that A. B. had been guilty of fraud in the promotion, I should say that that report, though it might, in words, comply with the requisitions of the statute, would not be such a report upon which any judge would act, when he came under the 3rd sub-section to take the report into consideration. It is the judge who has to direct that the public examination shall take place. Now what is this report? It has been very fully described by the Master of the Rolls, and it appears to me that it does contain a substantial basis for the opinion which is expressed at the end of it. The official receiver gives his opinion in the last paragraph, "that fraud has been committed by the persons named in the schedule in the promotion or formation of the company, or in relation to the company since the formation thereof"; and then there is a schedule which puts down the names of many gentlemen, with remarks in one column showing "their connection with the company." I am not saying—nor did the Master of the Rolls say—that this report was drawn in as good a form as it might have been. I think it might have been in several respects more particular, especially in the matter which I am now going to mention; but putting the introductory statement of the official receiver's opinion, that fraud has been committed by the persons named, and then coming down to Mr. Long, I find that he, under the heading "Connection with company," is said to be one of the promoters. It may be that charge, as it is, is a little too wide, so that it might be suggested, as it has been suggested, that there is a charge against him subsequent to the formation of the company for acts not done by him as promoter. But the answer to this part of the case appears to me to be, that the report is not to be an indictment, and it is not to be a statement of claim, to charge a man with fraud. The object of the statement is to show a general *primâ facie* case—not that the man has to answer whether he has committed a fraud or not—upon which he is to undergo the public examination, and all that is done on the public examination, after it has taken place, is, as the end of the 7th section says, that it may be used in evidence against him. Then I do not see that the Act requires that the charge should be formulated against him in any strict and precise manner. I think it is only fair—and the official receiver probably in any future report will bear this in mind—that he should endeavour to reduce to as precise a point as he can the nature of the charge. But, as the House of Lords has said, all these sub-sections are to be read together and reconciled; and I find in the 7th sub-section, not that it is a charge made, but a charge suggested from which he

can exculpate himself. So that in the report, according to the language which the Legislature has used in section 8, which has been so much referred to in the House of Lords, the suggestion of fraud may be made against the persons whom the judge directs to be examined. Then there are the other parts of the report. The report states who the promoters were, and it mentions a company, which is called the contract company, and immediately after that it mentions Mr. Long and other persons as being concerned in the promotion of the company. I think that it would have been much more happy to use the term that is found in the Act itself, "taking part." But I do not hesitate for a moment to say that the meaning of this paragraph in the report is intended to point out that Mr. Long did take part in the promotion of the company, and it is in respect of that taking part in the promotion of the company that Mr. Long is charged.

There is one other point which I think just worthy of mention, and that is that in this narrative there is a statement of Long's agreement to sell to the company which is called for shortness the contract company. What was that company? It was a company that never had a greater subscribed capital than £35, and yet Mr. Long, who had some option, which has not been stated upon the report, to buy Cater's business, which had gone through a series of disasters, sells to that company the Cater business for £35,000, of which £25,000 is to be paid in cash, and £10,000 is to be paid in shares of any company which was to be formed by the contract company, and which is this company now in liquidation. That is one of the facts (the Master of the Rolls has called attention to many others) which present a very serious aspect. All I say is that it forms a part of what I consider to be a substantial basis that is made by this report for the judge directing that the public examination of Mr. Long shall take place.

I do not pursue the history of the Cater business; that has already been, I think, sufficiently dealt with. But here you have Mr. Long—I mean on the report, I am not saying a word against him in any other respect—endeavouring to pass off upon the public a business which is of little value through the medium of a contract with the promoting company, which promoting company had only got £35 in sovereigns, and never had any more. I think that that is a case that requires inquiry. I think that is a case in which Mr. Long probably, if he had not been advised to contest this, would say willingly: "I will face any public inquiry in regard to such a matter as this, and I can explain it all."

As to the decision in *Ex parte Barnes* I have nothing to add to what the Master of the Rolls has said except that in that case there was no charge of fraud made in the report, nor was there any statement of fact from which fraud could be inferred against the persons who were named as persons to be examined. For these reasons I agree with the Master of the Rolls.

VAUGHAN WILLIAMS, L.J.—In this case two questions have been raised. One is a question as to whether there was jurisdiction in the learned judge to make this order, and the second is whether the learned judge exercised a proper judicial discretion in making the order for the examination. Now, whatever may have been the view taken as to the conditions precedent to jurisdiction before the decision of the House of Lords in *Ex parte Barnes*, there can be no doubt that since that decision there are certain conditions precedent to the exercise of the jurisdiction which have been placed beyond the possibility of doubt. In the first place it is not sufficient that there should be the general report; there must be the further report; in the next place there can be no doubt that the further report must find fraud as against the persons against whom the order for public examination is asked; and lastly, there can be no doubt but that these persons against whom the order for public examination is to be made must fall within the categories mentioned in the beginning of sub-section 3 of section 8. I will just read that. [His lordship read the sub-section, and continued:] That does not mean that it is to be proved as a matter of fact that he does come within that category; but it does mean that the report must state that he comes within that category. Now, as to those conditions precedent there is no doubt at all. But there may be more questions as to what the nature of the finding of fraud against the individual must be before jurisdiction arises, and to a certain extent one has to look at sub-section 7 in order to get guidance as to this. Now, speaking for myself, I should hesitate very much to say that a mere narration as to the manner (to use the very words of the section) of the formation of the company, coupled with a statement that in the opinion of the official receiver fraud had been committed by A. B., would be sufficient to justify an order for the examination of A. B. I do not say that the judgment of the House of Lords in *Ex parte Barnes* is at all conclusive as to this point. But it does suggest that the statement of that opinion by the official receiver must be in such a shape that it can be said that there is a charge made against the person sought to be examined of such a kind that he can either exculpate himself or be incriminated. In my judgment that is essential to the exercise of the jurisdiction. I do not say that the decision in the House of Lords says so in so many words. It does not; but in my view that is necessary. The spirit of the decision of the House of Lords is that you are not to make an order for the examination of anyone unless he falls within those categories, and unless the judge is satisfied on the report that the report does make such a charge against the person sought to be examined, that he can know what it is that he must exculpate himself from, or if he fail, be incriminated with. In my judgment this report is on the borderline in both respects, so far as jurisdiction is concerned.

I think myself it is a great pity that this report not only does not use the words "take part in the promotion" (although I never think that much stress should be laid on using the very words of the section), but also carefully avoids from the beginning to the end of the report stating those facts from which it may be inferred that the person sought to be examined, in this case Mr. Long, took part in the promotion. Now, just let us see what the facts stated here are. They are stated a little in inverse order. Paragraph 3 in the report, which I think, in order to follow the chronology, should be read before paragraph 2, says: "Early in the year 1897 the contract company, with the assistance of Mr. Charles James Fox and Mr. Power, was engaged in promoting a scheme for amalgamating a number of army tailors and outfitters businesses, with the object of transferring the same to a company to be formed for the purpose of acquiring and carrying them on." So that one has got the contract company in existence who had this object. And paragraph 5 says, "With regard to W. Cater & Co. (Limited) it has transpired that the contract company"—that is, the company who were amalgamating these businesses—"were introduced by Mr. Cordeux Rhys (who afterwards became a director of the company) to Mr. Harry V. Long, of 8, Adam-street, Adelphi, who at that date was entitled by agreement to acquire

the assets of W. Cater & Co. (Limited). As commission or remuneration for the introduction, Mr. Cordeux Rhys was to be entitled to one-half of the net profits made by Mr. Long on the sale to the company." That being the state of things, paragraph 2 says, "The promoters of the company were the Home, Foreign, and Colonial Contract Co. (Limited)," which we have called the contract company, "a company which was registered on the 10th of December, 1887, with a nominal capital of £1,000 in 200 shares of £5 each, but which has never had a larger subscribed capital than £35." It was not, therefore, a mushroom company, formed *ad hoc*, but it was a company that had been in existence many years. "The persons concerned in the promotion of the company"—by which I understand is meant the company which is in liquidation and which was formed for the purpose of amalgamating these businesses—that is, the contract company—"were Mr. Charles James Fox, Mr. John Power, Mr. H. L. Fox, Mr. C. T. Fox, Mr. H. V. Long, Mr. F. C. Westoby, Mr. Albert King, Mr. Cordeux Rhys, and Mr. Arthur Firmin." Thus far no fact is stated to show that Mr. Long took any part in the promotion, or that he was concerned in the promotion in any other respect than that he had done the things mentioned in paragraph 5—that is, having an option of buying the business of Cater & Co. (Limited), he, being introduced to this financing company by Mr. Rhys, agreed to pay Mr. Rhys a commission for having obtained a purchaser of his option. Now, there is not another syllable, as far as I know, from the beginning to the end of this report showing that Mr. Long took any part or did anything in respect to the promotion. There are statements which lead one to see that Mr. Long would have derived a very large profit from the sale to this company which is now in liquidation, because it is plain that the contract corporation, to whom Mr. Rhys introduced Mr. Long, could not have paid out of their own means, and that they were only a promoting company who expected to pay out of the profit they made from the company that they were forming to purchase. There is not any statement of anything that Mr. Long did in the course of the promotion of this purchasing company which is now in liquidation. It also appears upon the facts stated here that in 1895 an order was obtained putting a reserve, apparently on the occasion of an attempted sale to this company, of something between £8,000 and £9,000, and there are statements as to the moneys earned by Cater & Co. and they do not seem to have exceeded, to put them at the highest sum, more than £8,000. So it is perfectly plain upon the face of the report that Mr. Long was going to get a very handsome price for that which he was selling to the contract company and through the contract company to this purchasing company which was to be formed by it. Now, I can only say that, in my judgment, it is highly undesirable that a report should be drawn in this form, and although I cannot take upon myself to say that the exercise of Wright, J.'s, discretion was wrong in the matter, I confess that I should have had considerable hesitation before I drew the inference that the report sufficiently stated that Mr. Long took part in the promotion.

Then one comes to the form of the charge that appears in the final clause, which comes in between clause 26 and the beginning of the schedule, "the official receiver is of opinion that fraud has been committed by the persons named in the schedule hereto in the promotion or formation of the company, or in relation to the company since the formation thereof"; that is to say, it is a writing out of the section of each possible matter as to which a charge could be made. Then follow the names of the people in the schedule. As to Mr. Long it is said that he is one of the promoters. It is said that although this finding of the official receiver is in form so vague that it only amounts to saying that the persons respectively—I suppose it means—named in the schedule had been guilty of one or other of the offences mentioned in the section, yet that this means that Mr. Long was guilty of the offence that he promoted the purchasing company to purchase a business which was worthless, and worthless to his knowledge. I think myself that it is straining the language of the report a good deal to say that you can find in the report itself either such a definite charge against Mr. Long, or the facts upon which such a charge could be substantially based. But here again there is a question of fact, and Wright, J., is satisfied as to both matters. He is satisfied that the report sufficiently states that Mr. Long did take part in the promotion, and he is satisfied that the report sufficiently finds fraud against Mr. Long. I cannot say that, with regard to either of those matters, there is nothing in the report to support the finding, and I do not feel justified under those circumstances in differing from Wright, J., whose duty it was to deal with this matter. But I cannot help saying that I think that to be satisfied with the meagre statements that are made here on either of those two questions—that is to say, as to Mr. Long taking part in the promotion, or as to there being any charge against him of fraud in the promotion, is not to act in accordance with the spirit of the decision in the House of Lords. The spirit of the decision in the House of Lords, to my mind, is that in dealing with this section you must not consider only the interests of the company, the shareholders, and the public in getting all the information they can in a case where the facts show that somebody or other has been guilty of gross fraud; but you must take care that you do not subject any person to public examination merely because you are satisfied, or merely because the official receiver is satisfied, that somebody or other has been guilty of fraud against the company. The spirit of that decision is that you are not to subject anyone to this public examination unless you are satisfied on the report that the official receiver has come to the conclusion, and come to the conclusion upon some substantial grounds, that there is a charge disclosed by the facts against the person sought to be examined, and such a charge that he may know what it is from which he will have to exculpate himself, and with which he may know that it will be sought to incriminate him.

I cannot, I think, usefully say any more in this case, excepting to express my earnest hope that our decision in this case may not be considered a precedent for reports of this character by the official receiver; that in future when reports are made by the official receiver, if he means to say that a particular person ought to be examined because he took part in the promotion, he will either say so in so many words, or will make statements of fact from which it can be inferred; and if he means to say that he not only took part in the promotion, but that he took part in a fraud, which is suggested to have been committed by some persons in the promotion, that he will definitely say so.

Appeal dismissed.

Solicitors, *J. Westcott; Solicitor to Board of Trade.*

High Court of Justice.

Chan. Div. North, J. — Nov. 5.

In re Kuyper's Policy Trust. (a.)

Married woman — Policy under Married Women's Property Act, 1870—*Appointment of trustees—Title of petition.*

Where a husband effected a policy in favour of his wife under the provisions of the Married Women's Property Act, 1870, *a petition for the appointment of trustees need not be entitled "In the Matter of the Married Women's Property Act,* 1882."

In re Turnbull, 46 *W. R.* 3, [1897] 2 *Ch.* 415, *and* In re Adams' Policy Trusts, 31 *W. R.* 810, 23 *Ch. D.* 525, *followed.*

Petition.

Under the Married Women's Property Act, 1870, a husband had effected a policy in favour of his widow. The husband having lately died, the widow now applied for the appointment of trustees to receive the sum secured by the policy. The petition was headed in the matter of the Act, 1870, and the policy trusts.

On the petition coming on a question arose as to whether the petition ought not also to be entitled in the matter of the Married Women's Property Act, 1882.

Metcalfe, for the petition, cited *In re Turnbull*, 46 W. R. 3, [1897] 2 Ch. 415, following *In re Adams' Policy Trusts*, 31 W. R. 810, 23 Ch. D. 525.

He also cited *In re Soutar's Policy Trust*, 32 W. R. 701, 26 Ch. D. 236.

North, J., followed *In re Turnbull* and *In re Adams*, and held that the petition need not be entitled under the Act of 1882.

Solicitors, *Gasquet & Metcalfe.*

Chan. Div. North, J. — Aug. 11, 1898.

In re Day.
Sprake *v.* Day. (a.)

Will—Contract entered into by testator—Devise—Non-completion of contract at time of testator's death—Right of devisee.

Where a testator devised land by his will and entered into a contract for the building of cottages on such land, which contract was unfinished at the time of his death.

Held (following Cooper *v.* Jarman, 15 *W. R.* 142, *L. R.* 3 *Eq.* 98), *that the devisee was entitled to have the contract completed at the cost of the estate.*

But this principle does not apply to land already conveyed to devisee before testator's death.

Summons.

This was a summons taken out in an administration action asking that the following supplemental inquiry might be directed—viz., "Whether the testator at the time of his death had entered into any and what building contracts still remaining uncompleted, and whether the estate of the testator is under any liability in respect thereof, and what sums of money would have to be provided in order to have the contracts completed."

The testator had by his will devised his dwelling-house and appurtenances to the defendant Mrs. Sprake-Day during her life and after her death to her daughter, and after the death of the survivor the testator directed that the said premises should fall into his residuary estate. Some time before the testator's death he had entered into contracts to have cottages built on the estate devised to Mrs. Sprake-Day and also on certain other land situate at Misterton, which, though originally belonging to the testator, had some time before been conveyed by him to Mrs. Sprake-Day. These contracts were not finished when the testator died, and Mrs. Sprake-Day claimed to have them finished and have the costs thrown on the personal estate left by the testator.

H. Terrell, Q.C., and *Romer*, for Mrs. Sprake-Day, relied on *Holt* v. *Holt*, 2 Vern. 322, and *Cooper* v. *Jarman*, 15 W. R. 142, L. R. 3 Eq. 98, as covering the case of the land devised, and argued that the principle extended to the land which had been conveyed.

E. C. Macnaghten, Q.C., and *T. H. Carson*, for the executors.—The case of *Cooper* v. *Jarman* stands by itself, and was decided on the ground that the heir-at-law had himself carried out the contract, and he was allowed the cost of so doing, but here the executors refuse to go on with the contract. In any event that case does not cover the Misterton property.

Romer replied.

North, J., held that as regards the property devised he would follow *Cooper* v. *Jarman*, which, although it had never been followed, had yet stood for a number of years without being reversed or commented on. But as regards the Misterton property he held that as there was no consideration passing from Mrs. Sprake-Day she could not claim to have the contract completed, for as regards this property she was in the position of a stranger, and could not ask for a contract entered into by the testator to be completed for her benefit.

Solicitors, *Hartcup, Davis, & Cobbold; Edmunds & Co.*

Chan. Div. Byrne, J. — July 11, 1898.

Felix Hadley & Co. *v.* Felix Hadley. (a.)

Cheque—Securities—Sale of a business for all book and other debts and the full benefit of securities for such debts—Debt paid by cheque not cashed until after date of sale—Conditional payment.

The sale of a business in consideration, inter alia, *of all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts, will not pass debts for which the vendor has received cheques prior to the sale and which he cashed subsequent to it, payment by cheque amounting to a conditional payment, and the debt only reviving if the cheque is dishonoured.*

Trial of action.

This was an action for damages and an account

(a.) Reported by R. Sillem, Esq., Barrister-at-Law.

(a.) Reported by J. Arthur Price, Esq., Barrister-at-Law.

in respect of a sale of the defendant's business to the plaintiff company. The facts of the case so far as the same call for a report were as follow: Under an agreement bearing date the 5th of April, 1888, the defendant agreed to sell to the plaintiffs the business as existing on the 31st of December, 1887, with the goodwill thereof, trade-marks, patent rights, &c., also the stock-in-trade, plant, and effects, and all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts, and of all engagements, rights, and privileges of the vendor in relation to the said business. At the trial Byrne, J., dismissed the action so far as related to the claim for damages, but directed an inquiry as to whether the defendant had received any debts, &c., belonging to the business since the 1st of January, 1888. On the inquiry, the defendant admitted that on the 31st of December, 1887, he was in possession of cheques and bills received by him in respect of debts belonging to the business, but which he had not cashed until after that date. The matter, therefore, again came before the court.

Astbury, Q.C., and *Kirby*, for the plaintiffs.—The matter may be put in two ways. It may be said that the sums in respect of which the uncashed cheques were given were debts. In that case as these debts were not paid on the 31st of December, 1887, they passed to the purchasers. Or the cheques and bills may be regarded as securities for debts, in which case also they passed to the purchasers under the agreement.

They referred to *Currie* v. *Misa*, 23 W. R. 450, L. R. 10, Ex. 153; *M'Lean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95, 32 W. R. Dig. 35.

Ere, Q.C., and *Ingpen*, for the defendant.—A payment by cheque of a debt is a good conditional payment. It is distinctly a conditional payment, and the debt revives only if the cheque is dishonoured: *Belshaw* v. *Bush*, 11 C. B. 191.

They referred to the observations of Lord Blackburn in *M'Lean* v. *Clydesdale Banking Co.*

Astbury, Q.C., replied.

BYRNE, J.—The point that I have to decide here turns upon the proper construction to be put upon the agreement of the 5th of April, 1888. [His lordship proceeded to state the terms of the agreement, and continued:] The sale was therefore to include all book and other debts due to the vendor in connection with the said business, the full benefit of all securities for such debts and of all contracts, engagements, rights, and privileges of the vendor in relation to the said business. On or before the 31st of December, 1887, the vendor received cheques and bills in payment of debts due to him. Such bills or cheques were not met or honoured on that day, and it is said that these debts therefore are debts included within this clause of the contract. I do not think that this is the true view to take of it. I think that the true view is that when debts were paid conditionally or unconditionally, such debts were not meant to pass to the purchasers. In this case I think that what took place amounted to a conditional payment of the debts, the condition being that the cheque or bill should be duly met or honoured at the proper date. If that be the true view, then I think that the position is exactly as if an agreement had been expressly made that bills or cheques should operate as payment unless defeated by dishonour by not being met, and I think that that agreement is implied from the giving and taking the cheques and bills in question. Then with regard to the words "Full benefit of all securities for such debts." Those words mean all running securities for such debts as have not conditionally or unconditionally been paid upon that date. If these bills or cheques had not been duly met the debts would have revived; but inasmuch as they have been duly met, I consider that, the condition having been observed, there was payment as from the date of giving the bills and cheques.

Action dismissed.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*, for *Smith, Pinsent, & Co.*, Birmingham.

Solicitors for the defendants, *Burton, Yeates, & Hart*, for *Johnson, Barclay, & Co.*, Birmingham.

Q. B. Div.
(Lawrance and Channell, JJ.) Jan. 25.

JONES v. BEIRNSTEIN. (*a*.)

Landlord and tenant—Distress—Pound breach—Possession—Abandonment—11 *Geo.* 2, *c.* 19, *s.* 10.

To maintain an action for pound breach or rescue of goods distrained for rent it is not necessary, even as against the true owner thereof, that the plaintiff should retain actual possession of the goods.

Appeal from the Southwark County Court.

The plaintiff levied a distress upon the premises of Morrisey, his tenant, for £12 10s. arrears of rent. A man, Kay, was put into possession of the goods upon the premises. A large part of the goods belonged to the defendant, who had let them to Morrisey on a hire-purchase agreement. Kay went home every night, returning the following morning. On Saturday, the 16th of July, he left the premises at 8.30 p.m., intending to return on Monday morning. Shortly after his departure the defendant removed the goods from the premises. The plaintiff thereupon brought an action in the county court for treble damages for pound breach.

The learned county court judge found that Kay abandoned possession of the goods, there being no reasonable necessity for his absence, but that he did not abandon the distress, and upon these findings he gave judgment for the defendant on the ground that real possession was required, allowing for absences reasonably necessary.

J. D. Crawford, for the plaintiff.—Actual possession of goods impounded under a distress is not necessary even against the true owner: *Bagshawes (Limited)* v. *Deacon*, 46 W. R. 618, [1898] 2 Q. B. 173, which was founded on *Ackland* v. *Paynter*, 8 Price, 95, does not apply. The goods were there taken under an execution, and the law with regard to distress is different. Prior to 1737 it is clear that no possession was necessary. The goods or cattle distrained were put into a public pound. The law is thus stated in Co. Litt. at p. 476: "If the distress be taken of goods without cause, the owner may recover; but if they be distrained without cause and impounded, the owner cannot break the pound and take them out, because they are in the custody of the law." This passage is cited in *Parret Navigation Co.* v. *Stower*, 6 M. & W. 564. Section 10 of the Act 11 Geo. 2, c. 19, passed in the

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

interest as well of the tenant as of the landlord, provides as follows: ". . . it shall and may be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent as shall be most convenient for impounding and securing such distress. . . ." To impound goods under this provision in a private house nothing more was required than what was formerly required in impounding goods in a public pound: *Washborn* v. *Black*, 11 East, 405 (note); *Swan* v. *Falmouth* (*Earl of*), 8 B. & C. 456; *Firth* v. *Purvis*, 5 T. R. 432; *Kemp* v. *Christmas*, 79 L. T. 233; Clerk and Lindsell on Torts (2nd ed.), p. 261.

Green, Q.C. (*Schwabe* with him).—In 11 Geo. 2, c. 19, s. 10, a distinction is drawn between "impounding" and "otherwise securing." The goods here were "otherwise secured," and the presence of the man in possession was necessary to indicate which of the goods were in the custody of the law. The goods were distrained, but there was no impounding. In order to properly impound the goods it is necessary to collect the goods so impounded into one or more rooms: see Bullen's Law of Distress, p. 147. The goods having been only otherwise secured and not impounded, as soon as the possession ceased they were free. No action for tresspass would lie by the distrainer and *a fortiori* no action for pound breach: *Tennant* v. *Field*, 6 W. R. 11, 8 E. & B. 336; *Thomas* v. *Harries*, 1 Man. & Gr. 695.

LAWRANCE, J.—The question is whether as against the true owner of goods taken in distress real possession is necessary on the part of the distrainer. I think the county court judge was wrong. I cannot see that the true owner is in any better position than the tenant of the property on which the distress is made. It is clear from the case of *Bannister* v. *Hyde*, 2 El. & El. 627, 8 W. R. C. L. Dig. 26, that there is ample authority that it is not necessary to have anyone on the premises. For these reasons, without deciding what is necessary to be done in every case, I think the learned county court judge was wrong.

CHANNELL, J.—I am of the same opinion. In order to maintain an action for pound breach it is necessary to show that the goods are in the custody of the law. It is said that it is necessary in order to keep them in the custody of the law that the party distraining them should retain actual posession. It seems, however, that if once they are in the custody of the law retention of possession is not necessary. If the distrainer goes out with the intention of abandoning the distress, the goods are then out of the custody of the law, but it is not necessary that he should remain in actual possession. That was decided in *Bannister* v. *Hyde*. It makes no difference whether you assume the goods were impounded or not—whatever does constitute impounding. Probably simply taking possession is sufficient to constitute impounding. The action for pound breach therefore lies in this case, and the learned county court judge was wrong. In *Kemp* v. *Christmas* the point raised here was assumed.

Solicitor for the plaintiff, *C. J. Parker*.

Solicitor for the plaintiff, *H. E. Tudor*.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Jan. 14.

MELLOR v. TOMKINSON. (*a*.)

Master and servant—Employers' liability—Accidental injuries — Building — Building over thirty feet in height — Building on which machinery is used—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.

According to the true construction of section 7, *sub-section* 1, *of the Workmen's Compensation Act*, 1897, *employment on a building on which machinery is used for the purpose of the construction, repair, or demolition thereof, is within the Act, although the building does not exceed thirty feet in height.*

Appeal from the decision of the judge of the Liverpool County Court in an arbitration under the Workmen's Compensation Act, 1897.

This was a claim by a workman to recover from his employers compensation for accidental injuries suffered by him in the course of his employment. At the time of the accident the workman was engaged in the construction of a building which did not exceed thirty feet in height, but on which machinery driven by mechanical power was being used for the purpose of the construction thereof.

By section 7, sub-section 1, of the Workmen's Compensation Act, 1897, "This Act shall apply . . . to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof."

The county court judge held that the case came within the statute, and made an award in favour of the workman.

The employers appealed.

Clavell Salter, for the appellants.—No building is within the statute, unless it is over thirty feet high. The words "which exceeds thirty feet in height" govern all the remaining words down to the end of the sub-section. In order to bring a building within the statute it must be shown, in the first place, that it is over thirty feet high, and, in the second place, either that it is being constructed or repaired by means of a scaffolding, or that it is being demolished, or that machinery driven by mechanical power is being used on it.

Pickford, Q.C., and *Segar*, for the respondent, were not called upon to argue.

A. L. SMITH, L.J.—The question is as to the construction of that part of section 7, sub-section 1, of the Workmen's Compensation Act which relates to buildings. I read the sub-section as meaning this: the Act is to apply to any building which exceeds thirty feet in height, and which is either being constructed or repaired by means of a scaffolding, or is being demolished. There the sub-section pauses. The words "which exceeds thirty feet in height" are only coupled with the words "and is either being constructed or repaired by means of a scaffolding, or

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

being demolished." Then the sub-section proceeds: "or on which"—that is to say, the Act is to apply to any building on which—"machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof." Therefore, if a workman sustains injuries by accident arising out of and in the course of his employment, while he is engaged on a building on which machinery driven by mechanical power is being used for the purposes of construction, repair, or demolition, he is within the Act, and it is not necessary that the building should be thirty feet high. The appeal must be dismissed.

CHITTY, L.J.—I am of the same opinion. According to the natural grammatical construction of the sub-section, the antecedent to the word "which" in the clause "or on which machinery driven by steam, water, or other mechanical power is being used," is "any building," not "any building which exceeds thirty feet in height." The Legislature evidently considered employment on a building on which machinery driven by mechanical power is used as being a distinct class of dangerous employment apart from employment on a building over thirty feet high.

COLLINS, L.J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Mackrell, Maton, & Co.*, for *Tyrer, Kenion, Tyrer, & Simpson*, Liverpool.

Solicitors for the respondent, *Crowders & Vizard*, for *Lynskey*, Liverpool.

From Q. B. Div. (A. L. Smith and Chitty, L.JJ.) — Jan. 27.

HODSON AND WIFE *v.* PARE. (*a*.)

Libel—Defamation—Absolute privilege—Lunacy proceedings — Petition for reception order — Judicial proceedings—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 4, 5, 6, 9, 28.

Proceedings instituted by petition under the Lunacy Act, 1890, *ss.* 4 *and* 5, *for a reception order are judicial proceedings, and therefore a defamatory statement made in the statement of particulars accompanying the petition is absolutely privileged.*

Appeal from the refusal of Grantham, J., at chambers to order the statement of claim to be struck out as disclosing no cause of action, and the action to be dismissed as vexatious and an abuse of the process of the court.

The statement of claim was as follows:

1. The plaintiffs are the father and mother of the defendant's wife and of two other daughters who are unmarried and of five sons.

2. On or about the 16th of August, 1898, the defendant presented a petition for a reception order in respect of his said wife pursuant to the provisions of the Lunacy Act, 1890, ss. 4 and 5, and signed a statement of particulars by which such petition was accompanied, and caused the said petition and statement of particulars to be delivered and presented to Richard Gleed as a justice of the peace for the parts of Holland, Lincolnshire, having jurisdiction in the place where the defendant's said wife was then alleged by him to be.

3. The defendant in the said statement of particulars falsely and maliciously wrote and published of the female plaintiff in the form of an answer to the question "whether any near relative has been afflicted with insanity," the words following, that is to say: "Yes" (meaning thereby that some near relative of his said wife had been afflicted with insanity), "her mother with puerperal mania" (meaning thereby that the female plaintiff had been afflicted with that form of insanity).

4. The defendant further meant by the said words that the plaintiffs' children had an hereditary predisposition to insanity, and that his said wife, as one of them, was then insane in consequence of such predisposition.

5. By reason of the premises the plaintiffs have respectively been brought into contempt and disrepute, both personally and in respect of their children, and have suffered great annoyance and been injured in their social reputation and character as a family.

Each of the plaintiffs claims £1,000.

The master having ordered the statement of claim to be struck out as disclosing no cause of action, and the action to be dismissed as vexatious and an abuse of the process of the court, Grantham, J., discharged this order upon the ground that the case was not one to be dealt with on a summary application.

The defendant appealed.

R. M. Bray, Q.C., and *Willoughby Williams*, for the defendant.—The statement of claim discloses no cause of action. The proceedings before the justice as described in the statement of claim were judicial proceedings, and any statement made in the course thereof is absolutely privileged. By section 4, sub-section 1, of the Lunacy Act, 1890, a person, not being a pauper or a lunatic so found by inquisition, shall not be received and detained as a lunatic unless under a reception order made by the judicial authority thereinafter mentioned; and by sub-section 2 the order must be obtained upon a private application by petition, accompanied by a statement of particulars and by two medical certificates on separate sheets of paper. By section 5, sub-section 4, the petition has to be signed by the petitioner and the statement of particulars by the person making it. The form of the statement of particulars is given in Form 2, Schedule II., of the Act, and the statement complained of as defamatory was given in answer to a question specified in that form, "whether any near relative has been afflicted with insanity." By section 6 the judicial authority, before making the order, shall consider the allegations in the petition and statement of particulars and the evidance of lunacy appearing by the medical certificates. By section 9, sub-section 1, the "judicial authority" is defined to mean a justice of the peace specially appointed, a county court judge, or a stipendiary magistrate. These provisions of the Act show that the proceedings are judicial, and therefore the statement of claim discloses no reasonable cause of action, and as a demurrer would formerly have succeeded, the court may now order the action to be dismissed: *per* Lord Selborne, L.C., in *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, at p. 710, 10 App. Cas. 210, at p. 215. [They also referred to *Lilley* v. *Roney*, 61 L. J. Q. B. 727, 41 W. R. Dig. 64.] Secondly, the words complained of are not capable of a defamatory meaning, and upon this ground also the learned judge was wrong.

Blake Odgers, Q.C., and *Etherington Smith*, for the plaintiffs.—These proceedings are not judicial proceedings either in their nature or in their result. They are administrative proceedings. The evidence is not given on oath. The judicial authority merely reads the documents

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

and makes or refuses to make the order, though by section 9, sub-section 2, he has power to summon witnesses and examine them on oath. Further, no notice is given to the alleged lunatic or to the relatives to appear and contest the matter, or to cross-examine. The alleged lunatic has no right to call evidence as to her sanity. Nor are the proceedings heard in public. These facts show that the proceedings are not judicial. The order does not decide anything, nor does it affect the status of the alleged lunatic: section 72, sub-section 1. It is a mere temporary disposal of the alleged lunatic for a few hours: section 8. The operative words in the order (Form 3) are the same as those in an urgency order (Form 4), which, by section 11, sub-section 1, must be signed, if possible, by the husband or wife or a relative of the alleged lunatic, and which is clearly not an order made in a judicial proceeding. The phrase "judicial authority" does not show that the proceedings are judicial, because a judicial authority frequently acts in merely administrative matters. Part I. of the Act, which deals with reception orders, is not judicial in its character; whereas Part III., which is headed "Judicial Inquisition as to Lunacy," is clearly judicial. The statements complained of, therefore, are not absolutely privileged. At any rate, this is not a case for the application of the summary powers conferred by ord. 25, r. 4.

They referred to *Royal Aquarium, &c., Society* v. *Parkinson*, 40 W. R. 450, [1892] 1 Q. B. 431.

Willoughby Williams, in reply.—As regards the objection that the evidence is not given on oath, the medical certificates are, by section 28, sub-section 4, made evidence of the facts therein appearing, and of the judgment therein stated to have been formed, as if the matters therein appearing had been verified on oath. The Act makes the statements in the petition, in the statement of particulars, and in the medical certificates evidence; and by section 317 any person making a wilful misstatement of any material fact therein shall be guilty of a misdemeanour.

A. L. SMITH, L.J.—This is an application under ord. 25, r. 4, to strike out the statement of claim as disclosing no cause of action, and to dismiss the action as vexatious and an abuse of the process of the court. The statement of claim is drawn so that it raises in a neat form the question whether proceedings instituted under sections 4 and 5 of the Lunacy Act, 1890, are judicial or administrative. If the former, the statement complained of is absolutely privileged; if the latter, it is not. Therefore we must see whether the statement was made in the course of judicial proceedings. The statement was made to a justice of the peace in the course of proceedings instituted for the purpose of obtaining a reception order authorizing the detention of a lady under the provisions of the Lunacy Act, 1890. Section 4, sub-section 1, of the Act, dealing with reception orders, provides that "subject to the exceptions in this Act mentioned, a person, not being a pauper or a lunatic so found by inquisition, shall not be received and detained as a lunatic in an institution for lunatics, or as a single patient, unless under a reception order made by the judicial authority hereinafter mentioned. . . ." To see what is the "judicial authority," I turn to section 9, which by sub-section 1 provides that "the powers of the judicial authority under this Act shall be exercised by a justice of the peace specially appointed as hereinafter provided, or a judge of county courts, or magistrate," the word magistrate being defined, by section 341, to mean a stipendiary or metropolitan police magistrate. The contention on the part of the plaintiffs is that the judicial authority in hearing an application for a reception order merely exercises administrative duties, just as in the case of *Royal Aquarium, &c., Society* v. *Parkinson* it was held that the London County Council, when engaged in hearing applications for music and dancing licences, act administratively. It seems to me to be clear, reading the various sections of the Act, that the judicial authority, in the exercise of lunacy jurisdiction under this part of the Act, is exercising judicial as distinguished from administrative functions. In opposition to this view it is first of all said that the judicial authority does not take evidence on oath. The answer to that contention seems to me to be this, that the statements in the petition, in the statement of particulars, and in the medical certificates are made evidence by the Act: section 6, section 1; and by section 28, sub-section 4, every medical certificate is made evidence of the facts therein appearing, and of the judgment therein stated to have been formed by the medical practitioners on such facts, as if the matters therein appearing had been verified on oath; and as a protection, section 317 enacts that any person who makes a wilful misstatement in any of these documents shall be guilty of a misdemeanour. It is next said that the alleged lunatic is not heard before the judicial authority, nor given the opportunity of appearing or being represented, and that this shows that the proceedings are not judicial. To my mind that cannot affect the question of absolute privilege. It has been held* that a statement made on an *ex parte* application to justices sitting in court is absolutely privileged. It is then said that the reception order does not affect the status of the alleged lunatic. I cannot agree with that view. So long as the order stands the alleged lunatic is not entitled to go free. I have therefore come to the conclusion, upon the true construction of the Act, that the justice of the peace, in exercising his jurisdiction in regard to lunacy matters as set out in the statement of claim, was exercising judicial as distinct from administrative functions, and that anything said in the course of those proceedings before him is absolutely privileged. The order, therefore, of the master must be restored.

CHITTY, L.J.—I am of the same opinion. The question is a short one. If these proceedings are administrative, the privilege is not absolute; if they are judicial, the privilege is absolute. To my mind the answer to the question can only be that the proceedings are judicial according to the statute. The proceedings commence with a petition accompanied by a statement of particulars and two medical certificates: section 4, sub-section 2; and by section 5, sub-section 4, the petition is to be signed by the petitioner, and the statement of particulars by the person making it. The statement of particulars required is given in Form 2 in Schedule II. of the Act, and the statement alleged to be defamatory in the present case was made in answer to a question set out in the form, namely, "whether any near relative has been afflicted with insanity." It is said that the evidence is not given on oath. But the Act says what shall be sufficient evidence: section 6, sub-section 1, and section 28, sub-section 4; and by section 317 any person who makes a wilful misstatement shall be guilty of a misdemeanour. The Act has thus safeguarded the proceedings by making the petitioner, the person signing the statement of particulars, and the medical men subject to punishment if they make a wilful misstatement. Then there come the sections (section 6, sub-section 4; section 9, sub-section

* See *Usill* v. *Hales*, 26 W. R. 371, 3 C. P. D 319; and *Kimber* v. *Press Association*, 41 W. R. 17, [1893] 1 Q. B. 65.

which empower the judicial authority to summon any persons before him and to administer an oath. I therefore come to the conclusion that this statement of claim discloses no cause of action, and in my opinion the second part of ord. 25, r. 4, should be applied, and the action dismissed.

Appeal allowed.

Solicitors for plaintiffs, *Indermaur & Brown*, for *Clifford & Perkins*, Loughborough.

Solicitors for defendant, *Dalston, Son, & Elliman*, for *Turner, Barrows, & Moss*, Nottingham.

From Q. B. Div. (Bkcy.) (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) Jan. 20.

In re HIRTH.
Ex parte THE TRUSTEE. (*a.*)

Bankruptcy—Fraudulent conveyance by insolvent trader —Sale of business to limited company—Bankruptcy of vendor — Winding up of company — Rights of trustee in bankruptcy and liquidator respectively— 13 Eliz. c. 5—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (b); *ss.* 43, 44.

Where an insolvent trader, for the purpose of defeating his creditors, transfers his business to a limited company, the transfer is an act of bankruptcy within sub-section 1 (b) *of section* 4 *of the Bankruptcy Act,* 1883; *and if he is made bankrupt on a petition presented within three months after the transfer, the title of his trustee in bankruptcy relates back to the date of the transfer, so as to enable the trustee to avoid the transfer and to claim the property fraudulently transferred to the company, even after a winding-up order has been made.*

Salomon *v.* Salomon & Co. (Limited), 45 *W. R.* 193, [1897] *A. C.* 22, *distinguished.*

Decision of Wright, J. (ante, *p.* 192), *reversed.*

Appeal from a decision of Wright, J. (*ante*, p. 192, where the facts are sufficiently stated).

Muir Mackenzie and *Eldridge*, for the trustee in bankruptcy, who appealed, referred to sub-section 1 (*b*) of section 4 of the Bankruptcy Act, 1883; *In re Von Weissenfeld, Ex parte Hendry*, 9 Morr. Bank. Rep. 30; *Ex parte Chaplin, In re Sinclair*, 26 Ch. D. 319, 334, 32 W. R. Dig. 10; *In re Carey, Ex parte Jeffreys*, 43 W. R. 605, 44 W. R. 59, [1895] 2 Q. B. 624; *Sanguinetti v. Stuckey's Banking Co.*, 43 W. R. 154, [1895] 1 Ch. 176; and *In re Farnham*, [1895] 2 Ch. 799, 44 W. R. Dig. 98.

Herbert Reed, Q.C., and *Edward Clayton*, for the liquidator.—*In re Carey* shows that in any case creditors of the company are to be preferred.—[VAUGHAN WILLIAMS, L.J., referred to *Smith* v. *Brown*, 45 W. R. 132, [1896] A. C. 614.] Unless the transferees were parties to a fraud on creditors, and unless the transfer included the whole of the transferor's property, the Act of Elizabeth does not apply; and if the transfer was a *bonâ fide* sale the Bankruptcy Act, 1883, does not apply. Even if this transfer was an act of bankruptcy, it is not void, but only voidable, and rights acquired under it before it is avoided are not affected: *Stevenson* v. *Newnham*, 13 C. B. 285. [VAUGHAN WILLIAMS, L.J., referred to *Butcher* v. *Stead*, 24 W. R. 463, L. R. 7 H. L. 839.]

They referred to sections 123, 138, 163 of the Companies Act, 1862; *In re Wragg*, 45 W. R. 557, [1897] 1 Ch. 796; *Shears* v. *Goddard*, 44 W. R. 402, [1896] 1 Q. B. 406; *In re Carter and Kenderdine's Contract*, 45 W. R. 484, [1897] 1 Ch. 776; *In re Thurso New Gas Co.*, 38 W. R. 156, 42 Ch. D. 486; *Smith* v. *Hodson*, 4 T. R. 211; and *Smith* v. *Baker*, L. R. 8 C. P. 350, 21 W. R. Dig. 260.

No reply was called for.

LINDLEY, M.R.—This is a case which has taken some considerable time, and which is of enormous practical importance; for, covered with a multitude of technicalities, there is, behind, a question of the utmost possible importance to people who promote and form these public companies.

There was, it appears, a person of the name of Carl Hirth, who was a trader. There was an action, or several actions, pending against him, and he thought that he would turn his business into a limited company, and so he did. The company was formed for the purpose (according to its memorandum of association) of taking over his business for a sum of £3,000. The capital of the company was to consist of 3,000 shares of £1 each. Of course—to use, not accurate legal language, but colloquial language—Hirth was the company. Of course there were seven members; the requirements of the Companies Acts were in form carefully complied with. But Hirth was the managing director, he was the secretary, he was everything. He could, and did, draw cheques as he liked, and nearly all the cheques he drew were payable to himself. He has now become bankrupt, and the company to which he sold his business is being wound up; and in consequence there is a struggle between Hirth's trustee in bankruptcy, who represents Hirth's personal creditors, and the liquidator of Hirth & Co. (Limited), who, of course, represented the creditors of the company. The question between those parties is, which set of creditors is to get the assets which Hirth sold—as he calls it—to this company. If the decision of this court should now be in favour of the company the practical result would be that much greater frauds could be perpetrated by traders in difficulties than can be perpetrated even now. Though, to a certain extent, these bubble companies have been declared by the House of Lords to be legal, yet nothing in the decision of the House of Lords in the case of *Salomon* v. *Salomon & Co.* (*Limited*), to which, of course, we all bow, touches the point which we have now to decide. *Salomon* v. *Salomon* was, of course, a decision of the utmost importance. It decided that a company can be legitimately formed under the Companies Acts by one man, or by one or two men, all the rest of the subscribers to the memorandum being mere men of straw. Such companies are now ascertained to be legal, and there is, in the present state of the law, no machinery by which they can be extinguished. The question in *Salomon* v. *Salomon & Co.* was whether the company can first of all present a petition for winding itself up, and then get out of the bargain it had made with its founder. But in that case the question was never raised whether the creditors of the sole trader can impeach the transaction as a fraud upon his creditors under the statute of Queen Elizabeth, or as an act of bankruptcy under the Bankruptcy Act, 1883.

The point now raised is new to all of us, and, as will be obvious to all who have followed me in what I have just said, is one of enormous practical importance to all those concerned in the formation of such companies. I have come to the conclusion that this appeal ought to succeed. I think the view taken by the trustee in bankruptcy of Mr. Hirth is the right one, and that the difficulty felt by Wright, J., in giving effect to that view can be got over. It seems to me

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

plain that the transaction carried out by the agreement of the 7th of March, 1898, was a juggle and a fraud. That, I think, admits of no doubt at all to anybody who has attended to the evidence. There may be a difficulty—I think there is a difficulty—in saying whether that transaction can be reached under the statute of Elizabeth as a fraud upon creditors. Perhaps it can be more easily reached under the Bankruptcy Act, 1883. To enable it to be reached under the statute of Elizabeth, it must be shown that the transfer included all, or substantially all, of Hirth's property, and that the transferee knew that the transferor was cheating his creditors. I do not say that we have evidence which ought to satisfy us judicially that the company did know that. I have a very strong opinion upon that point, but I think it is safer not to go the length of saying that the company was a party to the fraud. But this case appears to me to fall within the 4th section of the Bankruptcy Act, 1883. [His lordship read sub-section 1 (*b*) of that section, and proceeded:] This enactment enormously extends that contained in the statute of Elizabeth. You have not now to consider whether the person who takes the debtor's property knows anything about the fraud which the debtor is committing upon his creditors, and you have not to consider whether that which is transferred is the whole, or substantially the whole, of the debtor's property. You have simply to consider the debtor's own position, and to see what he has done; and if you find that he has made "a fraudulent conveyance, gift, delivery, or transfer," then he has committed an act of bankruptcy. That is what this section says: it says nothing at all about a void or voidable transaction, or about anything else except a fraudulent conveyance.

Now, without going through the evidence, I think there can be no doubt, so far as Hirth is concerned, that the purpose of the transaction with the company, Hirth & Co. (Limited), was to defeat the persons who, at the time of the formation of the company, were bringing actions against the debtor. That, I think, is as plain as the nose on a man's face. The company was formed on the 7th of March, 1898, and at that time there were several actions pending against Hirth. An agreement was entered into between Hirth and the company for the sale to the company of Hirth's property for a sum of £3,000, and so on. The company continued to carry on business, more or less, for some time. In May, 1898, not very long afterwards, the costs which were being incurred against Hirth, and which he wished to escape paying, were taxed and ascertained. On the 3rd of May a bankruptcy notice was issued against him in respect of those costs, and afterwards, that notice not being complied with, a bankruptcy petition was presented against him, and a receiving order was made on that petition on the 27th of May, 1898. On the 2nd of August, 1898, the trustee subsequently appointed in Hirth's bankruptcy elected to treat, or determined to treat, the transaction of the 7th of March, 1898, as invalid as against Hirth's creditors, and applied to have that transaction set aside. Of course, if the trustee in bankruptcy is right, the liquidator of the company must hand over to him such assets belonging to Hirth as have come into the liquidator's possession in the liquidation. We have heard to-day a long discussion about void and voidable transactions; about which discussion, as it seems to me, it is necessary for us to say very little indeed. I have already called attention to the important fact that section 4 of the Bankruptcy Act, 1883—the section which lies at the very foundation of the law on this subject—says nothing at all about void and voidable transactions, but simply provides that certain acts therein mentioned shall be acts of bankruptcy. Pausing there for a moment, it is impossible to say that, because a sale or conveyance is by that section made an act of bankruptcy within the meaning of that Act, it is therefore void, and of no effect. That that is an impossible view is obvious, because although a man may commit an act of bankruptcy he may yet never be adjudicated bankrupt; and, of course, if he is not, all this talk about void and voidable transactions is beside the mark.

Then I pass on to the sections which have to be considered for the purpose of deciding the real question now raised—those sections which deal with the disposition of the property of a man who has committed an act of bankruptcy. The first of any importance is section 43, which embodies, with regard to the trustee in bankruptcy, what is called the doctrine of "relation back." [His lordship read the section.] That section is very important. There is no talk in it about "void" and "voidable." Hirth having been adjudicated bankrupt upon a petition presented on the 12th of May, 1898, his bankruptcy relates back to the 7th of March, 1898, the date of the assignment to the company, if that assignment was, as it clearly in fact was, a fraudulent conveyance within the meaning of the fourth section of the same Act, which I have already read. Now we are getting on to ground where it becomes important to speak of void and voidable dealings. What is the effect of this relation back? Its effect is to be gathered from section 44, which vests in the trustee in bankruptcy all the assets of the bankrupt. [His lordship read it.]

Now we have to consider this question: What is the position of a trustee in bankruptcy who finds that there has been a fraudulent conveyance which has been an act of bankruptcy, and who elects to treat that as an act of bankruptcy, and to upset it? It appears to me that absolutely no answer at all can be made to his claim to do so. There are, as we know, certain provisions in the Bankruptcy Act, 1883, as to protected transactions, and, of course, if this transaction is protected by those provisions, the trustee in bankruptcy cannot impugn it. But, so far as I have yet gone, there is nothing which points to any difficulty at all in the way of the trustee's application. Hirth's trustee in bankruptcy claims this property. The conveyance, which was an act of bankruptcy, was avoided by section 43 of the Bankruptcy Act, 1883, as from its date, being overreached by the bankruptcy petition. So far there is no difference between the view we are now taking and the view taken by the learned judge in the court below.

But we have now to consider the effect upon the trustee's rights of the winding-up of the company. Supposing this company were a person and not a corporation, what effect could that person's bankruptcy have upon the trustee's rights? None. What effect, then, has the winding-up of the company? It appears to me that it has simply none at all, and for this reason: the provisions in the Companies Act, 1862, which prevent any alteration in the status of bankrupt companies have no bearing at all on mere outsiders, and Hirth's trustee in bankruptcy is an outsider. There is no provision in the Companies Acts which prevents the claim of the trustee being prosecuted against the liquidator, except sections 85 and 87, which enact that after the presentation of a winding-up petition actions, suits, and proceedings may be restrained; and that after a winding-up order no action, suit, or proceeding shall be proceeded with or commenced. Mr. Herbert Reed said that the winding-up resolution alters the rights of the creditors by making them liable to have their actions stopped, and that the creditors, having

had their rights altered so that that may be done, ought to be treated as being, in a sense, secured creditors, and as having preferential claims. That argument would be all very well if the title of the trustee in bankruptcy could be treated as accruing only when he gave notice of his intention to impeach the transaction. In short, the argument might be good as against anybody except a trustee in bankruptcy, whose title relates back to the commencement of the bankruptcy. That "relation back" is peculiar to bankruptcy, and it is because the property is the trustee's as from an anterior date that no valid title can be acquired against him in the winding-up, and that he can upset all those transactions upon which Mr. Reed relied as an answer to his claim. That is the only point which has presented any difficulty, but I think I have shown how the language of sections 43 and 44 of the Bankruptcy Act, 1883, concludes the matter. There is really no difficulty when you understand the question and the sections of the Bankruptcy Act.

The appeal must therefore be allowed, and an order must be made for the handing over by the liquidator of the assets in his hands to Hirth's trustee in bankruptcy. The liquidator will be allowed any costs he has properly incurred in getting in the assets; but I do not suppose he will expect any costs of these proceedings. We shall not make him pay any costs. The trustee in bankruptcy will get his costs out of the assets when he receives them.

RIGBY, L.J.—I am entirely of the same opinion, and I shall deal only with that part of the case where we differ from Wright, J. The learned judge held that the mere commencement of the winding up is an absolute bar to the recovery of the property which belonged to the bankrupt, and which has been transferred to the company by a transfer constituting an act of bankruptcy. If that decision stood it would place in the hands of persons who wish to avoid payment of their debts a very simple machinery by which they could, to a very large extent indeed, avoid such payment. All that such persons would have to do would be to form a bubble company, and to wait until they saw whether their creditors (or the trustee in bankruptcy, as in this case) were going to take proceedings to recover the property which manifestly belongs to them and not to the company. If the creditors do take such proceedings, then the company would pass a resolution for winding up, and from that time forth that property, which belonged in every way to the bankrupt, the promoter of the company, would be beyond the reach of his creditors.

I agree that the appeal ought to be allowed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion, and I want only to correct a mistake which I made myself in the course of the argument to-day. When the case of *In re Carey, Ex parte Jeffreys*, was first mentioned I had not the report before me, and I thought I had in that case made an order preserving the rights of the *bonâ fide* creditors of the company upon the basis that they had acquired certain rights as members of the company, and that the property passed, subject to their rights, to the trustee in bankruptcy. The company being in liquidation, and the creditors of the company having got rights in the nature of a charge by reason of the appointment of a liquidator. On looking at the case I see that that was not so; and I see that the ground on which I decided that case cannot, since *Salomon* v. *Salomon & Co.*, be supported. That is to say, when I decided *Broderip* v. *Salomon*, before it went to the House of Lords as *Salomon* v. *Salomon*, I treated the trader who had formed this company for the purpose of carrying on his business as the principal and the company as the agent. I was of opinion, when I decided *In re Carey*, that the creditors of the bankrupt could not stand in any better position than their bankrupt, and that, therefore, the relation of principal and agent existing between the trader and the company, and the trader being bound to indemnify his agent against liabilities incurred by his agent at his direction, that gave the creditors of the agent priority. Of course, since the decision in *Salomon* v. *Salomon*, that cannot be supported.

I really have nothing to add to the exhaustive judgments already delivered by the other members of the court. But I do wish to say that on the facts of this case I should myself have been perfectly prepared to hold that on the 7th of March, 1898, the date of the conveyance of this property to the company, the company, by its agent, the managing director (Hirth himself), had notice of the true nature of the transaction, so as to bring the company itself within operation of the statute of Elizabeth, and that it has further had full notice for the purpose either of preventing the company taking advantage of the protective sections of the Bankruptcy Act, or of preventing the company from in any way successfully claiming the position of a *bonâ fide* purchaser without notice.

Appeal allowed.

Solicitors, *Sugden & Harford; Firth & Co.*

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Jan. 19.

NEWBY v. ECKERSLEY. (*a*.)

Landlord and tenant—Agricultural holding—Compensation for improvements—Special bargain—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 57.

By an agreement between the tenant of a farm and his landlord it was agreed that the tenant should quit the farm on a day named within the space of two months, and that, in consideration thereof, the landlord should pay him reasonable compensation in respect of certain unexhausted improvements under four heads, one of them being a matter for compensation under the Agricultural Holdings Act, 1883, *the other three being outside the Act.*

Held, that, notwithstanding anything contained in the Agricultural Holdings Act, such agreement was valid, and the tenant might maintain an action against the landlord to recover compensation thereunder.

Appeal from the judgment of Lawrance, J., at the trial of the action with a jury at Leeds Assizes.

The action was brought by the outgoing tenant of a farm against his landlord to recover compensation in respect of certain unexhausted improvements under the following circumstances:

The plaintiff was the holder of a farm on a tenancy from year to year determinable by six months' notice under a lease dated the 29th of April, 1886.

On the 17th of December, 1896, it was orally agreed between the parties that the plaintiff should give up possession of the farm on the 2nd of February, 1897, and should receive from the defendant reasonable compensation in respect of certain unexhausted improvements—viz.: (1) Purchase of feeding stuff consumed on the holding; (2) value of hay left on the holding; (3) a new floor to a barn; (4) cost of manuring eight acres. The amount of the compensation was to be fixed by two

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

valuers, and two referees were accordingly appointed for the purpose. In pursuance of this agreement the plaintiff quitted the farm on the 2nd of February. In the course of correspondence which followed between the parties, the defendant raised the point that the plaintiff had not given notice of his intention to claim compensation two months before the determination of the tenancy under section 7 of the Agricultural Holdings Act, 1883; but he waived the objection on condition that the valuers should also fix the amount of dilapidations for which the plaintiff was liable to him. The valuers met and agreed upon the amount of compensation payable by the defendant as follows—viz.: for purchase of feeding stuff consumed on the holding, £120 19s. 8d.; for hay left, £13 1s.; for new floor to barn, £1 5s.; and for cost of manuring, £4. They could not, however, agree on the question of dilapidations, and consequently they did not make any award; neither did they appoint an umpire in accordance with the provisions of section 9 of the Agricultural Holdings Act. The defendant having refused to pay compensation, the plaintiff brought this action to enforce the agreement entered into between the parties, and he claimed compensation as fixed by the referees. The defendant counterclaimed for dilapidations. At the trial, the jury having returned a verdict for the plaintiff in respect of his claim, the defendant took the objection that the action was not maintainable, and that the plaintiff's proper course was to proceed in accordance with the provisions contained in the Agricultural Holdings Act. Lawrance, J., gave judgment for the plaintiff on the claim, but stayed execution, saying that the parties might settle between themselves the amount of the dilapidations, and that that sum should be deducted from the amount of the plaintiff's claim. The defendant appealed.

A. T. Lawrence, Q.C., and *R. A. Shepherd*, for the defendant.—The High Court is not the proper tribunal to determine this matter. The plaintiff's only remedy is to follow the procedure provided by the Agricultural Holdings Act. The first and principal item in respect of which he claims compensation—viz., purchase of feeding stuff, is an improvement to which the Act applies: see First Schedule, Part III. Section 57 says that "a tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act." The effect of that section is to invalidate bargains such as that made in the present case.

Cyril Dodd, Q.C., and *G. J. Banks*, for the plaintiff, were not called upon to argue.

A. L. SMITH, L.J.—This is an action by the outgoing tenant of a farm against his landlord to enforce a bargain that if the tenant went out of possession before the expiration of his tenancy the landlord would pay him reasonable compensation to be settled by two valuers for unexhausted improvements under four heads, one of them being a matter for compensation under the Agricultural Holdings Act, the other three being matters outside the Act. The defendant says that the plaintiff cannot bring this action because the making of such a bargain is prohibited by the Agricultural Holdings Act. The question is whether by that Act a landlord and tenant are prohibited from bargaining with one another as to the terms on which the tenant should go out with regard to payment of compensation for unexhausted improvements. No doubt an Act of Parliament may contain an express prohibition against contracting out, as was in fact done in the Ground Game Act, 1880, s. 3. But I cannot find any such prohibition in the Agricultural Holdings Act, and therefore it seems to me that this bargain was a good bargain. It is argued that section 57 contains such a prohibition. That section says that "a tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act." Section 1 gives an outgoing tenant a general right to compensation in respect of certain classes of improvements, section 7 requires that a tenant claiming compensation under the Act shall give two months' notice of his claim, and succeeding sections deal with the settling of claims for compensation under the Act. I think that section 57 ought to be construed as applying only to a tenant claiming compensation under the Act, and as meaning that such a tenant shall not claim otherwise than in manner authorized by the Act. Here the plaintiff does not claim under the Act, for he claims in respect of matters which are not mentioned in the Act. I am therefore of opinion that the appeal should be dismissed.

CHITTY, L.J.—It is said on the part of the defendant that this bargain was void by reason of the Agricultural Holdings Act. I am of opinion that it was a perfectly valid bargain, for the Act does not prevent persons contracting themselves out of the Act if they think fit. The bargain was for payment of compensation in respect of four matters, three of which are without the Act, and only one within it. Again, the bargain itself was such that it was impossible for the tenant to give two months' notice of his intention to claim, and for want of such notice he had no power to claim for compensation under the Act. In my opinion there was in this case no reference under the Act all. I agree that section 57 applies only where a tenant is claiming compensation under the Act.

COLLINS, L.J.—The defendant's contention is that this agreement cannot be enforced by action, because the Agricultural Holdings Act provides a sufficient remedy, and that no agreement can qualify a right given by the Act. I do not think that the question of contracting out arises here at all; for this is not a case of contracting out of the Act. The tenant in this case had no right to compensation under the Act, because he had not given notice as required by section 7. The position was this: the landlord could not call upon the tenant to turn out on the 2nd of February, and the tenant had no right to compensation if he was to turn out on the 2nd of February, for it was impossible that he could give two months' notice of his intention to make a claim. So they entered into a bargain that if the tenant turned out on that day he should, in consideration thereof, receive certain compensation for improvements. The tenant, not having any existing right, bargained for a new and distinct right. I agree that that bargain was not rendered invalid by section 57. The claim in the action is founded on that bargain, and not on the statute: and I think the plaintiff is entitled to succeed.

Appeal dismissed.

Solicitors for the plaintiff, *Waddy & Kelsey*, for *H. A. Child*, Leeds.

Solicitors for the defendant, *Thorowgood, Tabor, & Hardcastle*, for *Bond, Barwick, & Peake*, Leeds.

C. A. NATL. TELEPHONE CO. (LTM.) (APPLTS.) v. COMMISSIONERS OF INLAND REVENUE (RESPTS.) C. A.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) Dec. 8, 9.

NATIONAL TELEPHONE CO. (LIMITED) (*Appellants*) v. THE COMMISSIONERS OF INLAND REVENUE (*Respondents*). (a.)

Inland revenue—Stamp duty—Agreement in consideration of fixed annual payments—"Bond, contract, or instrument, being the only or principal or primary security"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *First Schedule.*

By an agreement in writing, not under seal, one S. R. agreed to pay a telephone company the sum of £12 per annum for the use of a telephone wire and apparatus which the company was to affix to his house. The rent was to be payable every year in advance, and either party might put an end to the agreement by giving the other party three months' notice.

Held, that this instrument was liable to an ad valorem *duty under the head "Bond, Covenant, or Instrument of any kind whatsoever" in the first schedule to the Stamp Act*, 1891, *as being "the only or principal or primary security for any . . . sum or sums of money at stated periods for an indefinite period."*

Jones *v.* Commissioners of Inland Revenue, 43 *W. R.* 318, [1895] 1 *Q. B.* 484, *approved.*

This was an appeal by the National Telephone Co. from the judgment of Grantham and Channell, JJ., sitting as a Divisional Court, upon a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39). An instrument, of which the following is a copy, was presented by the National Telephone Co. for the opinion of the commissioners as to what stamp duty it was chargeable with: "The 9th of March, 1886. The undersigned hereby agrees with the South of England Telephone Co. (Limited)," (whose business the appellants in this case, subsequent to the above date, purchased) "subject to above conditions, to pay them the sum of £12 per annum yearly in advance, the first payment to be made on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the undersigned, and each subsequent payment to be made on the corresponding day in each and every following year, for the use of a private wire between No. 155, North-street and the South of England Telephone Co.'s local exchange system in Brighton. Either the company or the lessee may put an end to this agreement by giving to the other three calendar months' notice in writing expiring on the day previous to the rent being due in any year. No verbal notice can be recognized. Signature of renter (signed) Samuel Ridley. N.B.—All rentals are payable yearly in advance, and the first year's rent becomes due on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the renter."

The commissioners were of opinion that the instrument was the only or principal or primary security for the sum of £12 payable annually for an indefinite period, that such sum was neither interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, and that the instrument was chargeable with stamp duty under the head "Bond, Covenant, or Instrument of any kind whatsoever" in the first schedule to the Stamp Act, 1891, with the duty of 7s. 6d., being the *ad valorem* duty of 2s. 6d. for every £5, and also any fractional part of £5 of the £12, the sum annually payable by the renter to the telephone company. They assessed the duty thereon accordingly, and the instrument was stamped in conformity with the assessment. The questions for the court were (1) whether the instrument was chargeable with the duty of 7s. 6d. in accordance with the assessment of the commissioners; (2) if not, with what duty the instrument was chargeable.

Grantham and Channell, JJ., held that they were bound by the decision in *Jones* v. *Commissioners of Inland Revenue*, 43 W. R. 318, [1895] 1 Q. B. 484, and accordingly affirmed the decision of the commissioners.

From this judgment the company now appealed.

Asquith, Q.C., and *Roskill*, for the appellants.—This instrument is not covered by the words in the schedule to the Stamp Act, 1891, "bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security . . . for any sum or sums of money at stated periods . . . for any indefinite period." In order to come under those words the instrument must be a security to pay money. A security is something additional to a promise or undertaking, and is for the purpose of making the performance more certain. It implies an antecedent obligation. The present instrument cannot be described as such. It is merely an agreement for the hire and use of certain property of the company for which the hirer agrees to pay rent. An instrument which does nothing more than create a liability is not a security. It is therefore not a security and it is only chargeable with a stamp duty of sixpence. The decision in *Jones* v. *Commissioners of Inland Revenue* is wrong. Also in that case the instrument was under seal, in the present case it is not.

Counsel also referred to *Limmer Asphalte Co.* v. *Commissioners of Inland Revenue*, 20 W. R. 610, L. R. 7 Ex. 211; *Thames Conservators* v. *Commissioners of Inland Revenue*, 35 W. R. 274, 18 Q. B. D. 279; *Clifford* v. *Commissioners of Inland Revenue*, 45 W. R. 14, [1896] 2 Q. B. 187.

Sir R. B. Finlay, S.G. (*Danckwerts* with him), for the Crown.—The word "security" in the clause in question was intended to include an instrument creating a liability as in this case; it was not intended to apply only to documents creating a collateral liability. It is immaterial whether the instrument is under hand or under seal. This was a contract creating a liability to pay, and the instrument itself was the only security for the payment; it was therefore a "security" within the meaning of the clause in the first schedule.

They cited the following cases: *Matheson* v. *Ross*, 2 H. L. Cas. 286; *Adams* v. *Morgan*, 12 L. R. Ir. 1. 31 W. R. Dig. 190; *Mersey Docks and Harbour Board* v. *Commissioners of Inland Revenue*, [1897] 2 Q. B. 316, 46 W. R. Dig. 74; *Guardians of the Poor of West Ham Union* v. *Ovens*, 21 W. R. 143, L. R. 8 Ex. 37.

A. L. SMITH, L.J.—I am of opinion that this appeal fails. The question we have got to decide is what is the meaning of the word "security" in the Stamp Act, 1891, not what is its meaning in ordinary parlance; and it seems to me that when this Act is looked at we find the word "security" is fairly defined by the Act itself.

In the first schedule to the Act we find, first of all, that an "agreement or any memorandum of an agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

a written instrument," shall have a sixpenny stamp. Those words, "not otherwise specifically charged with any duty," bring us to the next passage in this schedule which we have to construe—namely, "bond." We there find that a "bond, covenant, or instrument of any kind whatsoever . . . being the only security for any sum or sums of money at stated periods . . . for any indefinite period," is to have an *ad valorem* stamp.

Now then, I will take "bond." First of all a bond given to secure payment of money. I should say it is a "security." A bond is a "security," and therefore that would clearly come within this schedule.

Next, a "covenant." That clearly stands exactly in the same position as "bond."

Now I will take the third (which raises the question in this case), "or instrument of any kind whatsoever." That covers a contract in writing. A contract in writing "being the only" security "for any sum or sums of money at stated periods," for any indefinite period, is to have a 2s. 6d. stamp for every £5 and for any fractional part of £5.

I cannot sever the word "instrument" from the words "bond" and "covenant," and "bond" and "covenant" appear to me to be clearly a "security" within the meaning of this Act, and so does the "contract in writing," which is in the same clause; it falls within the same category, in my judgment, as "bond" and "covenant."

Then it is argued that "security" only means something "auxiliary" to an obligation which has gone before, therefore this simple contract for the payment of £12 a year in consideration of this telephone being put up at Brighton is not "auxiliary" to any other obligation. In my judgment that is a wrong reading of this Stamp Act. "Security" here means the original thing which has been given for securing the payment of money; and if that is so, it is fortified when I come to another part of this schedule a little later on, which is headed "Mortgage, bond, debenture, covenant (except a marketable security, otherwise specially charged with duty) and warrant of attorney to confess and enter up judgment (1) being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money" (in certain events) which carries an *ad valorem* stamp.

Now we see the meaning of the word "security" there ["being the only or principal or primary security"] is made perfectly clear by division 2 under the same heading, which says: "being a collateral or auxiliary or additional or substituted security" which is to bear a lower stamp if the original "security" has been stamped with an *ad valorem* stamp. It seems to me, therefore, that upon the true construction of this statute, a contract in writing, whereby an obligation is undertaken to pay a certain sum of money, as in this case, for an "indefinite period" does come within the taxing clause under the head "Bond, covenant, or instrument of any kind whatsoever."

That being, in my opinion, the true construction of this statute, I need only say that the *Limmer Asphalte case* was rightly decided, and I also think that the case of *Jones* v. *The Commissioners of Inland Revenue*, which was decided by my brothers Wright and Collins, JJ., was also rightly decided. I have read the judgment of those two learned judges, and I agree with them entirely. For these reasons I think the appeal fails.

RIGBY, L.J.—I agree. I think there cannot be a doubt that a contract in writing is within this head of the section. It also appears to me clear that what are called personal securities are securities within the meaning of this part of the schedule if they are created by bond or covenant. I cannot distinguish this case in any way by reason of the fact that it is an instrument that is not under seal. The phrase "personal security" is almost as common as "real security." "Real security" is associated with property, but "personal security means something which has no property at the back of it, but is a mere personal obligation. I also agree in the view that this applies to original securities. On the whole I think that the *Limmer Asphalte case* and *Jones* v. *Commissioners of Inland Revenue* are cases which we ought not to interfere with, and which we ought to affirm and not disaffirm.

COLLINS, L.J.—I am of the same opinion. I confess that I was startled at the outset of the case by hearing that I was a party to a decision which did not on its *primâ facie* statement commend itself to my judgment, but now that I have heard the argument and have had the opportunity of looking through the judgment in *Jones* v. *Commissioners of Inland Revenue*, I cannot see any escape from the decision. I have nothing further to add to what I said in the case of *Jones* v. *Commissioners of Inland Revenue*, except that in citing the case of *Taylor* v. *Overseers of Pendleton* (35 W. R. 762, 19 Q. B. D. 288), I obviously was making a mistake and confounding it with the *Thames Conservators* v. *The Commissioners of Inland Revenue*; all that I said there had reference to that case and not to *Taylor* v. *Overseers of Pendleton*, and I must say after reading it again I think the case of the *Thames Conservators* v. *Commissioners of Inland Revenue* is open to the observations which I ventured then to make.

Appeal dismissed.

Solicitor for the appellants, *W. E. L. Gaine.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. } Stirling, J. } Nov. 4.

OXFORD AND CAMBRIDGE UNIVERSITIES *v.* GEORGE GILL & SONS. (*a.*)

Practice — Parties — Joinder of plaintiffs — Causes of action—R. S. C., ord. 16, *r.* 1.

Under ord. 16, *r.* 1, *in its amended form now in force, persons may join as plaintiffs whose causes of action arise out of the same series of transactions, where a common question of law or fact arises.*

Stroud *v.* Lawson, 46 *W. R.* 626, [1898] 2 *Q. B.* 44, *considered.*

In this case the action was brought by the University of Oxford and the University of Cambridge, as co-plaintiffs seeking to restrain the defendants from selling, advertising, or offering for sale any books or publications as being or bearing the title "The Oxford and Cambridge Publications," or "The Oxford and Cambridge Edition," and from using the names "Oxford and Cambridge," or either of such names upon or in connection with the books or publications or advertisements of the defendants in such a manner as to induce the belief that the books or publications of the defendants were publications of the Universities of Oxford and Cambridge or

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

either of them or emanated from the presses of or were authorized by the said universities or either of them.

The plaintiffs, by their statement of claim, alleged, amongst other things, as follows:

(1) The plaintiffs carry on an extensive and profitable business in printing and publishing, and their respective presses known as the Oxford University Press and the Cambridge University Press, and the works emanating from their respective presses, have a world-wide reputation.

(4) There are certain works, including the Revised Version of the Bible, which are joint publications of the Oxford and Cambridge University Presses.

(6) During the year 1897 it came to the notice of the plaintiffs that the defendants had begun to publish text-books under the title of "The Oxford and Cambridge Press," and were advertising the same under that title in the *Journal of Education* and the *Educational Times*; and further, that the defendants were using the arms of the two universities, or devices resembling those arms, in their advertisements and on the covers of their books.

(7) The plaintiffs objected to the use of the aforesaid title and of the arms of the universities by the defendants as aforesaid, and after some correspondence between the parties, and as the defendants would not desist from the wrongful acts complained of by the plaintiffs as aforesaid, an action was commenced by the plaintiffs against the defendants, claiming an injunction and other relief. And by an order dated the 3rd of May, 1898, on motion by the plaintiffs for an interlocutory injunction, it was by consent ordered that the defendants, their servants and agents, should be perpetually restrained from selling, advertising, or offering for sale any books or publications bearing the title of "The Oxford and Cambridge Press" or "The Oxford Press" or "The Cambridge Press," or the arms of the Universities of Oxford and Cambridge or either of the said universities, or from inserting in advertisements any reference to the Oxford and Cambridge Press or Presses, or either of them, or the arms of the said universities or either of them which might induce the belief that the books or publications of the defendants were publications of the Universities of Oxford and Cambridge, or either of them, or emanated from the presses of the said universities or either of them, but the said order was not to preclude the defendants from selling any bound books then in stock with the university arms thereon not infringing that part of the injunction which related to the use of the title "The Oxford and Cambridge Press," "The Oxford Press," or "The Cambridge Press."

(8) Subsequently to the date of the said order, it was brought to the notice of the plaintiffs that the defendants had commenced to advertise their publications as "The Oxford and Cambridge Publications," and had also commenced selling their works with the title the "Oxford and Cambridge Edition" thereon, and were using the words "The Oxford and Cambridge" in connection with the defendants' Biblical and other publications.

(9) The use by the defendants of the titles "The Oxford and Cambridge Publications" and "The Oxford and Cambridge Edition," and of the words "The Oxford and Cambridge" in connection with the defendants' Biblical and other publications is calculated to deceive and to induce the belief that the books or publications of the defendants are publications of the Universities of Oxford and Cambridge, or emanate from the presses of the said universities, or are authorized by the said universities as text-books.

(11) The titles adopted by the defendants as mentioned in paragraph 8 hereof are calculated seriously to injure the plaintiffs in the sale of educational and Biblical works emanating from their respective presses.

The defendants moved that all claims by the plaintiffs in their statement of claim to any relief in respect of any separate cause of action in either of the plaintiffs, and all allegations in such statement of claim in support of any such separate cause of action, might be struck out, and that the action and the proceedings therein might be confined to the alleged joint cause of action of the plaintiffs, and that the statement of claim might be amended accordingly; or, in the alternative, that the plaintiffs might be put to their election whether they would proceed with their alleged joint cause of action, or with the alleged separate cause of action of one of the plaintiffs, and that so much of the statement of claim as applied to any joint cause of action or to any cause of action by the other plaintiff might be struck out, and the statement of claim amended accordingly.

Moulton, Q.C., and *A. à B. Terrell*, for the defendants.—It is impossible to join separate causes of action with joint causes of action. Here the statement of claim alleges that the plaintiffs carry on business at their respective presses. Two people do not become a firm merely because they are jointly interested in a copyright. The plaintiffs do not allege that they trade together as a firm. [*Jenkins, Q.C.*—We do not suggest that we do. STIRLING, J.—If either A. or B. can bring an action, why may they not together bring an action?] The case does not fall within ord. 16, r. 1, or ord. 18, r. 1. There is no common question of law or of fact which arises here: *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494. [*Jenkins, Q.C.*—That case was decided prior to the alteration of ord. 16, r. 1.] See also *P. & O Steam Navigation Co.* v. *Tsune Kijima*, [1895] A. C. 661, 44 W. R. Dig. 128; *Sadler* v. *Great Western Railway*, 45 W. R. 51, [1896] A. C. 450. *Stroud* v. *Lawson*, 46 W. R. 626, [1898] 2 Q. B. 44, decided after the amendment of rule 1 of order 16, shows that there must still be a common question of law or fact. Here there is no common question of law. [STIRLING, J.—There is a common question of fact, whether the defendants have published the books complained of, and if so, what is the effect of such publication?] In any case the plaintiffs are not entitled to an injunction: *Clark* v. *Freeman*, 11 Beav. 112.

They also referred to *Drincqbier* v. *Wood*, *post* p. 252.

Jenkins, Q.C., and *Ingpen*, for the plaintiffs, were not called upon.

STIRLING, J. (after stating the facts).—It is said that an action in this form really contains a combination of claims—first, by the two universities in respect of a joint interest; secondly, separate actions by each of them in respect of their separate interest; and it is said that according to the rules such an action cannot be brought. Whatever might have been said prior to the modification of ord. 16, r. 1, which was introduced in the year 1896, it seems to me that what I have to deal with is the existing rule, and not the rule as it existed prior to the alteration. I only call attention to the former rule to show the great modification which has been introduced into it. It ran thus: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." The existing rule is in widely different terms: "All persons may be joined in one action as plaintiffs in whom any right to relief"—not the right to any relief, but "any right to relief in respect

of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise." That rule has been commented upon and explained by the Court of Appeal in the case of *Stroud* v. *Lawson*. Chitty, L.J., whose judgment I refer to as stating the effect of the rule, says: "That rule in its present form was framed with reference to the difficulty which arose in the cases of *Smurthwaite* v. *Hannay* and *Carter* v. *Rigby & Co.*, 44 W. R. 566, [1896] 2 Q. B. 113. It is obvious on the face of the rule that it was not thereby intended to allow any number of different plaintiffs to join in one action any number of separate and different causes of action, but that it was intended merely to effect a modification of the old rule by which a limited liberty of joining plaintiffs with separate causes of action should be conferred." Therefore there is to be a limited liberty of joining plaintiffs with separate causes of action. "The nature of the limitation is plain upon the face of the rule." Then his lordship read it, and then he says: "It is necessary that both these conditions should be fulfilled—that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law in order that the case may be within the rule." It was held by the Court of Appeal in *Stroud* v. *Lawson* that the rule did not apply to the case then under consideration. A little further on Chitty, L.J., says: "It is not necessary for the present purpose to say to what cases the rule would apply. But I mentioned during the argument by way of illustration a case where persons having separate inheritances in a graveyard had separate rights of action in respect of disturbances of graves therein by one common act." That is the illustration of his lordship. Now, according to the interpretation put upon the rule by the Court of Appeal (and, indeed, it seems plain upon the face of the rule itself) there are two conditions to be satisfied. First, that the right to relief alleged to exist in each plaintiff should be in respect of, or arise out of, the same transaction; and secondly, that there should be a common question of fact or law. Are these conditions satisfied in the present case? First, do they arise out of the same transaction or series of transactions? The action arises out of the publication by the defendants of a series of books bearing the title "The Oxford and Cambridge Publications" or "The Oxford and Cambridge Edition," and otherwise bearing the name "Oxford and Cambridge." It seems to me clear that the action arises out of one transaction, or at any rate a series of transactions, if each publication is to be treated as a separate transaction.

Then comes the question, Does the statement of claim show that any common question of law or fact would arise in this case? In the first place, the statement of claim alleges the fact of publication. No defence has yet been put in, and it does not appear upon the pleadings as they stand how far that fact will be admitted.

It is said that upon the hearing of the motion the fact of publication was not denied, and that as to that no common question of fact would arise. But is the pleader in framing his action to take upon himself to judge as to what the defendant is going to do in the way of admission in the prosecution of an action? Can that be the meaning of the rule? That would make the rule very difficult to work. What the rule says is, "Where if such persons brought separate actions any common question of law or fact would arise." The publication of these books is a common fact which will have to be proved by the plaintiffs in order to establish this case. But there is more than that. What is the case made by the plaintiffs' pleader in paragraph 9? It is "the use by the defendants of the titles 'The Oxford and Cambridge Publications' and 'The Oxford and Cambridge Edition' in connection with defendants' Biblical and other publications is calculated to deceive and to induce the belief that the books or publications of the defendants are publications of the Universities of Oxford and Cambridge or emanate from the presses of the said universities"—that means from both—"or are authorized by the said universities as text-books"—that is by both. Therefore, what the plaintiffs take upon themselves, according to this statement of claim, to prove is—that the belief which is induced in the public is, not that it is published by Oxford and Cambridge separately, but by Oxford and Cambridge Universities together. That is one of the paragraphs which I should anticipate that the defendants will join issue upon. The evidence which goes to prove the effect upon the public of that statement will be common to both cases. It seems to me that there is manifestly in this case a common question of fact which will have to be decided.

In my judgment this case is brought within the terms of the rule; and I must say, after all the argument I have heard, that it would be lamentable if, the rule having been amended, this case was not brought within it; for it appears to me to be one of the class for which the amendment was intended to provide. The rule has been amended in the way pointed out by Bowen, L.J., as the means of bringing about the result which was sought to be attained in *Smurthwaite* v. *Hannay*, and I think that the draftsman has attained what I doubt not was his object.

Then another question is raised. It is said that if this be so I ought to exercise the power conferred upon me by ord. 18, r. 8, which is this: "Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together."

It is said that the causes of action—namely, the case of injury to the plaintiffs jointly and the case of injury to the plaintiffs separately—cannot be conveniently tried together. Now, it seems to me that the nature of the case is such as to show that it is most convenient that these different causes of action should be disposed of together, and I think that that application fails just as much as does the other.

Solicitors, *T. Lamartine Yates; Freshfields & Williams.*

Chan. Div. } Kekewich, J. } Oct. 28.

CHARTER v. WATSON. (a.)

Mortgage—Realty and personalty—Indivisible security—Right to redeem realty barred—No right to redeem personalty—Real Property Limitation Acts, 1833 (3 & 4 *Will.* 4, c. 27), *s.* 40; *and* 1874 (37 & 38 *Vict.* c. 57), *s.* 8.

Where by a mortgage deed realty and a policy of

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

insurance were conveyed and assigned respectively to the mortgagee as one indivisible security for the mortgage debt and subject to one and the same proviso for redemption, then, when the mortgagor's right to redeem the realty has been barred by the Statute of Limitations, his right to redeem the policy is also gone, because the security being one and indivisible, he cannot redeem part without redeeming the whole.

The Statutes of Limitations which refer to legal interests in realty, although applicable by analogy to equitable interests in realty, cannot be applied by analogy to property of an entirely different nature — viz., to personalty.

Action.

By an indenture of mortgage dated the 1st of July, 1869, and made between Joseph Charter and Sarah his wife of the one part, and Job Watson of the other part, it was witnessed that in consideration of the sum of £350 then advanced by Job Watson to Joseph and Sarah Charter they, the said Joseph and Sarah Charter, thereby granted and conveyed certain freehold lands at Wentworth and Witcham, in the Isle of Ely and county of Cambridge, and at Somersham, in the county of Huntingdon, to Job Watson, his heirs and assigns, subject to the proviso for redemption thereinafter contained; and it was also witnessed that for the consideration aforesaid Joseph Charter covenanted that he and his wife would forthwith surrender certain copyhold lands at Witcham aforesaid to such uses as Job Watson should appoint, and in default of appointment, to the use of Job Watson, his heirs and assigns, subject to the proviso for redemption thereinafter contained; and it was further witnessed that for the consideration aforesaid Joseph Charter thereby assigned a policy of insurance upon his own life for £100 in the Royal Insurance Co. unto Job Watson, his executors, administrators, and assigns, subject to the proviso for redemption thereinafter contained. By the proviso for redemption which followed next, it was provided that if Joseph and Sarah Charter, or either of them, or their heirs, executors, administrators, or assigns, should pay to Job Watson, his executors, administrators, or assigns, £350, with interest at £5 per cent., on the 11th of October then next, Job Watson, his heirs or assigns, would reconvey the freehold hereditaments to the like uses as the same were then vested, and release and discharge the said copyhold hereditaments, and assign the said policy respectively. In default of payment on the 11th day of October, 1869, power was thereby given to the mortgagee to enter into possession of and sell the said mortgage securities. The indenture also contained the usual covenants for payment of interest until payment off and for keeping up the policy. Subsequently to the execution of the indenture the copyholds were duly surrendered in accordance with the above covenant.

Previous to 1876 J. Charter had made default in paying the premiums on the policy, and thenceforth the same were paid and the policy kept on foot by the mortgagee till his death, and afterwards by his executors. In 1876, upon the default of the mortgagors in payment of interest, the mortgagee entered into the freehold and copyhold lands and continued in possession thereof without any acknowledgment of the title of the mortgagors or their right to redeem. The mortgagee died in 1881, and the defendant Charlotte Amelia Watson was his surviving executrix. Joseph Charter died intestate in 1897, leaving the plaintiffs Sarah Charter, his widow, and G. W. Charter, his heir-at-law, surviving him, and letters of administration to his estate had been taken out by the latter. The Royal Insurance Co. had not yet paid over the policy moneys to the defendant C. A. Watson, and they were joined as co-defendants. The plaintiffs brought this present action claiming against the defendant C. A. Watson an account of moneys received by her as mortgagee in possession, an inquiry of what hereditaments the mortgage security consisted, and redemption and reconveyance of the freehold and copyhold hereditaments and policy, and against both defendants an account in respect of the policy moneys, an injunction to restrain the defendant company from parting with the policy money until such account had been taken, and a receiver of the policy moneys. The plaintiffs submitted that even if their right of redemption was barred in respect of the freeholds and copyholds they were at any rate entitled to redeem the policy. At the trial it was not denied that the right to redeem the realty was barred by the statute.

Counsel and *R. Bertrand Jackson*, for the plaintiffs.—The plaintiffs still have a right to redeem the policy even if their right is barred in respect of the realty. The mortgagee by electing to make himself owner of the realty must be held to have abandoned his right to the collateral security of the policy: *Dyson* v. *Morris*, 1 Hare 413. He should have realized the collateral security before foreclosing the realty, and, not having done so, his right to it is gone. The right to redeem the policy is not barred, for there is no statute applicable to it.

Warrington, Q.C., and *Ribton*, for the defendants.—So far as the real estate is concerned the plaintiffs' title became barred in 1888. The claim to redeem the policy is a purely equitable claim, and the court ought to apply by analogy to an equitable demand the same rules which the Legislature has provided shall apply in the case of land: *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, and *Re Lady Hastings*, 35 W. R. 584, 35 Ch. D. 94; and the proper period applicable to this case is twelve years: *Harrison* v. *Hollins*, 1 Sim. & St. 471. This is also a stale demand. *Dyson* v. *Morris* is not a case in point, for there the mortgagee had only gone into possession of part of the mortgaged land, whereas here the plaintiffs have taken possession of the whole security.

Counsel in reply.—The cases cited show that real estate statutes have been applied by analogy to other real estate; they do not support the contention that those statutes should be applied by analogy to personalty: *Mellersh* v. *Brown*, 38 W. R. 732, 45 Ch. D. 225.

KEKEWICH, J.—The novelty of this question calling for decision is certainly somewhat strange seeing that mortgages, including freehold, copyhold, and leasehold hereditaments and chattels, particularly policies of insurance, are extremely common. One would have thought that by now questions would have arisen relating to the lapse of the equity of redemption to chattels and policies of insurance in cases where it was already gone as regards the freehold, copyhold, or leasehold part of the security. But no authorities have been produced by the counsel on either side, and it seems to me that there are none such to be found, and I cannot recall any cases where the point has arisen. The point arises here very clearly. It cannot be denied that from lapse of time and by the operation of the statute the plaintiffs are debarred from redeeming the freeholds and copyholds comprised in the mortgage deed of the 1st of July, 1869. That is not denied. The twelve years have expired since the mortgagee took possession of the freeholds and copyholds and no acknowledgment has been put forward sufficient to keep alive the equity of redemption. But the mortgage also comprises this policy of insurance, and the question arises, has the right to redeem it also gone? I am asked to say that it has,

and to apply by analogy the Statute of Limitations, and reference is made to Lord Redesdale's judgment in the well-known case of *Hovenden* v. *Lord Annesley*, where he expounds the analogy between legal and equitable interests. The answer to that argument was given in reply, when it was said that I am asked to apply by analogy the statute, which only touches land, to property of an entirely different nature—namely, to policies of insurance, which are purely personal estate, and I am asked to do that notwithstanding that there is no statute touching such kind of property. Now, if I were to do that, I should be doing something very different from what Lord Redesdale did. He, in effect, said: We find a statute which does not purport to bind equitable interests, but we will apply it by analogy, and in dealing with equitable interests we will be bound by the statute. That seems to me to be very different from arguing that a statute which applies only to land should apply to a policy of insurance. I do not see my way to apply any such analogy, and I hesitate to create one on the present occasion. Then it is said that the plaintiffs come here with a stale demand. I am not sure that that is not a complete answer, but it has been pointed out that although there has been no such acknowledgment of the right to redeem as is required by the statute, yet if the matter were looked into there might possibly be some conduct on the part of the defendants which would render the defence of a stale demand insufficient. At any rate I should be reluctant to decide against the plaintiffs on the ground of a stale demand upon the facts which I have at present. I propose to deal with the case on a different footing. I shall treat it as a novel point, and strictly on principle.

This is a mortgage of freeholds, copyholds, and a policy of insurance. The fact that there are copyholds makes no real difference: my conclusion would be the same if there were no copyholds. The mortgage first of all conveys the freeholds in fee subject to the proviso for redemption thereinafter contained. That proviso does not follow directly, but is postponed. Then comes the second witnessing part, which deals with the copyholds; they are also to be held subject to the proviso for redemption thereinafter contained, and which is again postponed, because there is a third witnessing part by which the policy is assigned subject also to the proviso for redemption which then follows. One thus sees that all these three properties are intended to form one security; they may be called collateral in the sense that each is a branch of the security intended to lie side by side, and in that sense only are collateral, but there is no principal security, for all three constitute together one security. You know that before you come to the proviso for redemption, and when you do come to it, it makes it quite clear. [His lordship then read the proviso for redemption, and continued:] That is to say that if the money is paid by the day named there is to be a reconveyance of the freeholds and the copyholds and the policy. They are all placed together, and it would be impossible for either party to say that the redemption could be completed without the payment of the whole debt, and the reconveyance and reassignment of the whole security. I therefore conclude that we have here one indivisible security for one indivisible amount of money. I need not consider the rest of the deed; there are, of course, different provisions for keeping up the policy and other provisions usual in mortgage deeds of that date, but there is nothing which affects the construction which I have put upon the security. Now, how is the proviso for redemption to be read? One must bear in mind that a proviso for redemption which limits a particular day for payment of the principal sum and which makes the conveyance absolute and the property conveyed the property of the mortgagee unless such payment is made on the particular day named, has always been taken in a court of equity as not fixing a particular day once for all, but as constituting the transaction of the mortgage and making the property the security only, and as providing that so long as the interest continues to be paid the right to redeem remains. Before there were any Statutes of Limitations, certain limits were placed by the court on that right, but all those limits have been done away with by the Statutes of Limitations, and the right to redeem is now limited by statute and is not gone until the statutory limit has expired, provided that there has been no acknowledgment. When that time has expired the right to redeem has gone and the mortgagee in possession may retain the property strictly both at law and inequity, so that if the mortgagor does not pay by a certain day fixed by statute, not, of course, by the proviso for redemption, the result is that the right of redemption is gone. In this case the money has not been paid by the mortgagor, and the statutory period having expired, his right of redemption is therefore gone. That right, however, as I have already pointed out, was not to redeem a part of the mortgaged premises, but to redeem the whole of them, therefore the right is gone just as much with respect to the policy of insurance as with respect to the lands, not because with respect to the policy it is barred by the statute or by applying the statute by analogy, but because it being now impossible to require a reconveyance of the lands, it is equally impossible to require a re-assignment of the policy of insurance, the lands together with the policy forming one security for one debt. I think that that is in accordance with the principles of equity as applied to mortgages. On that ground I am of opinion that the plaintiffs fail, they cannot now redeem the policy without paying the principal, interest, and costs of the whole debt, and that they are not entitled to do, because as regards the lands they are barred by the Statutes of Limitations. The lands and the policy together form one security, and as they cannot redeem the lands neither can they redeem the policy. I think that that is a sounder view of the matter than to attempt to apply the Statutes of Limitations by analogy to a mortgage of personal property.

There will therefore be a declaration that the court being of opinion that the right to redeem the freeholds and copyholds being barred by the Real Property Limitation Act, 1874, the plaintiffs are not entitled to redeem the policy of insurance, and the action must be dismissed with costs.

Solicitors, *Savory, Pryor, & Blagden; Frank Woodbridge*, for *H. Watson*, Bedford.

Chan. Div. Byrne, J. } Oct. 31; Nov. 12.

DRINCQBIER v. WOOD. (*a*.)

Practice—Parties—Joinder of plaintiffs—Common cause of action — R. S. C., ord. 16. *r.* 1 — *Company — Prospectus—Director — Liability — Director wilfully ignorant of contents of prospectus, but not repudiating it before action brought—Directors' Liability Act*, 1890 (53 & 54 *Vict.* c. 64), *s.* 3.

The expression "the same transaction" in R. S. C.,

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

ord. 16, r. 1, does not necessarily imply a transaction taking place between two parties; and, where different persons have causes of action arising out of the same transaction, they may be joined as co-plaintiffs.

The expression "prospectus" in the Directors' Liability Act, 1890, means the prospectus on the faith of which shares or debentures are taken.

A person, who assumes the post of director of a company and is aware of the issue of a prospectus, does not escape from his liabilities under the Directors' Liability Act, 1890, by abstaining from making an inquiry as to its contents; he must give public notice of his repudiation of such prospectus, and it will not be sufficient for him to repudiate it after action brought.

Trial of action.

This was an action in which four separate plaintiffs claimed compensation for damages alleged to have been sustained by them by reason of certain untrue statements contained in a prospectus and covering circular, on the faith of which they took certain debentures in the plaintiff's company.

The claim was based upon the provisions of the Directors' Liability Act, 1890.

The facts of the case were as follow:

On the 3rd of January, 1895, the defendant James L. Wood entered into an agreement with the other defendant, his brother Henry Wood, whereby he agreed to let to the said Henry Wood a piece of land at Edmonton for the term of one year commencing from the 25th of December, 1895, at the rent of £50 per annum. Under the agreement it was provided that Henry Wood should be at liberty to dig and sell sand under the land, subject to his paying to his landlord for all the sand so taken a royalty to be arranged as the sand was dug; that he should on certain terms therein mentioned be at liberty to use a siding connected with the Great Eastern Railway for the purpose of conveying his sand from the land; that he should be at liberty within the year, by sending in a postage prepaid envelope a notice in that behalf to the landlord, to purchase the fee simple of the land at the sum of £1,000 with interest at 5 per cent. from the 25th of December, 1894, to the completion of the purchase, and that if he availed himself of this option he might pay the purchase-money in one sum or more within the said year or in instalments amounting in any one year to not less than £250, the amounts paid for royalties and rents in any one year to be included in this sum; that if he agreed to purchase he should be allowed to remain in possession pending completion; and that, in the event of his exercising the option and paying the purchase-money as provided, a proper conveyance of the premises should be executed to him.

Henry Wood entered into this agreement with a view of forming a company to make bricks, and he had, it was stated, obtained a patent for this purpose.

On the 20th of March, 1895, the company was registered under the title of the "Wood's Patent Brick Syndicate, Limited," with a memorandum and articles of association signed by the defendant J. L. Wood and certain other signatories, who were clerks or relations of J. L. Wood or of Henry Wood. Each signatory signed for one share only.

The capital of the company was to be £5,000, of which it was contemplated that the defendant Henry Wood should hold shares to the amount of £4,993.

On the 22nd of April, 1895, a meeting of the signatories to the memorandum was held, at which the persons present were the defendants and Mrs. Wood, the wife of one of them, at which the defendants were appointed directors, Henry Wood was appointed managing director, and A. T. Collins secretary. And after this the shares were allotted—viz., £1 fully paid-up share to each of the seven signatories and 4,993 shares of £1 each to Henry Wood. The articles and memorandum were approved, the contracts "of the prospectus and articles" (whatever meaning may be attached to this expression) were agreed to, and a resolution was passed to issue 1,200 debentures of £25 each.

Prior to the 24th of May, 1895, a prospectus had been prepared, and a third proof was in print. It was headed "for private use only," and stated the capital at £5,000 divided into 5,000 shares of £1 each. It gave the names of the two directors, and contained the following passage: "A site has been acquired at Angel-road, Edmonton, where a siding has been allotted capable of containing twenty wagons. Machinery has been erected capable of making 20,000 bricks daily. The cost of machinery, machine-erecting, &c., will be about £15,000. The whole of the shares will be kept by the vendor, except seven as ordered by Act of Parliament." The prospectus gave an estimate of the anticipated profits from brick-making, and continued: "The above net profit is arrived at after paying all office and management expenses, rent, &c. The above result is obtainable by working the patent upon one site only at Edmonton. . . . The following contracts have been entered into with Mr. J. L. Wood to purchase the land at Edmonton to be paid by the royalty of the sand disposed of. It is proposed to sell the sand off the estate, which is of an exceptionally fine quality and worth about 3s. per yard in rail or carts." It was also stated that these contracts, together with the memorandum and articles of association and specification of the patent, might be inspected at the offices of the company. At the same time a circular was in print headed "Wood's Patent Brick Co., Limited," dated May, 1895, "issue of 1,200 debentures of £25, each carrying 10 per cent. per annum payable quarterly, repayable in 5 years, at £27 10s. It commenced, "Dear Sir,—You will find enclosed a prospectus of my Patent Brick Co., and I am pleased to offer you some debentures on the above terms." The following passages occurred in the letter: "I have patented the process and purchased a field at Angel-road, Edmonton, to develop the business." "As the assets of the company include the freehold land, machinery, buildings, and patent rights, it will be seen that there is abundant security for the debenture-holders." This letter was not signed, but it had a place left for signature, under which were the words "Managing Director."

The evidence at the trial of the action made it clear that three out of the four plaintiffs applied for and took their debentures on the faith of the prospectus and the covering letter, and that the fourth of these, Auguste Drincqbier, placed more reliance on these documents than on certain statements made to him by Henry Wood, which statements, however, were not inconsistent with anything therein contained. With the exception of their rights under the agreement of the 3rd of January, 1895, the company never acquired any land, machinery, or buildings. The business proved a failure and the assets of the company were realised in June, 1897, by a sale under the direction of the court in an action brought by a debenture-holder, and were insufficient to pay the plaintiffs the principal amount due upon their debentures.

The defendant, Henry Wood, did not defend this present action. J. L. Wood in a separate defence denied that he prepared or issued to the public a prospectus or covering letter as alleged in the statement of claim either at all or with a view to induce the plaintiffs to subscribe for debentures, or that he

delivered to the plaintiffs or any of them copies or a copy of the prospectus and covering letter. He further submitted that if the plaintiffs had any cause of action against him, they could not be joined in one action. The plaintiffs moved for judgment against Henry Wood.

R. S. C., ord. 16, r. 1, provides: "All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise."

The Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3, provides, *inter alia*: "When, after the passing of this Act, a prospectus or notice invites persons to subscribe for shares in, or debentures or debenture stock of, a company, every person who is a director of the company at the time of the issue of the prospectus or notice . . . shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any prospectus or memorandum appearing upon the face thereof, or by reference incorporated therein or issued therewith, unless it is proved that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent, or that after the issue of such prospectus or notice, and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal and of the reason therefor to be given."

Astbury, Q.C., and *G. Cave*, for the plaintiffs, opened the case.

Eve, Q.C., and *Beddall*, for the defendant, J. L. Wood, took a preliminary objection. The action cannot be sustained, as the plaintiffs have not a common cause of action. The circumstances under which they received the prospectus may have been different. Ord. 16, r. 1, provides that all persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction is alleged to exist. But here the claim of the plaintiffs does not arise out of the same transaction or series of transactions, and to hold that it did would be to embarrass the defendant.

They referred to *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494; *Stroud* v. *Lawson*, 46 W. R. 626, [1898] 2 Q. B. 44; *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*, [1895] A. C. 661, 44 W. R. Dig. 128.

Astbury, Q.C., and *G. Cave*, for the plaintiffs.—The action in this case has arisen out of a common wrong —viz., the issue of the prospectus. *Stroud* v. *Lawson* does not apply here. That was an action in which a plaintiff sought to join in one action a claim for damages in his personal capacity and a claim by him as representing the shareholders for a declaration that a payment made was *ultra vires*. In deciding that case Vaughan Williams, L.J., says, "I do not understand, however, that by the new rule it was intended to prevent the joinder of different causes of action under it": [1898] 2 Q. B. at pp. 53, 54.

They also referred to *Carter* v. *Rigby & Co.*, 44 W. R. 566, [1896] 2 Q. B. 113; and *Arnison* v. *Smith*, 37 W. R. 405, 593, 739, 40 Ch. D. 567, 41 Ch. D. 98, 348.

Eve, Q.C., replied.

BYRNE, J.—This case is not free from difficulty, but I think that the action is properly brought. Ord. 16, r. 1, provides. [His lordship read the rule, and continued:—] Prior to this rule being made there had been certain decisions given, notably *Smurthwaite* v. *Hannay*, in which it was held that the old ord. 16, r. 1, dealt merely with the parties to an action and had no application to the joinder of several causes of action, and that when the causes of action of several plaintiffs were separate and distinct, the same could not be joined in one action. Since the new rule has come into operation one case, *Stroud* v. *Lawson*, has been decided by the Court of Appeal which assists me in its interpretation. In that case plaintiff commenced an action for damages against the directors for fraud in inducing him to purchase shares in the company, and he also sought in the same action, as representing the shareholders, for a declaration that the payment by the directors of dividends out of capital was *ultra vires*, and it was held that he did not come within the rule, because the right to relief did not arise out of the same transaction or series of transactions. I have, therefore, to consider in the present case if the plaintiffs can allege causes of action arising out of the same transaction. It is true that if these plaintiffs had not entered into contracts to take debentures they would not have had any title to relief, and that the entering into each of these contracts was a separate transaction. The case of the plaintiffs is, however, that their right to relief arises out of the issue of the same prospectus, and therefore out of the same transaction. The "same transaction" in the rule does not necessarily imply something taking place between two parties, as for instance, where a collision between two ships causes damage, or a traction engine passing along a highway shakes houses. It is true that each plaintiff, to establish his right to relief, must prove his case on distinct evidence. But here the plaintiffs ground their case upon the issuing of the prospectus by the defendants. I think, therefore, that the case comes within the rule and that the defendants are not entitled to say that each of the plaintiffs must bring a separate action. The rest of the rule prevents any injustice or inconvenience to defendants in case of the joinder of a large number of plaintiffs.

The case accordingly proceeded. The plaintiff Auguste Drincqbier in his cross-examination and re-examination admitted that if Henry Wood had told him that the company was going to acquire a patent, that it would be tenant of the property at Edmonton for a year, and that at any time within a year it was in a position to purchase the same for £1,000, it would not have made any difference to him. On re-examination he stated that he read the statements in the prospectus about the freehold land and understood them to mean that the company had the freehold, that if it had said that the company might have the freehold, but must pay £1,000 for it, he would have thought the security for the debentures just as good as not, because of the valuable gravel pits and the plants.

Certain questions put to this witness by his lordship and his answers thereto appear in the judgment.

Counsel for the defendant J. L. Wood submitted that upon this evidence no case was made out.

Henry Wood and J. L. Wood were also examined.

J. L. Wood stated that he had never authorized his brother to make use either of the prospectus or of the covering letter, and in cross-examination he said that he never heard of the prospectus until the action was

brought, that he left to his brother and the secretary all matters relating to the issue of the debentures. He admitted that until the action was brought that he had taken no steps to repudiate his name in connection therewith.

Astbury, Q.C., and *Cave*, for the plaintiffs.

Eve, Q.C., and *Beddall*, for the defendant J. L. Wood.

The argument sufficiently appears in the judgment.

BYRNE, J.—The plaintiffs claim compensation for loss or damage alleged to have been sustained by them by reason of untrue statements in a prospectus and covering circular on the faith of which they took certain debentures. They ground their claim upon the provisions of the Directors' Liability Act, 1890. There are two defendants, Henry Wood and J. L. Wood, who at the date of the events giving rise to this claim were the only directors of a company called the Wood's Patent Brick Syndicate (Limited). The defendant Henry Wood put in no defence, and against him the plaintiffs move for judgment, and as the averments in the statement of claim are admitted, and are sufficient to entitle the plaintiffs to relief, there must be judgment in their favour severally for compensation for the loss or damage sustained by reason of the untrue statements contained in the covering letter and prospectus in the statement of claim mentioned, and there must be an inquiry and payment of the amount found to be due. They are also entitled to costs up to and including judgment, the subsequent costs being reserved.

As against the plaintiff Auguste Drincqbier, counsel for the defendant J. L. Wood elected to call no evidence, and submits that no case has been made out. As against the remaining plaintiffs he has adduced evidence, and I must therefore consider the case of Auguste Drincqbier separately. [His lordship proceded to read the provisions in the Directors' Liability Act and to state the facts of the case, and continued:] The next question that I have to consider is, are the statements to which I have referred untrue statements. I consider that the statements in the covering letter as to the purchase of a field at Angel-road, as to the assets of the company including the freehold land are untrue. [His lordship proceeded to summarize the plaintiff Drincqbier's evidence, and continued:] I was not satisfied from the form of the questions asked or from the answers given whether the witness quite appreciated their meaning, and for that reason I asked him at the conclusion of his re-examination whether it would have made a difference to him in taking debentures if he had known what the terms really were with reference to the acquisition of the site, and I explained to him what the real terms were—that is to say, taking as nearly as possible the words of the agreement showing that an option would have to be exercised within a year, and £1,000 would have to be paid, and showing the way in which the £1,000 might be paid. He said that it would have made a difference to him; but in reply to the question, "What difference?" he replied. "I cannot answer what difference it would have made." I did not feel justified in further pressing the matter, and the evidence rests there. I did not, as I said, feel justified in pressing the matter further upon him, as I might have been suggesting an answer; but I must point out that he could not have understood the effects of the non-exercise of an option to purchase if he thought, nevertheless, that he should have the gravel pits. There is a passage that I should like to refer to in the judgment of the Lord Chancellor in *Arnison* v. *Smith*, 41 Ch. D. 369, where he says, "It is an old expedient, and seldom successful, to cross-examine a person who has read a prospectus and ask him as to each particular statement, what influence it had on his mind and how far it determined him to enter into the contract. This is quite fallacious. It assumes that a person who reads a prospectus and determines to take shares on the faith of it can determine among the different parts of it the effect produced by the whole. This can rarely be done at the time, and for a shareholder thus to analyze his mental impressions after an interval of several years, so as to say which representation in particular induced him to take shares, is a thing all but impossible. A person reading the prospectus looks on it as a whole; he thinks the undertaking is a fine commercial speculation; he sees good names attached to it; he observes other points which he thinks favourable, and on the whole he forms his conclusion. You cannot weigh the elements by ounces." To my mind it is very frequently an extremely difficult thing for a man who has taken shares or debentures upon the faith of a prospectus, on being asked, "Would you have taken shares if something had been left out and something else put in?" to answer. And probably in many cases his true answer would be, "I can hardly answer that question, as I never saw a prospectus with the statement that you mention in it." I think that the plaintiff Drincqbier believed, and was justified in believing, that a freehold site had been actually acquired, and that he was deceived. I am of opinion therefore that he is entitled to succeed in this action.

In regard to the case of the other plaintiffs, their evidence is not open to the criticism directed against that of Auguste Drincqbier. I am satisfied that each one of them took debentures on the faith of the prospectus and covering letter, but I have to consider the effect of the evidence adduced on behalf of the defendant J. L. Wood. The Act provides for the liability to which I have referred on the part of a director, unless it is proved amongst other things that the prospectus was issued without his knowledge or consent. J. L. Wood admits that except in putting it into the hands of his solicitor to defend the action he never did anything to repudiate the prospectus which bore his name. [After considering J. L. Wood's evidence further, his lordship continued:] I am satisfied that the defendant J. L. Wood knew that there would be a prospectus, and that there was one in existence in or about July, 1895, at a time when debenture-holders were being sought for, and that if his evidence be true as to his not having seen it, before action brought, he chose to abstain from asking to see it. Two points have been submitted to me in reference to this matter, the one being that the Act uses the expression "the prospectus" and that the prospectus means the prospectus on the faith of which the debentures were taken—a construction of the Act with which I agree. And it is further said that there might have been others. But no evidence was adduced, nor was any suggestion made, except that it was put in argument as a possibility, that any other prospectus was issued, although there is some little evidence tending to show that a further print, which so far as I know was in exact accordance with that proved to have been issued, was executed. But it is clear that the defendant J. L. Wood never "forthwith" nor ever before action brought, "on becoming aware of its issue," gave reasonable public notice that the prospectus was so issued without his knowledge or consent, or that after the issue of the prospectus or notice and before allotment, he on becoming aware of any untrue statement therein withdrew his consent thereto, and caused reasonable notice to be given of such with-

drawal and of the reason therefor. I do not consider that a director otherwise liable under the provisions of this Act, discharges himself from the burden thrown upon him if he can do no more than show that, having become aware of the issue of a prospectus or notice, he deliberately abstained from inquiring as to its contents, and refrained from giving any notice. It may be that he can repudiate without making inquiry as to the contents, and he can certainly take the more reasonable course, and one more consistent both with his duty as a director and an honest man, of endeavouring to understand what statements have been made for which he is responsible and then if he finds that there are untrue statements publicly put forward, forthwith repudiate them. It is quite true that he had no pecuniary interest in the company beyond his interest as landlord and possible interest as vendor under the agreement, and he was content to leave the preparation and issue of everything, including the prospectus and any notice that might be issued to obtain money, to his brother and the secretary, trusting in them. He was not fully acquainted with the provisions of the Act. But it must be understood that a director who consents to be a director assumes a position involving duties which cannot be shirked by leaving matters to others.

There is one other observation that I should like to make before I conclude, and that is upon the question whether I took the right view of the meaning of the rule under which I allowed the case to proceed. I am satisfied that in the present case, so far from working an injustice, it has saved expense to those parties by whom the expense of this litigation will have to be borne. Under the circumstances I hold that all the plaintiffs are entitled to judgment severally for the amounts which, on the proper inquiries being taken, shall be found due to them.

I think that it is only fair to add that I do not look on Henry Wood as a rascal. I think that he was an enthusiast believing most firmly in the patent which he had obtained, and he says that he still thinks that the prospectus is all true. I think that he is probably like a good many investors, extravagantly sanguine, and he seems to have taken the advice of a layman with regard to this prospectus who had had something to do with some other prospectus, but I cannot relieve him of responsibility upon that account. With reference to J. L. Wood, I will not say anything upon the way in which he gave his evidence; but apart from that, he chose to rely upon his brother Henry, and he cannot complain that he has been made responsible.

Judgment for the plaintiffs.

Solicitors, *George Willson*, for *Edwards & Willson*, Ramsgate; *J. R. Pakeman.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.) — Oct. 27.

WANDSWORTH BOARD OF WORKS (*Appellants*) *v.* PRETTY (*Respondent*). (*a.*)

Metropolis—Streets—Costermonger—Exposing for sale on carriage-way—Metropolitan Police Act, 1839 (2 & 3 *Vict. c.* 47), *s.* 60, *sub-section* 7—*Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 *Vict. c.* 5), *s.* 1—*Police Regulations of the* 28*th of December*, 1869.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

By section 60, *sub-section* 7, *of* 2 & 3 *Vict. c.* 47, "*Every person who shall expose anything for sale . . . upon or so as to hang over any carriage-way or footway . . . so as to cause annoyance or obstruction in any thoroughfare within the Metropolitan Police district, shall be liable to a penalty of not more than forty shillings.*"

By regulation 6 *of the Police Regulations dated the* 28*th of December*, 1869, *and made under the Metropolitan Streets Act Amendment Act*, 1867, *it is provided that costermongers and others and their barrows are thereby made liable to be removed from any street and public way in which they cause an obstruction to the traffic, or where they are an annoyance to the inhabitants.*

Held, that section 60 *and the above regulation do not cover the same ground, and that section* 60 *was not impliedly repealed by the regulations, nor was the penalty provided for by the said section superseded by them.*

This was an appeal on a case stated by one of the Metropolitan police magistrates sitting at the South-Western police-court.

The respondent, who was a costermonger, was summoned upon a complaint made by the appellants, the Wandsworth Board of Works, that she had unlawfully exposed for sale celery upon the carriage-way in a thoroughfare so as to cause annoyance and obstruction in the said thoroughfare contrary to the provisions of the Metropolitan Police Act, 1839, s. 60.

Upon the hearing of the complaint it was proved the respondent did expose celery for sale upon the carriage-way in Balham High-road, which is a thoroughfare in the Metropolitan police district, in such a manner that she caused annoyance to the inhabitants and obstruction to the traffic. Upon that evidence the magistrate found as a fact that she had exposed celery for sale upon the carriage-way in a thoroughfare within six miles of Charing Cross in such a manner as to create obstruction to traffic and annoyance to the inhabitants, but he refused to fine her and dismissed the summons on the ground that the remedy given by regulation 6 of the Police Regulations, 28th December, 1869, framed under section 1 of the Metropolitan Streets Act Amendment Act, 1867, superseded the remedy provided by 2 & 3 Vict. c. 47, s. 60.

The sixth regulation provides that "costermongers, street hawkers, and itinerant traders, and their barrows, carts, and stalls are hereby made liable to be removed from any street and public way in which they cause an obstruction to the traffic, or where they are an annoyance to the inhabitants."

By 2 & 3 Vict. c. 47, s. 60, it is provided that "every person who, in any street or public place within the limits of the Metropolitan police district, shall be guilty of any of the following offences, shall be liable to a penalty of not more than forty shillings for every such offence."

Sub-section 7 continues: "Every person who shall expose anything for sale . . . upon or so as to hang over any carriage-way or footway . . . so as to cause any annoyance or obstruction in any thoroughfare."

By section 6 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), it is provided that "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act or be otherwise allowed to cause obstruction or inconvenience to the passage of the public for a longer time than may be absolutely necessary for loading or unloading such goods or other articles."

"Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding forty shillings."

Then by the Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1, it is provided that "The sixth section of the Metropolitan Streets Act, 1867, prohibiting the deposit of goods in the streets shall not apply to costermongers, street hawkers, or itinerant traders so long as they carry on their business in accordance with the regulations from time to time made by the Commissioner of Police with the approval of the Secretary of State."

The questions for the opinion of the court were whether section 60, sub-section 7, of 2 & 3 Vict. c. 47, was impliedly repealed or superseded by the Police Regulations of the 28th of December, 1869, and whether the magistrate's decision was right in law.

Horace Avory, for the appellants.—The magistrate was wrong in not convicting the respondent. The police regulation in question did not impliedly repeal or supersede section 60, sub-section 7, of 2 & 3 Vict. c. 47.

No one appeared for the respondent.

Lord RUSSELL OF KILLOWEN, C.J.—I am of opinion that this appeal must be allowed. There is no ground for saying either that section 60, sub-section 7, of 2 & 3 Vict. c. 47 is impliedly repealed by the regulations of the 28th of December, 1869, or that the sixth of these regulations supersedes the remedy provided by section 60. The statute and the regulations do not cover the same ground. Section 60 provides that every person who shall expose anything for sale upon any carriage-way so as to cause annoyance or obstruction in any thoroughfare shall be liable to a certain penalty, whereas number six of these regulations provides that costermongers and their barrows are liable to be removed from any street and public way in which they cause an obstruction to the traffic or an annoyance to the inhabitants. For these reasons I am of opinion that the magistrate's decision was wrong in point of law, and the appeal must be allowed. The case will be remitted to the magistrate to convict.

WILLS, J.—I entirely agree.

Case remitted.

Solicitors for the appellants, *W. W. Young & Son.*

House of Lords.

From C. A. (England). Dec. 5, 6.

ATTORNEY-GENERAL *v.* BEECH. (*a.*)

Inland revenue—Estate duty—Property passing on death—Settlement—Surrender of life estate to remainderman—Finance Act, 1894 (*57 & 58 Vict. c.* 30), *ss.* 1, 2 (*sub-section* 1 (b)), 5, 7 (*sub-section* 7).

A tenant for life (*who died in* 1896), *more than twelve months before her death, surrendered her life interest in certain trust property, so as to merge her life estate in the immediate reversioner, who then became absolutely entitled.*

Held, that, upon the death of the tenant for life, no property passed on her death within the meaning of section 2, *sub-section* 1 (b), *of the Finance Act*, 1894, *and estate duty was not payable.*

Decision of the Court of Appeal (46 *W. R.* 435, [1898] 2 *Q. B.* 147) *affirmed.*

This was an appeal from an order of the Court of Appeal (A. L. Smith, Chitty, and Collins, L.JJ.) reported 46 W. R. 435, [1898] 2 Q. B. 147, reversing the judgment of the Queen's Bench Division (Pollock, B., and Ridley, J.), 46 W. R., p. 44, [1897] 2 Q. B. 535, upon an information by the Attorney-General claiming estate duty under the Finance Act, 1894.

The facts are set out at length in the report of the case in the Queen's Bench Division. Shortly they are as follows:

Mrs. Beech was entitled under her marriage settlement to the income of real and personal property for her life, with remainder to her son Howard Beech absolutely.

In 1894 she by deed surrendered her life interest in the property to the trustees of the settlement to the end and intent that her life interest might merge in the interest in remainder of her son Howard Beech. Upon the surrender of this life interest to Howard Beech, he became absolute owner of the property.

Mrs. Beech died in August, 1896, upon whose death estate duty was claimed.

The Court of Appeal had held that the duty was not payable.

The Crown appealed.

By the Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this part of this Act there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value, ascertained as hereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called estate duty. . . ."

By section 2, sub-section 1: "Property passing on the death of the deceased shall be deemed to include the property following—that is to say: . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . ."

By section 7, sub-section 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall, (*a*) if the interest extended to the whole income of the property, be the principal value of that property. . . ."

Sir R. E. Webster, A.G., Sir R. T. Reid, Q.C., Sir R. B. Finlay, S.G., and *Vaughan Hawkins*, for the appellant.—The duty is leviable under section 1. What is the natural meaning of these words, "All settled property which passes on the death of the person"? We say it is the ordinary devolution of property, *i.e.*, when a different interest arises. The scheme of the Act so intends. A succession takes place when a different person takes. Due effect has not been given to the words of the Act considered apart from surrender. On the dropping of the life, the remainderman gets an interest in the property. We have not to consider what the individual acquires, but what passes. The remainderman acquires owing to the settlement. Section 2, sub-section 1 (*b*), means property in which deceased or any other person has a life interest, *i.e.*, an interest ceasing on her death. But for merger, the remainderman would take an assignment of an interest which does cease on the death of the deceased. The character of the interest is considered in this sub-section; the value to be taken as the principal value. The words used in section 5 (dealing with settlement estate duty) must be taken as passing under that disposition. Section 7, sub-section 7, are descriptive of the interest. It was intended to fix the time (the death of the tenant for life) when the duty was payable. On this supposition the scheme works.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Cozens-Hardy, Q.C., Levett, Q.C., W. M. Spence, and *Austen Cartmell,* for the respondents, were not heard.

Earl of HALSBURY, L.C.—In this case I confess I have not been able to entertain any doubt that the judgment of the Court of Appeal is right, and that the judgment of the Divisional Court was erroneous.

The real difficulty I have in this case is in speaking with sufficient precision and, at the same time, proper respect towards the argument that has been addressed to us. I do not deny the ingenuity with which it has been sought to invest ordinary language with some extraordinary and subtle meaning which I have not always been able to follow. The subject-matter seems to me to be clear enough. The Finance Act, 1894, is a statute which is intended on the face of it to impose a tax upon property passing on death; that is the meaning of the statute, that is what it purports to do; and in this case I do not see that any property did pass on the death. That seems to me to be the whole case. I am unable to follow any other proposition. It is said, indeed, that there was a life estate, and that when once a settlement has been made, it is supposed to fasten and stamp upon every life estate that may be comprehended within it an indelible obligation to pay estate duty at some time or another. That does not seem to me to be the natural meaning of the words. What the statute is intended to make liable to pay duty is the succession by one person from another upon death; I do not say necessarily from the person who has died—there may be such a thing, of course, as a succession by reason of the death of a person not immediately the former owner of the property in popular language—but some death settled between the parties as the period at which the estate should vest.

But that being the meaning of it, let us see what the facts are here. I assume for the purpose of what I am about to say that the twelve months' limit is out of the question. It is out of the question for two reasons. First, because, as a matter of fact, the period was longer than twelve months when the particular conveyance which is now sought to be charged with the duty was made; and, according to Sir Robert Reid, who has said a good deal to induce one to take that view, his view, at all events, is that it is out of the question for another reason, which I will not stop to consider, because it may prejudice future inquiries if I express any opinion upon it; but that being so, the question here is whether, upon a conveyance *inter vivos* of the interest that the mother possessed, that falls within the language of the statute, "property passing by death." Again I say I agree with a great deal that has been said about the language which is intended to be understood, and has been used as language to be understood by ordinary people, and not in a technical sense. When the mother had passed her life estate by a conveyance *inter vivos* to her son, would anybody, untainted by technical views, have said that that estate passed from the mother to her son upon death? Death had nothing to do with it. The moment that conveyance was made the son was completely master of the situation, and he might have sold the property the very next day. That seems to me to dispose of the question under section 1.

Then in what other sense has it passed on the death? It is said that there is certain property which is to be deemed to pass. It seems to me, from what I have already said, that it is very manifest that the Legislature had good reason to use those words "shall be deemed to pass," because, taking the case I have already illustrated, where the death is the point of time at which the new estate shall vest, although it does not pass from the one to the other in a certain sense, yet death is the point of time at which the estate is to pass from the one to the other, and therefore it is deemed to pass within the meaning of the statute.

I think this is the whole question. I cannot argue it any further because it seems to me to speak for itself. It is not necessary here to say that taxing Acts must be precise and particular, and that the object of taxation has to be ascertained, because I am really unable to fix upon any words which even by any doubtful construction can make the tax payable under these circumstances. It appears to me that it would go to the root of the whole principle of the statute itself. The scheme of the Act (which I quite agree is a phrase quite proper to be used, even in respect of a taxing Act) is to inflict taxation upon property passing on death; and the one principle which seems to me to dispose of the whole of the case is that here there is no property passing on death at all; death has no more to do with it than any other immaterial circumstance in the case. That which passed the property, which did operate upon the property that passed, was the conveyance *inter vivos* which vested the property passed in the person to whom it was conveyed, perfectly independently of, and having no relation to, the death at all.

In these circumstances it appears to me that the judgment of the Court of Appeal was perfectly right, and this appeal ought to be dismissed with costs.

Lord WATSON.—This is not, according to my apprehension, a very large question; it may be large in its scope, but it certainly depends upon considerations which are very shortly stated in the statute itself which the appellants seek to interpret. The arguments used in support of their contention have been very subtle, very ingenious, and on the whole—excepting in their result—very satisfactory; but I certainly do not see my way to placing upon any taxing statute so wide an interpretation as has been submitted for our approval by the present Attorney-General and his predecessor in office.

I think the case lies exactly where my noble and learned friend on the woolsack has stated it. The Act is one which grants to Her Majesty a right to taxation, which is to be levied in the case of any person dying "upon the principal value of all property, real or personal, settled or not settled, which passes on the death of such person." Taking these words by themselves, the construction of the taxing clause would, I think, necessarily be somewhat more limited than follows from the terms of the next section—section 2—which enlarges the scope of the clause. It apparently was anticipated that a court of law might place upon these words, "which passes on the death of such person," a construction limited to property which passed in the ordinary sense of the term from the deceased into the possession and property of another person after his death. But section 2 of the statute widens that interpretation very much, for it extends it to all cases where the survivor of the deceased derives a succession, or, I should say rather, derives a benefit by reason of the death of the deceased, dependent upon and emerging upon the death of the deceased.

The present case is said to fall within sub-section 1 (*b*) of section 2. I only read the first part of it; the rest is inapplicable. "Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest." There are two points in that definition in regard to which the present case utterly fails. "Property in which the deceased or any other person had an interest ceasing on the death of the deceased.

—that is, an interest in him or her at his or her death which did not cease except with his or her lifetime. With regard to the property in question here, it is a right of life rent which was not in the deceased at the time of her death; she had parted with it months before, and accordingly, having so parted with it by a deed *inter vivos*, it follows that in the words of the remaining part of the definition no benefit accrued or arose by the cesser of her interest.

It is said that the succession—the fee which was taken by the respondent—was taken by him under the settlement. That is true; but it was not taken by him in such circumstances as to render it a succession or interest which was liable to taxation under the Act with which we have to deal.

For these reasons (I do not require to say more) I entirely concur with the judgment moved by the Lord Chancellor.

Lord ASHBOURNE.—I concur with my noble and learned friend on the woolsack. This is a taxing Act, and it is essential to see that the tax is expressly imposed, that the subject is not taxed without clear words, and that the natural construction is given to the words used. Here the express words do not support, but contradict the Crown's contention, for as a fact nothing passed on the death of the tenant for life. Practically, the argument for the Crown requires the alteration of the words of the statute so as to include the case of a tenant for life who had previously had an interest which had ceased, not on, but before the death. Indeed, the argument requires not only the alteration, but the insertion of words that the life interest should be deemed to continue down to the death, notwithstanding previous surrender, conveyance, or merger.

I think that the order of the Court of Appeal is quite right.

Lords MACNAGHTEN and MORRIS concurred.

Lord SHAND.—I also concur, and I have only to add that, concurring as I do with what has fallen from all your lordships, I think the reasons given by the Court of Appeal, by Smith and Chitty, L.JJ., are entirely satisfactory, and make the decision of the question quite clear.

Lord DAVEY.—I also concur, and it is really sufficient, so far as section 1 is concerned, to say that this was not settled property at the date of the death, and that it did not pass.

I only desire to add that when the *cestuis que trustent* under a settlement become absolutely entitled in possession to the trust funds, with power to dispose of the trust funds without the consent of any other parties, the settlement, according to every rule and doctrine, is at an end. The trustees are *functi officio*, they have no longer any duties to perform, they have no longer any interest to protect; their position is exclusively that of bare trustees for the persons absolutely entitled, and whether those persons absolutely entitled choose to get in the outstanding legal estate, or do not care to get in the legal estate, cannot make the faintest difference in their position as absolute owners with power of dealing with the estate; and it is a complete fallacy, in my opinion, to say that the respondent in the present case was, after he took a surrender of his mother's life interest, the owner of two separate interests. He was the absolute owner of the property, and one cannot be more than the absolute owner of the property. There is no single test of absolute ownership that can be applied to his position at that date which shows that he was in any degree other than the absolute owner of the property. If he was the absolute owner of the property before his mother's death, he remained absolute owner of the property afterwards, and there was no passing of the estate—that is, no change of ownership by reason of her death.

This is not a mere technical doctrine, it is the expression of a fact. A man, it may be, had a conveyance from half-a-dozen persons, but from whomsoever he derives his title, however many be the persons who join in conveying to him, if he has got the absolute ownership he is the owner of one estate or interest—namely, the ownership in fee of real estate, or absolute owner of personal estate.

With regard to section 2 it may be said (as Sir Robert Reid in particular argued) that although this property did not pass, it is to be deemed to pass. I do not differ from what has been already said as to the construction of that section. It appears to me shortly upon that section that neither the deceased nor any other person had an interest ceasing at the death of the deceased at the time when the duty attached—namely, the death of the deceased; and it also appears to me that no benefit can be shown to have accrued or arisen in any form whatever to the respondent by the cesser of that interest. That seems to me to dispose of the case.

With regard to the difficulties raised by Sir Robert Reid as to the fearful consequences of evasion which this decision would lead to, I am not convinced that he takes a right view of the construction and effect of section 2, sub-section 1 (*c*); but it is not necessary to express any opinion whatever about that, and I abstain from doing so. It may be, even if he is right, that the point was overlooked by Parliament, or that Parliament thought that section 2, sub-section 1 (*c*), would hit it and were mistaken; but in either case I cannot see that it can in any way affect the construction to be put upon this Act.

Lord LUDLOW.—If this taxing Act is to be interpreted and read according to established principles, and if there is to be given to the words used in it their ordinary popular meaning, I can only say that I have not the slightest hesitation in coming to the conclusion that the judgments of the Court of Appeal were perfectly right; I concur with them, and I am unable to agree with the decision of the Divisional Court.

Appeal dismissed.

Solicitors for the appellant, *Solicitor of Inland Revenue.*

Solicitors for the respondents, *Bell, Steward, May, & How.*

Court of Appeal.

From Q. B. Div. (Bkcy.) (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Jan. 13.

In re H. P. THOMAS.

Ex parte THE SHERIFF OF MIDDLESEX. (*a*.)

Bankruptcy—Execution—Sheriff's right to poundage—Goods seized but not sold—Sale stopped by official receiver—Bankruptcy Act, 1890 (53 & 54 *Vict.* c. 71), *s.* 11, *sub-section* 1—*Order as to Fees* (31*st August*, 1888) *under the Sheriffs Act*, 1887 (50 & 51 *Vict.* c. 55).

A sheriff who has seized goods under a judgment, but has, by notice of a receiving order and a request (*under*

(*a*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

section 11 of the Bankruptcy Act, 1890) to deliver the goods to the official receiver, been prevented from selling, is not entitled to poundage.

Appeal from the Queen's Bench Division (Wright and Darling, JJ.).

In March, 1898, the Sheriff of Middlesex, under a writ of execution issued in an action in which the debtor, H. P. Thomas, was defendant, seized goods belonging to the debtor. The sale of the goods so seized was duly advertised to take place on the 31st of March, 1898; but on the 29th of March the official receiver served the sheriff, who was still in possession, with notice that a receiving order had been made against the debtor, and further requested him (in pursuance of section 11 of the Bankruptcy Act, 1890) to deliver the goods to the official receiver. The sheriff did, accordingly, deliver up the goods. Afterwards the sheriff sent in to the debtor's trustee in bankruptcy a bill of charges which included a charge for poundage. On taxation the registrar of the Edmonton County Court disallowed the charge for poundage.

The question turned upon, first, sub-section 1 of section 11 of the Bankruptcy Act, 1890; and, secondly, the order made under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), which is set out in the Annual Practice for 1899, vol. 2, pp. 236-239.

The former enacts that "where any goods of a debtor are taken in execution, and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge." The latter provides that "sheriff's poundage and the fee for delivery of the writ to the under-sheriff shall be the same as before the making of this order" (item No. 11); that "the foregoing fees, numbered . . . 11, shall be levied in every case in which an execution is completed by sale"; and that "where an execution is . . . stopped the fees under this order shall be paid by the person . . . at whose instance the sale is stopped."

The county court judge reversed the decision of the registrar, and allowed the poundage.

The trustee in bankruptcy appealed to the Divisional Court, which reversed the decision of the county court judge and restored that of the registrar, but gave leave to appeal.

The sheriff appealed to the Court of Appeal.

Muir Mackenzie, for the appeal.—Poundage is part of the "costs of the execution" within section 11 of the Bankruptcy Act, 1890. Poundage is the only remuneration allowed to the sheriff, except the fee for seizure, and is payable when the money is obtained without a sale: *Madeley* v. *Greenwood*, 42 Solicitors' Journal, 34. [LINDLEY, M.R.—Under the old law poundage was not allowed unless there was a sale: *Sneary* v. *Abdy*, 1 Ex. D. 299, 24 W. R. Dig. 262.] The person who "stops" a sale is liable to pay poundage. Here the official receiver stopped the sale by his request to deliver the goods, and the trustee must pay. Mere notice that a receiving order had been made would not have stopped it: *Trustee of Woolford's Estate* v. *Levy*, 40 W. R. 483, [1892] 1 Q. B. 772, at pp. 779, 781, 782. The two cases which seem to be against me, *Miles* v. *Harris*, 12 C. B. N. S. 550, 10 W. R. C. L. Dig. 67; and *In re Ludford*, 33 W. R. 152, (*sub. nom. In re Ludmore*) 13 Q. B. D. 415, are distinguishable, because they were before the order as to fees of the 31st of August, 1888 (Annual Practice, 1899, vol. 2, pp. 236-239); and some of the observations of the judges there are in my favour. *In re Harrison, Ex parte Sheriff of Essex*, 41 W. R. 512, [1893] 2 Q. B. 111, was a decision on a different fee (the possession money).

He also referred to *Lee* v. *Dangar*, 40 W. R. 469 [1892], 2 Q. B. D. 337.

J. D. Crawford, for the trustee in bankruptcy, was not called upon.

LINDLEY, M.R.—It appears to me that the decision appealed from is perfectly correct. First of all, let us take this case apart from the rules about the sheriff's fees which were made under the Act of 1887. Apart from those rules the sheriff has, to my mind, no case at all. That is as plain as anything in law can be. The sheriff has seized, no doubt, but he has not sold; and, as he has not sold, he is, by the law which had been settled for years, not entitled to poundage. I know that there is a qualification upon that doctrine of law where the sheriff has seized, and where, although he has not sold, the court has regarded him as having produced the money which has been obtained by the execution creditor. As to the case of *Madeley* v. *Greenwood*, if in that case the execution creditor did not get his money I should think that the decision was wrong; if he did get it, the decision may be right. But apart from that consideration that the sheriff produced the money received by the execution creditor—a consideration which we have not to consider here, because, of course, nobody here has got any money through the sheriff's action—I say again that, unless the rules of 1888 make a difference in his favour, the sheriff has no case at all. That is consistent with the decision in *Miles* v. *Harris*. Mr. Muir Mackenzie, for the appellant, contends that the order of 1888 is more beneficial to him than the old law was. We must look at that, of course. [His lordship read the material parts of the order, and proceeded:] There is not a word to direct that the sheriff shall be entitled to poundage when he does not sell; the language rather shows that the Rule Committee did not mean to interfere at all with the right to poundage. What they say does not assist the appellant in any way whatever. The right of the sheriff to what is called poundage is given by a statute of Elizabeth, and poundage is payable to the sheriff only on a sale, or possibly on the realization of money by a seizure without a sale; but here there was no sale. I think that, having regard to the case of *The Trustee of Woolford's Estate* v. *Levy*, Mr. Muir Mackenzie is right in saying that the official receiver, or Thomas's trustee in bankruptcy, whoever it was that served the sheriff with the notice and the request to deliver the goods, did "stop the sale." But that does not carry the appellant through, for what is to be paid is "the fees under this order." Now, that cannot mean that all the fees enumerated in the order are to be paid whether they have been earned or not; that would be nonsense. What must be meant, because it is the only sensible construction, is that such fees as have been earned up to the time of the stoppage of the sale are to be paid; unless we are to go the preposterous and absurd length of saying that all the "foregoing fees" are to be paid whenever the execution has been stopped.

I think we cannot decide in Mr. Muir Mackenzie's favour. The appeal must be dismissed.

RIGBY, L.J.—I agree. I do not think that the exceptional cases in which the sheriff had his poundage though he had not sold—where, namely, the

money had been obtained by the fact of his taking possession—ought to be treated as governing the present case.

Vaughan Williams, L.J., said: The sheriff's poundage is a fee which is given by a statute of Queen Elizabeth. Now, the words of that statute did leave an open question, because the expression was simply "levy, or extend and deliver in execution." But it was decided—although I cannot give the name of the case,* I am certain it was decided—even earlier than the case of *Miles* v. *Harris*, which was cited to us this morning, that "levy" in that statute meant turning the goods into money; and in *Miles* v. *Harris* itself Erle, C.J., when he comes to deliver judgment, says that he was only confirming a previous decision. He says: "The question is whether a seizure of goods under the *fi. fa.* is a levy within that statute. I am of opinion that the sheriff has not levied so as to be entitled to poundage under that statute until the goods seized have been turned into money." There has been no departure in any of the cases from that rule. It is quite true that in a case where the execution creditor has stopped the sale because he has got his money, that has in some way or other been held to be within the scope of the statute. But that consideration has here no application whatsoever. The eleventh item of the order of August, 1888, gives the sheriff the same poundage and fee for delivery of the writ as he was entitled to before the making of that order; and it really is not denied that the fees given to him there are the fees he earned down to the time of the notice of the receiving order and the demand for possession of the goods. According to the principle laid down in the case just cited, poundage has not been earned because the goods have not been turned into money.

Appeal dismissed.

Solicitors, *Charles A. Bannister & Reynolds; Powell & Skues.*

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 26.

Lower Rhine and Würtemberg Insurance Association v. Sedgwick. (a.)

Insurance—Marine—Re-insurance—Lapse of original policies—New policy—Alteration of risk—Liability under policy of reinsurance.

An underwriter who had subscribed two time policies on a ship valued therein at £5,600 effected a reinsurance by a time policy which was expressed to be a policy on the same ship, "being a reinsurance of policy or policies, and subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon." The first of the original policies having expired, the second original policy was cancelled, and the underwriter subscribed a new time policy on the same ship, which was valued therein at £5,000.

Held, that risk undertaken by the new policy was not covered by the reinsurance.

Judgment of Kennedy, J. (46 *W. R.* 380, [1898] 1 *Q. B.* 739), *reversed.*

Appeal from the judgment of Kennedy, J., at the trial of the action without a jury, reported 46 W. R. 380, [1898], 1 Q. B. 739.

The action was brought to recover money paid by the plaintiffs to the defendant on a policy of reinsurance under a mistake of fact.

On the 20th of February, 1896, the defendant, who was an underwriter at Lloyd's, and six other underwriters, subscribed for £50 each a policy of insurance upon the steamship *Collynie* for twelve calendar months, the total amount insured being £350. The steamer was valued as follows: Hull, £3,600; machinery, £2,000—total, £5,600. The premium was at the rate of nine guineas per cent. Time clauses were inserted providing for the return of a certain portion of premium in certain events.

On the 20th of June, 1896, the defendant, with six others, subscribed for £25 each a further policy upon the same ship for twelve calendar months, the total amount insured being £850. The risks, the valuation on hull and machinery, the premium, and the time clauses were identical with those in the former policy.

On the 27th of November, 1896, the defendant and his six co-insurers effected a policy of reinsurance with the plaintiffs. This policy was expressed to be for £250 on the ship *Collynie* from the 4th of November, 1896, to the 20th of June, 1897, the hull and machinery being valued at £5,600, and the premium being at the rate of ten guineas per cent. Affixed upon the policy by a rubber stamp was the following clause, "Being a reinsurance of policy or policies . . . and subject to the same terms, conditions, and clauses as original policy or policies, whether reinsurance or otherwise, and to pay as may be paid thereon."

The original policies were not asked for or shown to the plaintiffs. The plaintiffs themselves again reinsured under a policy dated the 12th of November against total loss only.

On the 20th of February, 1897, the first policy expired by effluxion of time, and the second policy, of the 20th of June, 1896, was cancelled, and the defendant, with eight others, subscribed a new policy for £50 each on the same ship for twelve calendar months. This policy was for £1,040, on hull and machinery valued at £5,000. The premium was at the rate of ten guines per cent., and the time clauses providing for return of premium differed from those in the two original policies.

On the 3rd of May, 1897, *The Collynie* was totally lost, and the plaintiffs paid the defendant for a total loss under the policy of reinsurance of the 27th of November, 1896, the defendant having paid his assured for a total loss under the policy of the 20th of February, 1897.

When the plaintiffs sought to recover from their reinsurers, their reinsurers asked to see the original policies, and the plaintiffs then ascertained the facts, which before they were ignorant of, relating to the cancellation of the policy of the 20th of June, 1896, and the substitution in its place of the policy of the 20th of February, 1897. The plaintiffs thereupon brought this action.

At the trial Kennedy, J., gave judgment for the defendant.

The plaintiffs appealed.

English Harrison, Q.C., Carver, Q.C., and *Joseph Hurst,* for the plaintiffs.

Joseph Walton, Q.C., and *Scrutton,* for the defendant.

Cur. adv. vult.

Nov. 26.—A. L. Smith, L.J., read the following judgment: The point raised in this case is, What risk has an underwriting company covered under a policy of marine reinsurance dated the 27th of November, 1896?

This depends upon what is the true reading of an

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* Possibly *Alchin* v. *Wells*, 5 T. R. 470.

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

unfilled-up clause attached, by means of a rubber stamp, to the margin of a policy upon ship against perils of the sea. Although the action is brought by the company to recover back money paid under a mistake of fact, it will be convenient to treat the case as if were an action by Mr. Sedgwick, the reinsured, to recover from his reinsurers a loss under a policy of reinsurance, for it is not disputed that the effect of the rubber clause attached to the policy is to cut down the policy upon ship to a policy of reinsurance.

The question is whether a policy dated the 20th of February, 1897, which I shall call "the new policy," and which was effected after the reinsurance policy of the 27th of November, 1896, is covered by that policy. Prior to the 27th of November, 1896, Mr. Sedgwick and others had underwritten two time policies upon the ship *Collynie*. The first is dated the 20th of February, 1896, and covers the ship against sea perils from the 20th of February, 1896, to the 20th of February, 1897, to the amount of £350. The hull and machinery is therein valued at £5,600—hull at £3,600 and the machinery at £2,000—and time clauses are inserted in this policy.

The second policy is dated the 20th of June, 1896, by which Mr. Sedgwick and others underwrote a further risk upon the same ship against sea perils, covering her from the 20th of June, 1896, to the 20th of June, 1897, to the amount of £850. This policy, with the exception of the time covered and the amount underwritten, is identical with the policy of the 20th of February, 1896. The hull and machinery are again valued at £5,600—hull at £3,600 and the machinery at £2,000—and similar time clauses are inserted.

Whilst these two policies were running, Mr. Sedgwick, being under liability as underwriter thereon, caused the reinsurance policy now in question to be effected with the company.

By this policy (27th of November, 1896) the company, by way of reinsuring Mr. Sedgwick, covered the ship *Collynie* against perils of the sea from the 4th of November, 1896, to the 20th of June, 1897, to the amount of £250, the hull and machinery being together valued at £5,600. Affixed upon this policy by a rubber stamp is the following clause, which is called for brevity "the rubber clause": "Being a reinsurance of policy or policies" (here a blank space is left unfilled in) "and subject to the same terms, conditions, and clauses as original policy or policies, whether reinsurance or otherwise, and to pay as may be paid thereon."

The effect of this clause I have before stated. It converts a policy upon ship into a policy of reinsurance; but what upon its true construction are the interests—or, as I prefer to call them, the liabilities—of Mr. Sedgwick which this rubber clause covers? Is the true reading that the company reinsured Mr. Sedgwick only against loss which might accrue to him under the two original policies then existing which he had theretofore underwritten, as the company contend, or is it that the company also reinsured any loss Mr. Sedgwick might incur under policy or policies which he might thereafter underwrite upon the ship *Collynie*, always assuming such loss to occur during the continuance of the reinsurance policy, which is what Mr. Sedgwick contends for?

The ship *Collynie* was lost upon the 27th of May, 1897, which was after the first policy underwritten by Mr. Sedgwick had expired, and after the second policy had been cancelled, which took place upon the 20th of February, 1897, but during the continuance of the reinsurance policy.

Upon the 20th of February, 1897, which it will be seen was about three months after the plaintiffs had underwritten the policy of reinsurance (27th of November, 1896), Mr. Sedgwick underwrote a new risk upon *The Collynie* to cover her from the 20th of February, 1897, to the 20th of February, 1898.

In this new policy of the 20th February, 1897, the hull and machinery of *The Collynie* are valued at £5,000, and not £5,600. This, in my opinion, for reasons hereafter given, plays an important part in this case.

Mr. Sedgwick's case is that this new policy of the 20th of February, 1897, effected after the making of the reinsurance policy, is covered by the rubber clause, and my brother Kennedy has so held.

It is argued by the learned counsel for Mr. Sedgwick that as by marine insurance law a policy upon ship or goods covers the interest of an assured which exists at the date of loss, and not necessarily at the date of the policy, and as the interest of an assured under a marine policy may vary between the time the policy is effected and the date of loss, the rubber clause by law is capable of covering the new risk Mr. Sedgwick undertook under the new policy of the 20th of February, 1897, for at the date of the loss of the ship Mr. Sedgwick was liable as underwriter thereunder, and consequently had an interest covered by the reinsurance policy.

These propositions of law are not denied by the learned counsel for the company; but they insist, and I think rightly, that the question still remains, what under the reinsurance policy were the interests—or, as I call them, the liabilities—of Mr. Sedgwick which were covered.

It is said for Mr. Sedgwick that the company might have inserted in the space left blank in the rubber clause the numbers of the two then existing original policies, and have limited the reinsurance to such policies, but not having done so, the company have reinsured any liability Mr. Sedgwick might undertake by underwriting any policy or policies upon the ship *Collynie* subsequent to the reinsurance being effected, if the loss then insured against occurred during the time the reinsurance was running. I do not agree with this.

At the date of the reinsurance policy two original policies, and two only, were in existence upon which Mr. Sedgwick was liable as underwriter. I agree that a person who effects a reinsurance *primâ facie* reinsures the liability he is under when he effects the reinsurance, and not a liability he is not then under, and may never thereafter come under. To cover this latter liability I should expect to find some words showing that this latter liability was covered.

Do I find such words in the rubber clause upon the reinsurance policy? By it the company reinsures policy or policies subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon. It seems to me that the original policy or policies here mentioned are the two original policies then in existence. Then what are the policy or policies subject to the same terms and conditions as the original policy or policies? They may include a policy or policies effected after the original policy and policies, and I am not prepared to say that the words are not sufficient to embrace a policy or policies effected after the date of the reinsurance policy; but it is unnecessary to decide this, for I am clear that to come within the rubber clause the policy or policies to be thereafter effected must contain the same terms, conditions, and clauses as the original policy or policies. Does, then, the new policy of the 20th of February, 1897, fulfil these conditions? Does it contain the same terms, conditions, and clauses as the original policy or policies? My brother Kennedy saw the point about the difference of values in the original policies and reinsurance policy and the new policy, but he said that this was

immaterial, because the ship *Collynie* was a total loss, and the difference in value did not matter in this case; but I think this point cannot be thus evaded, and must be dealt with in order to see whether the new policy of the 20th of February, 1897, comes within the rubber clause, and the question is not to be determined upon whether the ship happens to be a total loss or not.

The new policy of the 20th of February, 1897, is upon hull and machinery valued at £5,000, and not £5,600 valued separately as in the original policies. Does this make a material difference between the terms, conditions, and clauses of the original policies and the new policy? I think it certainly does, and to bring out the difference I will take a concrete case. In every case of damage happening to the *Collynie* for which Mr. Sedgwick was liable under the new policy of the 20th of February, 1897, excepting in the case of a total loss of ship, an important factor in ascertaining what was Mr. Sedgwick's liability thereunder would be the agreed value of the hull and machinery—*i.e.*, £5,000. Take the case of the question being as to whether the ship was a constructive total loss or not under the new policy. Take cost of repairs as being £5,250—the agreed value is £5,000. Mr. Sedgwick would have to pay under the new policy as for a total loss, because the cost of repairs would exceed the agreed value. When he came upon his reinsurance policy the ship would not be a constructive total loss, for the agreed value of the ship being £5,600, it would exceed the cost of repairs—*i.e.*, £5,250—by £350. What then? Mr. Sedgwick would have as underwriter to pay his assured under the new policy of the 20th of February, 1897, as for a total loss, and could only recover an average loss from his reinsurers. It was stated and admitted by Mr. Sedgwick's counsel that £5,600 was to be taken as the agreed value of the hull and machinery between Mr. Sedgwick and the company under the policy of reinsurance.

Now, by the rubber clause the reinsurers have agreed with Mr. Sedgwick "to pay as may be paid thereon"—that is, as he pays under the policies he has underwritten, they will pay him up to the amount of £250 underwritten by them, which to my mind shows that the rubber clause deals, as it says, with policy or policies which contain the same terms, conditions, and clauses as the two original policies, and not with policies which do not; and this is the position of the new policy of the 20th of February, 1897.

In my judgment, upon this ground the new policy of the 20th of February, 1897, is not covered by the rubber clause, and Mr. Sedgwick therefore cannot claim from the company as reinsurers losses he may have had to pay as underwriter thereunder.

For these reasons I cannot agree with my brother Kennedy, and I think judgment should be for the company.

RIGBY, L.J., read the following judgment: I am of the same opinion. At the date of the policy of reinsurance the construction of which has to be dealt with in this case, there were in existence two policies, which must in my opinion be deemed to be the original policies referred to in the rubber clause. The risk on those policies was covered by the reinsurance policy so long as the policies themselves were running. They, however, came to an end before the loss of the ship, and the only policy in existence at the date of the loss was expressed in terms different in material respects from those original policies. In particular, the valuation of the ship and machinery at £5,000, instead of £3,600 on hull and £2,000 on machinery as in the policies in existence at the date of the reinsurance policy, brought about such a difference in the risk thereunder as to make it impossible that a reinsurance thereon should be on the same terms, conditions, and clauses as the original policies. In my judgment, therefore, in the facts of this case the reinsurance policy does not extend to cover the risk under the newly-effected policy. In other words, the insured could not recover anything on the reinsurance. I think it unnecessary to determine what would have been the case if there had been no policy underwritten by the reinsured at the time of the reinsurance, or if the new policy had been on the same terms as the policies that were then in existence.

COLLINS, L.J., read the following judgment: The real point in this case turns on the construction of the rubber clause in the policy of reinsurance. Is it framed to cover any risks upon the vessel which the assured may underwrite during the period named, or is it limited to specific ascertained risks? Is it in fact, what it purports *primâ facie* to be, a reinsurance of an actual existing risk covered by an original policy or policies; or is it an antecedent undertaking to indemnify the assured against any future undefined risks which he may undertake on the named vessel within the given period? If the latter is the true construction, the judgment appealed from is right; if not, it is wrong.

I think the decision of this question stands quite outside the consideration of insurable interest so much pressed upon us in the brilliant argument for the respondent. No question of insurable interest arises in this case; and if it did, it is elementary law that its existence is material only at the time of the loss. It is not material, therefore, to contend that it would be legally possible to make an antecedent contract with an underwriter whereby he should undertake to hold the assured indemnified on all liabilities which he should come under in respect of risks to be undertaken by him within a given period. But it is obvious that the indefiniteness of the risks would be an important factor in determining the amount of the premium. The question here is whether, looking at the plain words of the policy taken in conjunction with the surrounding facts, the subject-matter of the contract was risks already undertaken by the assured under existing policies capable of being described. It seems to me that this is the fair meaning of the clause. It is described as "being a reinsurance," which in strictness it is not if there is no antecedent insurance, and it is only by somewhat straining the plain *primâ facie* meaning of the words that they can be held to describe an undertaking to indemnify against risks not already underwritten. The clause goes on, "of policy or policies," leaving a blank for their specification. This again, in my opinion, is framed to cover the case of existing risks. It is inapt to cover policies not yet in existence and incapable of specification. Something more than filling in the blank would be required to make the clause grammatically applicable to risks to be undertaken afterwards. The form is not framed to cover such a case. But the concluding words of the clause are, I think, even less adapted to cover future and variable risks. They are: "And subject to the same terms, conditions, and clauses as original policy or policies, whether reinsurance or otherwise, and to pay as may be paid thereon." This, as was pointed out, is the essence of the contract. Its purpose is to cover in whole or in part the risk actually undertaken on "an original" policy. The standard of liability must be ascertained and identical in both cases. I do not mean that the whole sum underwritten must be covered by the reinsurance, neither need the whole risk. For instance, the original

policy may cover any loss, total or partial; the reinsurance may be against total only, or partial only; but the conditions under which one or the other can be recovered are to be identical, so that the payment on the reinsurance may be "as paid" on the original. The clause does not provide for, and it seems to me excludes, the possibility of the same facts giving rise to a claim for total loss on the original policy, and for partial only on the reinsurance policy. The valuation, therefore, in the original and the covering policy ought to be the same where both are valued, and a condition of the former is that in case of constructive total loss the valuation in the policy is to be taken as the value of the ship when repaired; otherwise the main provision of the clause will be defeated, and the standard of liability will never be the same under the two policies except in the single case of an actual total loss. In considering, therefore, the clause itself, and looking, as I am entitled to do, at the surrounding facts to ascertain the subject-matter to which it was applicable, I find that at the date of the policy of reinsurance there were in existence two policies underwritten by the assured on the same ship at the same valuation—namely, £5,600, which is the valuation named in the covering policy; and I hold that it was the risk on these policies only that was intended to be covered by the reinsurance, which in its terms is in my judgment inapplicable to a policy subsequently effected at a different valuation. It is not and cannot be questioned that at the time the reinsurance was effected it was intended to cover the two existing policies, and complete effect could be given to every word in the reinsurance policy had the loss taken place while these policies were running.

But substitute for these policies a policy at a different valuation, and the standard of liability under the new policy and the reinsurance policy is no longer the same, but different. The argument for the respondent, that the rights of the assured on the reinsurance policy will always be measured by reference to the standard of the reinsurance and not of the "original" policy, does not meet the difficulty, as it admits that the standard of liability would not in such a case be identical; but that it should be identical I look upon as the governing intention of the clause. For instance, in this case Mr. Walton had to admit that, having regard to the difference in the valuation in the new policy and the reinsurance policy, coupled with the provision in the time clauses as to "repaired value," that which would be a constructive total loss under the former might be only a partial loss under the latter, and consequently that, though the amount insured in both policies was the same, the amount payable under the first would be different from that recoverable under the second, and thus what I hold to be the plain intention of the "rubber clause" would be defeated.

The inference from identity of valuation in the policies current at the date of the reinsurance, and in the reinsurance itself, is not, in my judgment, weakened by the fact that in the current policies this valuation was the sum of two named factors. The lump valuation is not inconsistent with the detailed valuation of the original policies, and the words of the rubber clause, "to be paid as paid thereon," would, I think, equalize the scale of payment under the original and covering policy. Still less does it affect the argument that policies to be brought under the reinsurance policy must, if due effect is to be given to the rubber clause, be at the same valuation. The valuation at £5,600 has a twofold operation: it helps to identify the subject-matter as being the two existing policies at that valuation, and it excludes a subsequent policy at a different valuation from the scope and intention of the clause. Neither do I draw any inference adverse to the underwriter in this case from the fact that the blanks were not filled up. I think this was probably a mere omission in the hurry of business, and has not had the effect of converting a clause framed, in my judgment, to meet specific risks into a general ambulatory undertaking to cover indefinite risks.

The argument for the respondent which was adopted by Kennedy, J., was that any policy effected by the assured on the same ship after the reinsurance during the named period might become the "original policy" within the meaning of the clause, and the respondent was bound to say so, as the contract of the reinsurance is to pay "as paid thereon"—*i.e.*, on the original. But I think it is quite impossible to make the language of the clause fit such a construction. As I have already pointed out, the two policies existing at the date of the insurance must in the circumstances of this case have been "the originals" at the date of the reinsurance. If so, it must be the terms and conditions of these policies, and no others, that are to govern the contract, and unless money is "paid thereon"—*i.e.*, on these policies, none becomes payable under the reinsurance. Whether or not, therefore, the clause was capable of covering risks not theretofore accepted in a case where none had been accepted at the date of the reinsurance, the fact that in this case risks had been accepted under existing policies which were intended to be covered by the reinsurance necessarily, it seems to me, by constituting these policies "the originals," ties the clause to these policies, and limits the obligation of the reinsurer to pay as paid thereon; and since nothing became due thereon, nothing is payable by the reinsurer. I am of opinion that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs, *Pritchard & Sons.*

Solicitors for defendant, *Waltons, Johnson, Bubb, & Whatton.*

High Court of Justice.

Chan. Div. North, J. — Nov. 11.

In re BENSON.

ELLETSON *v.* PILLERS. (*a.*)

Practice—Payment into court—Trustee.

A trustee, in answer to a motion that he should pay into court money arising from the sale of shares forming part of the trust property, swore that he in good faith paid away the purchase-money in the belief that he was entitled thereto, and no part thereof was then in his hands.

Held, that as the terms of the affidavit did not shew that the trustee had no control over the purchase-money, he must bring the sum into court.

Motion.

William Benson, by his will dated the 17th of October, 1888, gave all his real and personal estate to the plaintiff and defendant, whom he appointed his executors, upon trust for sale and conversion and investment of the proceeds, and subject to his widow's life interest, on trust for the plaintiff.

The testator died on the 30th of December, 1888, and the widow on the 21st of August, 1898.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

On the 19th of September, 1898, the plaintiff and defendant executed transfers of 195 fully-paid preference shares of £5 each in the Fishponds and Bedminster Brick and Tile Co., 335 ordinary shares, and a debenture for £1,000 to the defendant. Certain shares were also transferred to the plaintiff. The defendant sold part of the shares transferred to him for £2,025.

The defendant was a solicitor, and had managed the trust estate. He alleged that the plaintiff had given him the shares as remuneration for his services.

The only question in dispute was whether the defendant could be ordered to pay into court the purchase-money of the shares sold by him. By his affidavit he admitted having sold the shares and received the purchase-money, but said: "Before any question was raised as to the said transfers I in good faith paid away and disposed of all the said purchase-money in the belief that I was entitled thereto, and no part thereof is now in my hands, and I have no power over the said 195 preference shares and the 200 ordinary shares, or any of them."

Vernon Smith, Q.C., and *Ribton*, for the plaintiff.—The defendant must show that he has paid the money to someone entitled to it to resist this motion.

They cited *Neville* v. *Matthewman*, 42 W. R. 675, [1894] 3 Ch. 345; *Nutter* v. *Holland*, 43 W. R. 18, [1894] 3 Ch. 408; and *Crompton and Evans Union Bank* v. *Burton*, 44 W. R. 60, [1895] 2 Ch. 711.

Macnaghten, Q.C., and *C. James*.—The question is simply gift or no gift. The defendant does not admit that he has trust money in his hands.

Vernon Smith replied.

NORTH, J., referred to the facts, and said: The defendant has made an affidavit in which he says that he is entitled to the property as a gift from the plaintiff, and that it has ceased to be trust money. Of course if it is clearly established that there was a gift to him deliberately made by the plaintiff in such circumstances that he as a solicitor is entitled to retain it, it did cease to be trust property. That will have to be decided at the trial of the action. At present it is absolutely impossible to say that the court ought to be satisfied that the property has ceased to be trust property merely because the defendant says that there was a gift to him. I do not think that it makes any difference that some of the shares have been sold. If the shares are trust property the proceeds must be also trust property. The terms of the affidavit do not show that the defendant has no control over the proceeds of the sale. The defendant says that he has no power over the shares he has sold, but he does not say that he has no power over the purchase-money he has received. He says that he has disposed of it in good faith, but that would be consistent with its standing at this moment to his credit at his bank. He does not say that the money was not in his power or under his control, and I do not think his affidavit sufficient to relieve him from liability to pay the £2,025 into court, which he must do within a month.

Solicitors, *Meredith, Roberts, & Mills*, for *Perham & Son*, Bristol; *Indermaur & Brown*, for *Press, Inskip, & Press*, Bristol.

Chan. Div. Stirling, J. — Dec. 15.

In re DREW.
DREW *v.* DREW. (*a.*)

Will—Construction—Gift to wife of testator's son—Second wife.

Where in a will a gift is made to the wife of a person married at the date of the will, in the absence of any context to show the contrary the wife in existence at that date is the person benefited.

A testator gave the income of a share of his residuary estate to his son for life, after his death to his wife for life, and after her decease to the children of his son living at the time of the son's death. The will also contained a clause that in the event of the son's bankruptcy the trustees should apply the income of the share thereinbefore directed to be invested for the said son and his family for the benefit of the said son, his wife, and children.

Held, that there was sufficient context to take the case out of the general rule, and that a second wife of the son could benefit under the gift.

This was a summons raising the question as to what person was intended by the testator when he spoke of the wife of one of his sons, to whom he gave an interest in part of his property.

The testator gave all his property to trustees upon trust for the benefit of his wife during her life; and then, subject to that, "out of the said rents and profits, dividends, interest, and income which shall arise for and during the first sixteen years next following my decease" to make certain payments; and upon further trust to divide the surplus rent and profits in thirteen equal parts. Then he gave one-thirteenth part to his son Beriah Harvey Drew for so many years after the term of sixteen years as he should live; "and as to one-thirteenth part hereinbefore directed to be paid to my said son Beriah Harvey Drew upon trust to pay the same after his decease to his wife during the remainder of the said term of sixteen years in case she shall so long live for her separate inalienable use, and from and after her decease upon trust to pay the same to the child or children of my said son Beriah Harvey who shall be living at his decease for and during the remainder of the period of sixteen years in case they or any one or more of them shall so long live." Then after the period of sixteen years he directed a sale, and gave "the remaining one-thirteenth part of the said trust funds upon trust to lay out and invest the same in Government or real securities at interest, or in the purchase of preference shares in some or one approved railways or railway, and to pay the interest, dividends, or income arising from the money so invested unto my son Beriah Harvey Drew for and during the term of his natural life, and from and after the decease of my son Beriah Harvey Drew unto the wife of my said son for and during her natural life for her separate inalienable use, and from and after her decease upon trust to pay such interest, dividends, and income to the lawful child or children of my said son Beriah Harvey who shall be living at his decease, and who shall live to attain the age of twenty-one years; and on such child or children attaining his, her, or their age or respective ages of twenty-one years upon trust to pay to or divide the said principal moneys or share so invested amongst his children, if more than one share and share alike, and if only one then to such only child." The will also contained the following proviso:

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

"I do declare it to be my will that the part and share of the surplus rents and profits, dividends, and income hereinbefore provided for my said son Beriah Harvey Drew, and also the thirteenth part or share of the net moneys arising from the sale of my residuary estates and property hereinbefore directed to be invested for his benefit during his life, are so respectively by me given and provided for him, and shall be had and enjoyed by my said son only until he shall alien, or attempt to alien, charge, or encumber the same, or any part thereof, or until he shall become bankrupt or insolvent within the meaning of any Act of Parliament, or do or admit any act whereby the same benefits would, but for this limitation, become payable to or vested in any other person or persons, official or otherwise. And after the determination of the interest so given or intended for my said son Beriah Harvey Drew, upon trust that the said trustees or trustee for the time being do and shall retain and keep in their own hands the share of and in the said surplus rents and profits, interest, dividends, and income, and the interest, dividends, and income of the thirteenth part or share hereinbefore directed to be invested for my said son Beriah Harvey Drew and his family, and every part thereof, for the purpose of applying the same in or towards the maintenance and support of my said son Beriah Harvey Drew, his wife, and children, at such time or times and in such manner and in such proportions as the said trustees or trustee shall in their or his entire discretion think fit, or otherwise paying the same to any one or more of my other children or their respective issue."

The testator died in 1862. At the date of the will B. H. Drew was married. His wife died, and on the 5th of April, 1890, he married the defendant Sarah Ann Drew. B. H. Drew died on the 16th of February, 1898, and the question now arose whether the second wife was entitled to the income of the thirteenth share during her life.

E. J. Payne, for the trustees of the will.

S. Dickinson, for the plaintiff.

Stewart Smith, for Mrs. Drew.

The arguments used and cases cited appear from the judgment.

STIRLING, J.—This is a case which it is not satisfactory to decide, either having regard to the state of the authorities or the principle on which the case must be decided. [His lordship then stated the facts, and continued:] As regards the rule of law, the proposition which is admitted in this case is that *primâ facie* where the wife of a person is spoken of, and that person is married at the time of the will, in the absence of any context to show the contrary the wife in existence at the date of the will is the person benefited. That proposition is clear, and is not disputed. The sole question I have to consider, therefore, is whether there is any context in this case to take it out of the general proposition. Two circumstances are relied on. The first is the gift to the children of B. H. Drew. As to this gift, it is argued that the children are, and must necessarily be, children by any wife, because they are described in the first place as his children, and secondly, the class is limited to those children who are living at the time of his death. That is the first thing, and it is said upon that, that as the children to be benefited are children by any wife, it would be an extraordinary thing if the wife to be benefited should not also be the wife living at the time of the death of B. H. Drew. The second ground is that in the clause which provides for the destination of the income of this one-thirteenth in the event of alienation or bankruptcy on the part of B. H. Drew, his wife and children are to be the objects of the discretionary trust, and I think it was hardly argued by counsel that in that clause the wife intended was not a second wife, but it was said that that clause did not throw any light on the previous gift, but only operated on the income which, but for the alienation or bankruptcy, would have come to the son.

As regards authority the matter stands in a somewhat peculiar position. The two cases which have been relied on by Mr. Dickinson in support of his argument—namely, *Radford* v. *Willis*, 20 W. R. 132, L. R. 7 Ch. App. 7, and *Firth* v. *Fielden*, 22 W. R. 622, appear to me to clearly establish the first proposition which I have stated, which is not disputed.

Then, as regards the effect of the first element contained in the objection, that the gift is to the children of B. H. Drew—namely, children by his first, second, or any subsequent wife, the authorities seem to me to be somewhat conflicting. First, there is the decision of Kindersley, V.C., in *In re Burrows' Trusts*, 10 L. T. Rep. 184, 12 W. R. Ch. Dig. 113. There a testator directed that if the wife of his brother, William Burrows, survived her husband she should enjoy for her life the property given by the will to William Burrows for life, with remainder to his children, and that the division should not take place till after her death. In that case it was held that the wife there meant was not a second wife. On the other hand, in *In re Lyne's Trust*, L. R. 8 Eq. 65, 17 W. R. Ch. Dig. 186, in which, unfortunately, *In re Burrows* was not mentioned, the testator gave £800 to trustees to pay the dividends to his son for life, and after his decease to transfer the capital unto and equally between and amongst the wife of his son (in case she should survive him) and all and every the child and children of his son equally upon their attaining twenty-one, at which period the shares of such children were to be vested in them. At the date of the will the son had a wife and one child, but the wife died before the testator. After the testator's death his son married again and died, leaving a widow, who claimed to be entitled to a moiety of the fund equally with the only child of the son, and Malins, V.C., held that the gift was to a class consisting of all the children and any wife of the son who survived him.

As regards the effect of the second element two authorities have been cited, neither of them, perhaps, directly in point, one being *Longworth* v. *Bellamy*, in 40 L. J. Ch. 513, 19 W. R. Ch. Dig. 127, in which there was a gift by a testator of his property to trustees in trust as to different portions for each of his children for life, and after the death of each child for its issue, and a declaration that if any of his sons should become bankrupt his life estate should cease as if he were dead, and during the remainder of his life the trustees should apply the income to which, but for such forfeiture, he would have been entitled for the benefit of the wife and children of such son in such manner as the trustees should think fit. One of the testator's sons was married at the time of the testator's death; he subsequently became bankrupt, his wife died leaving him without issue; he married again and had two children. Lord Romilly held that the trust for the wife and children of the bankrupt son revived as soon as there came to be any wife or child to take under it. That is open to the observation that in that case there were some legatees who were unmarried. The other case is *Boreham* v. *Bignell*, 8 Hare 131, which was the case of a very peculiarly worded will, and where the Vice-Chancellor held, as he says, with regret, that the gift did not extend to a second wife. But as I read the decision he would,

but for the special circumstances mentioned in the judgment, have come to a different conclusion.

Now I have to apply the rule to the case before me to say what the effect of the two elements which I have to consider is on my mind. I confess the effect of the two on my mind is that the testator meant any wife of his son. Whether I could have come to that conclusion on the first of the two elements alone in the conflicting state of the authorities it is needless for me to say, but I do rely on the way in which the testator provides for the income to be dealt with during the life of B. H. Drew in the event of alienation. I think there the testator meant any wife. I cannot believe it was the intention of the testator that though the children of the second wife were to be provided for, the second wife herself was to be excluded. What light does that throw on the prior part of the will? Testator has said that he has directed one-thirteenth part to be invested for the son and his family. "Family" there is used in a wide sense, and would include, I think, any wife of B. H. Drew for the time being, and that is shown by the direction that the income is to be applicable for the benefit of the son, his wife, and children. It seems to me, looking at the whole, that there is here a sufficient context to take the case out of the general rule, and I think, therefore, that the lady is entitled during her life.

Solicitors, *Wilkinson & Son; Alexander Pope.*

Chan. Div. } Oct. 25; Nov. 22.
Stirling, J. }

In re M——. (*a.*)

Trustee—New trustees—Appointment—Vesting order—Surviving trustee a person of unsound mind—Jurisdiction—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25-41—*Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *s.* 143.

Where the sole surviving trustee of a settlement is a person of unsound mind not so found, and is within the jurisdiction, the Chancery Division of the High Court has, under the Trustee Act, 1893, *jurisdiction to appoint new trustees, but has no jurisdiction to make a vesting order.*

This was a summons intituled in the matter of a settlement and also of the Trustee Act, 1893, asking for the appointment of new trustees of the settlement in the place of the two original trustees of the settlement, one of whom was dead, and the other of whom was a person of unsound mind not so found, and also asking that the right to call for a transfer of, and to transfer into the names of such new trustees a sum of consols, and to receive the dividends thereof, might vest in the new trustees. The applicant was a person of unsound mind not so found.

Kenyon Parker, for the applicant.—The question is whether or not this application ought not to have been made in Lunacy. I submit that it is properly made in this court. The old jurisdiction of the court in Chancery was not taken away by the Lunacy Act, 1890. Before that Act the jurisdiction was undoubted: *In re Lemann's Trusts,* 31 W. R. 520, 22 Ch. D. 633. The Trustee Act, 1893, re-enacts the provisions of the Trustee Acts, 1850 and 1852, as to the appointment of new trustees and the making of vesting orders, thus showing that the jurisdiction of this court and of the court in Lunacy are intended to be concurrent. The Act of 1893 gives this court power in the widest terms, and there is nothing to show that the case of unsoundness of mind is excluded.

Arkle, for the respondents.

The following cases are referred to in the judgment: *In re Davidson,* 20 L. J. Ch. 644; *In re Good Intent Benefit Society,* 2 W. R. 671; *In re Ormerod,* 7 W. R. 71, 3 De G. & J. 249; *In re Mason,* 23 W. R. 737, L. R. 10 Ch. App. 273; *In re Martin's Trusts,* 35 W. R. 524, 34 Ch. D. 618; *In re Arrowsmith's Trusts,* 6 W. R. 642; *In re Gardner's Trusts,* 27 W. R. 164, 10 Ch. D. 29; *Herring* v. *Clark,* L. R. 4 Ch. App. 167, 17 W. R. Ch. Dig. 139; *In re Owen,* 17 W. R. 1035, L. R. 4 Ch. App. 782; *In re Boyce,* 12 W. R. 359, 4 De G. J. & S. 205; *In re Sparrow,* 18 W. R. 1065, L. R. 5 Ch. App. 662; *In re Vickers' Trusts,* 24 W. R. 755, 3 Ch. D. 112.

STIRLING, J. — Before considering the powers conferred by the Act of 1893 it is necessary to see what were the statutory powers of the court at the time when it was passed. These were derived under the Trustee Act, 1850, and the Trustee Act, 1852. [His lordship referred to the provisions of those Acts, and continued:] Under those Acts it has been established that as a general rule, where a vesting order was required by reason of a trustee being of unsound mind, the lunacy jurisdiction had to be resorted to: see *In re Davidson, In re Good Intent Benefit Society, In re Ormerod, In re Mason, In re Martin's Trusts.* It has, however, been held that where the trustee of unsound mind was also an infant the jurisdiction conferred on the Court of Chancery by section 7 of the Trustee Act, 1850, might be exercised: *In re Arrowsmith's Trusts;* and the like conclusion was arrived at where the lunatic trustee was out of the jurisdiction: *In re Gardner's Trusts,* the judgment in which case shows the *ratio decidendi.* There Jessel, M.R., said: "The only point decided in *In re Mason* was that in the case of a lunatic trustee you should intitule your petition in Lunacy as well as in Chancery, under the 3rd section of the Act. The Court of Appeal, however, in directing the petition to be so intituled do not appear to have given any reason for the direction. The 9th section of the Act says that when the trustee is out of the jurisdiction the Court of Chancery may make a vesting order; and the 3rd section says that when the trustee is a lunatic the judges in Lunacy may make a vesting order. When you read the two sections together they evidently mean this, that when a lunatic trustee is within the jurisdiction the judges in Lunacy should make the order, but that when he is out of the jurisdiction the Court of Chancery—now the Chancery Division—may alone make the order, just as in the case of any other trustee out of the jurisdiction."

It has also been held that where the legal estate in land sold under the order of the Court of Chancery was vested in a person of unsound mind not so found, the Court of Chancery had power to make a vesting order under section 1 of the Trustee Act, 1852: *Herring* v. *Clark.* In cases where the lunacy jurisdiction was resorted to for a vesting order, and the appointment of a new trustee was also required, it was the usual course to make the order both in Lunacy and in Chancery; but wherever section 10 of the Trustee Act, 1852, was applicable, the order was properly made in Lunacy alone: *In re Owen.* If no vesting order was required, the Court of Chancery had power to appoint a new trustee in the place of one who had become a lunatic: *In re Boyce, In re Sparrow, In re Vickers' Trusts, In re Martin's Trusts.*

It has been suggested that a reason why it was

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

held that the Court of Chancery had no power to make a vesting order on the appointment of a new trustee in the case of a lunatic is to be found in the language of section 34 of the Trustee Act, 1850, stating the effect of the vesting order. It is true that there are no words which expressly refer to the freedom of the old trustees from disability; but such words are equally absent in sections 7 and 9, under which it was held that the Court of Chancery might make vesting orders although the trustee was of unsound mind. Again, the terms of section 26 of the Trustee Act, 1850, and section 6 of the Trustee Act, 1852, with reference to vesting orders of stock, are the widest possible. Yet *In re Ormerod* shows the opinion of the Court of Appeal to have been that the Court of Chancery had no power to make a vesting order either as regards realty or personalty. Finally, the absence of such words was not regarded by the Master of the Rolls in *In re Gardner's Trusts* as an obstacle to his making an order under section 9 of the Trustee Act, 1850.

This being the state of the law, there was passed, in 1890, the Lunacy Act, 1890, which, by section 342, repealed (*inter alia*) all the sections of the Trustee Act, 1850, and the Trustee Act, 1852, which conferred on the lunacy authority powers of making vesting orders or appointing new trustees, and substituted for them a series of enactments (sections 133-142) conferring similar or extended powers on the judge in Lunacy.

Section 143 provides as follows: "The provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustees out of the jurisdiction: *In re Gardner's Trusts*; or under section 1 of the Trustee Act: *Herring* v. *Clark*. The section appears, however, to show that it was not the object of the Act of 1890 to extend the jurisdiction of the High Court as regards the making of vesting orders in the case of lunatic trustees. The result, therefore, was that from the passing of the Lunacy Act, 1890, down to the passing of the Trustee Act, 1893, the High Court had no power to make a vesting order in the case of a lunatic trustee which that court did not possess before the Act of 1890 came into operation. By section 51 of the Act of 1893 the sections of the Acts of 1850 and 1852 which conferred on the Court of Chancery power to make vesting orders and appoint new trustees were repealed, and there were substituted for them a series of enactments, contained in sections 25-41, conferring on the High Court powers similar to those given by the repealed sections of the Trustee Acts. The contention on behalf of the applicant is that the power of the High Court has been extended by those sections, so that whereas prior to 1893 that court had no power to make a vesting order on the appointment of a new trustee in the place of a person of unsound mind, it now has jurisdiction to do so.

The language of section 32 of the Act of 1893 is in some respects wider than that of section 34 of the Trustee Act, 1850, and it expressly refers in some cases, though not in all, to the capacity of the trustee. The reason, however, why it was held that the Trustee Act, 1850, conferred no jurisdiction on the Court of Chancery to make a vesting order when the trustee was of unsound mind, was not, in my opinion, the presence or absence of words referring to incapacity from unsoundness of mind, but the existence in the Act of 1850 of clauses which dealt specially with the case of such trustees. Such clauses are not found in the Trustee Act, 1893, but they do exist in the Lunacy Act.

The Trustee Act, 1893, does not expressly deal with incapacity on the part of a trustee caused by unsoundness of mind. The Lunacy Act, 1890, and the Trustee Act, 1893, are simply statutes consolidating the existing enactments with reference to lunatics and trustees respectively; and looking at the history of the legislation on the subject, I have been unable to satisfy myself that the general terms used in the latter Act were intended to confer a jurisdiction which down to that time the High Court had not enjoyed. Seeing the great importance which attaches to vesting orders, and the undesirability of their being made by courts whose jurisdiction is open to doubt, I think that the safe and proper course in the present case is to abstain from making a vesting order, and so bring the present decision under the review of a higher court, by which I trust the question will be set at rest. At the same time, I consider that I have jurisdiction to appoint a new trustee and am willing to do so if the applicant desires it.

Dec. 2.—*Kenyon Parker* again mentioned the matter to the court, and asked for the appointment of a new trustee.

Solicitors, *Trower, Freeling, & Parkin; Field, Roscoe, & Co.*, for *Gibbons & Arkle*, Liverpool.

Chan. Div. Byrne, J. — Feb. 2.

MILLER & ALDWORTH (LIMITED) v. SHARP. (a.)

Statute of Frauds—Part performance—Landlord and tenant—Verbal agreement for lease with existing tenant—Payment of increased rent.

Payment by the tenant and acceptance by the landlord of an increased rent in respect of premises hitherto held and occupied by the tenant as a yearly tenant, may be acts unequivocally and in their nature referable to an alleged new agreement for a lease for 21 years, and therefore such a part performance as takes the case out of the Statute of Frauds and allows parol evidence to be given of the alleged agreement.

Nunn v. Fabian, *L. R.* 1 *Ch. App.* 35, 14 *W. R. Ch. Dig.* 119, *explained and followed.*

This was an action for an alleged parol agreement to grant a lease for twenty-one years. The defendants were, as the trustees of J. Sharp, deceased, owners in fee simple of a beerhouse called "The Jolly Millers," in Dartford, Kent, and the plaintiffs, Miller & Aldworth (Limited), a limited company, held the beerhouse, as yearly tenants of the defendants at the rent of £14 a year.

The statement of claim alleged that a few days prior to the 23rd of May, 1894, a verbal agreement was come to between Miller & Aldworth (Limited) and the defendants, whereby the defendants agreed to grant, and the said plaintiffs agreed to accept, a lease of the premises for the term of twenty-one years, from the 24th of June, 1894, at the increased rent of £26 a year, and that such lease was to contain the usual covenants. Miller & Aldworth (Limited) remained in occupation of the premises and paid the rent of £26 from the 24th of June, 1894, until July, 1897, when they assigned the agreement to the plaintiffs, the Dartford Brewery Co. (Limited), who thereupon entered into occupation, and paid the rent. The rent was accepted by the plaintiffs, who gave receipts for it from time to time.

The defendants admitted the remaining in possession by the plaintiffs, and their payment of the increased rent, but stated that these acts were merely done in continuation of the yearly tenancy, and to

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

avoid a notice to quit, and not in pursuance of any such agreement for a lease as was alleged. They also pleaded the Statute of Frauds. In proof of their case the plaintiffs produced at the trial, besides the receipts for rent, a letter written by James Sharp, one of the defendants, to Miller & Aldworth (Limited), as follows:

"Dear Sirs,—

"'Jolly Millers,'

"My brothers and I have arranged for Mr. E. Waterman to receive the rent of the above, so kindly pay him in future. We are advised that the rent you pay is a great deal too low, but as we are unwilling to take it out of your hands, we shall be glad to consider a proposal from you to take it on lease. Kindly let us have your early reply."

Upon the plaintiffs proposing to call witnesses to prove the agreement, the defendants objected that such evidence was inadmissible.

Astbury, Q.C., and *Mark Romer*, for the plaintiff.—The payment and acceptance of the increased rent of £26 was a part performance of the agreement for a lease of twenty-one years, which enables us to prove it by parol evidence. This was decided by *Nunn* v. *Fabian*, L. R. 1 Ch. App. 35, 14 W. R. Ch. Dig. 119; and the principle was stated and approved by Baggallay, L.J., in *Humphreys* v. *Green*, 10 Q. B. D. 148, at p. 156, 31 W. R. Dig. 82. And this view is consistent with the observations of Selborne, L.C., in *Maddison* v. *Alderson*, 31 W. R. 820, at p. 822, L. R. 8 Ca. App. 467, at p. 478.

They also cited *McManus* v. *Cooke*, at p. 35 W. R. 754, 35 Ch. D. 681 at p. 693; and *Williams* v. *Evans*, 23 W. R. 466, L. R. 19 Eq. 547.

Eve, Q.C., and *W. C. Dare*, for the defendants.—The cases have never gone so far as to say that mere payment of rent can be considered as part performance so as to let in parol evidence, and the better opinion is to the contrary: see the observations of Lord Selborne already quoted. *Nunn* v. *Fabian* does not decide this; in that case the increased rent paid by the tenant was in respect of premises part of which he had not previously been in possession of, and we submit that this was a special circumstance which distinguishes that case from the present: see the observations of Brett, L.J., in *Humphreys* v. *Green*, L. R. 10 Q. B. D. at p. 160.

BYRNE, J.—I am asked by the defendants to exclude parol evidence to show whether there was an agreement, and if so what that agreement was, with respect to the new tenancy alleged to have been entered into by the plaintiffs and defendants. It is an undoubted fact that there was a yearly tenancy existing. Then on the 8th of March, 1894, one of the defendants wrote the following letter to the tenants. [His lordship read the letter.] There is also a series of receipts for the new rent, of which the one dated the 29th of September, 1894, being a receipt for the rent, less tax, for the "Jolly Millers," is an example. The plaintiffs rely on the case of *Nunn* v. *Fabian*, and that case is a binding authority upon me. It appears to me that in that case Cranworth, L.C., held that notwithstanding the Statute of Frauds parol evidence might be given of an agreement to grant a lease on the ground of part performance where payment of rent at an increased amount had been proved. But the defendants sought to distinguish that case from the present one as being decided upon the special circumstance that new property not within the old tenancy was included in the new tenancy. I think, however, that in considering what was the ground of that decision, the remarks of Baggallay, L.J., in *Humphreys* v. *Green* (p. 156) must be considered, where, after stating that he was counsel in *Nunn* v. *Fabian*, he said, referring to the facts of that case, "the receipt for the balance of rent did not contain all the necessary elements of the contract; if, therefore, the plaintiff was entitled to a decree for specific performance, it must have been upon the ground of proof of a sufficient part performance to take the case out of the statute, and so Lord Cranworth held. The fact of the plaintiff being in possession of the property was not a sufficient part performance of the parol agreement, for it was equally consistent with his continuing in possession under his previous tenancy, as of his possession being due to some agreement between himself and his landlord; moreover, Lord Cranworth declined to treat a proved expenditure of money upon the property as a part performance; but he held *that there was a clear part performance by payment and acceptance of the Michaelmas rent at the increased rate*, being of opinion that the payment of the increased amount could be referable only to some agreement; and upon that ground alone he made a decree for specific performance." I think, therefore, that *Nunn* v. *Fabian* is an authority in point. I also think that the observations of Selborne, L.C., in *Maddison* v. *Alderson* (p. 478) are applicable. [His lordship read the passage commencing "Lord Hardwicke," and continuing:] "Some of the reasons which have been given for that conclusion" (that part payment of the purchase-money is not an act of part performance) "are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities show that the acts relied on as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged."

In the present case I think that the acceptances of rent at the increased rate were acts "unequivocally and in their own nature referable to some such agreement as that alleged," and not to the old tenancy, and consequently that parol evidence of what that agreement was may be given.

[The action was subsequently compromised.]

Solicitors for the plaintiff, *Nicholson, Graham, & Graham*.

Solicitors for the defendants, *Boyce & Son*, for *Ridley & Chancellor*, Dartford.

Q. B. Div.
(Lawrance and Channell, JJ.) Jan. 26.

GORDON v. CANN. (*a*.)

Local government—Lighting-up time for bicycles—"Sunset"—Greenwich mean time—Statutes (Definition of Time) Act, 1880 (43 & 44 *Vict. c.* 9), *s.* 1—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 85.

By section 85 *of the Local Government Act*, 1888, *bicycles and other similar machines are required to carry a light "during the period between one hour after sunset and one hour before sunrise."*

By section 1 *of the Statutes (Definition of Time) Act*, 1880, *whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred to shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time.*

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Held, that "one hour after sunset" was not an expression of time within the meaning of the Act of 1880, *and therefore that lighting-up time, within the meaning of section* 85 *of the Local Government Act,* 1888, *was to be reckoned from the time of sunset in the particular locality in which the alleged offence of riding without a light had been committed.*

Case stated by justices for the city of Bristol.

The question for the decision of the court was whether the period between one hour after sunset and one hour before sunrise, during which lights are required by section 85 of the Local Government Act, 1888, to be carried on bicycles and other similar machines, should be reckoned according to the actual time of sunset in the locality or according to the times of sunset and sunrise at Greenwich.

The justices held that the period must be reckoned according to the times of sunset and sunrise at Greenwich, because they thought it would be an advantage that there should be a readily ascertained time for the lighting-up of bicycle lamps. They accordingly convicted the appellant, who on the occasion of the alleged offence on the 19th of August, 1898, was riding a bicycle in Bristol without a light at 8.15 p.m., which was less than one hour after sunset at Bristol, but more than an hour after sunset at Greenwich on that date.

Macmorran, Q.C., and *Alexander Glen*, for the appellant.—"Sunset" is not an expression of time within the meaning of the Statutes (Definition of Time) Act, 1880, and therefore that Act does not apply. If the justices were right in holding that the Act of 1880 did apply, then we say that the decision of the justices must be set aside as being unworkable and absurd. The statute directs that "whenever any expression of time occurs in any Act of Parliament the time referred to shall, unless it is otherwise specifically stated, be held, in the case of Great Britain, to be Greenwich mean time." In the present case "one hour after Greenwich mean time" means, if it means anything at all, six o'clock all the year round. Supposing there was a difference between the local time of sunset where the alleged offence was committed and sunset at Greenwich of an hour in summer, then a cyclist might be required to light up an hour before the sun sank below the horizon, and in winter, in some cases, he would not be compelled to light up till an hour after it had sunk below the horizon. There is no difficulty in fixing the time of sunset at any given locality in England by reference to the book of the Cyclist Touring Club.

The respondent did not appear.

LAWRANCE, J.—I am not surprised that no one appears to argue for the respondent, for the decision of the justices is clearly wrong. The conviction must be quashed, and as it appears that the respondent set the law in motion with the object of getting the question decided, he must pay the costs of the appeal.

CHANNELL, J.—I concur.

Solicitors, *Darley & Cumberland*, for *Gilmore, Mawer, & Lloyd*, Bristol.

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Dec. 5; Jan. 23.

In re MASON.

Ex parte BING *v.* CRAIG. (*a.*)

Bankruptcy—Proof—Partnership—Loan of money at rate of interest varying with profits of business—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 2 (3) (d), 3.

In 1893 *a creditor advanced various sums of money to a firm of Bryan & Mason under an agreement to take a share of profits in lieu of interest. In* 1895 *the firm dissolved partnership, and Mason took over the business and liabilities, entering into a fresh agreement with the creditor to pay five per cent. interest on the money advanced. Mason became bankrupt in* 1898, *and the creditor proved for the moneys advanced.*

Held, that the money must be considered to have been advanced under the agreement of 1893, *and not under that of* 1895, *and that the proof could not be admitted until all the other creditors should have been paid in full.*

Appeal by a creditor from the rejection of a proof for money lent.

The first advance made by Mrs. Bing, the appellant, was made to the firm of Mason & Bryan under the terms of an agreement dated the 2nd of October, 1893, whereby she agreed to provide £600 on the 31st of January, 1894, and further capital not exceeding £1,000 on the 21st of July, 1894, and it was further agreed that she was to receive a sum equal to one-third of the profits of the business in lieu of interest. The partnership between Mason & Bryan was dissolved by a deed dated the 1st of June, 1895, whereby Mason took over the business and agreed to pay and satisfy all moneys owing by the firm to Mrs. Bing. Upon the 1st of August, 1895, a further agreement was entered into between Mason and Mrs. Bing, which recited that Mrs. Bing, in addition to the £1,600 agreed to be advanced under the deed of 1893, had at the date of the dissolution of partnership advanced to the firm a further sum of £2,307 14s. 2d., and had since that date advanced £1,120 to Mason. By the same deed Mason agreed to repay to Mrs. Bing the sum of £1,600 on the 31st of December, 1902, and in lieu of interest thereon one moiety of the profits of the business. He further agreed to pay her the sum of £1,000 (part of the said sum of £2,307 14s. 2d.) by the 31st of December, 1895, a further sum of £1,000 by the 30th of April, 1896, and the residue of the said sum of £2,307 14s 2d. and the sum of £1,120 and all further advances by the 30th of April, 1897, "and until the said principal sums (other than the said sum of £1,600) shall be repaid will pay to her interest thereon or on so much thereof respectively as shall be owing at the rate of £5 per cent. per annum."

Mason became bankrupt in 1898, and Mrs. Bing proved in the bankruptcy for the whole of the moneys advanced by her, whereupon the trustee rejected her proof upon the ground that the proof was in respect of a loan of money to a business at a rate of interest varying with the profits, within section 2 (3) (*d*) and section 3 of the Partnership Act, 1890, which enacts that where money has been advanced to a person engaged in business on a contract with that person that the lender shall receive a rate of interest varying with the profits, then in the event of such person being adjudged a bankrupt the lender shall not be entitled to recover anything in respect of the loan until all the other creditors have been satisfied.

Mrs. Bing appealed.

Herbert Reed, Q.C., and *Hansell*, for the appellant.—The trustee is only justified in thus rejecting a proof when the case comes within the words of the Partnership Act, 1890: "In the event of any person to whom money has been advanced by way of loan upon such a contract . . . being adjudged bankrupt." In this case the "person" to whom the money was advanced has not become bankrupt; the money was originally lent to Bryan and Mason, and Bryan has

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

not become bankrupt. On the 1st of August, 1895, there was a new lending to Mason, under an agreement whereby only £1,600 was left at a rate of interest varying with profits, and whereby it was agreed to pay 5 per cent. upon the remainder. The proof should therefore be admitted as to all but the £1,600.

Dickens, Q.C., and *P. T. Blackwell*, for the trustee.—The court must look at the terms upon which the loan was originally made. *Ex parte Taylor, In re Grason*, 28 W. R. 205, 12 Ch. D. 366. It makes no difference that one member of the original firm has retired, the sole representative of the firm has now been adjudged bankrupt.

Reed, Q.C., in reply, cited *Ex parte Nottingham, In re Tuff & Nottingham*, 35 W. R. 567, 19 Q. B. D. 88.

WRIGHT, J.—In this case it seems to me that the contract of the 1st of August, 1895, is not the contract under which the money in question was advanced because it recognizes that money as previously advanced. The contract of the 1st of June, 1895, does not affect the question because it does not mention the terms under which the money was advanced, it only substitutes one partner for two, and it does not amount to a fresh lending. We must therefore go back to the contract of October, 1893, and I think that the true inference from all the circumstances of the case is that when Mrs. Bing advanced the £2,300 she did it on the same basis on which she had advanced the £1,600. Therefore section 3 of the Partnership Act, 1890, applies. The contract of the 1st of August, 1895, altered the terms of the lending, but not so as to have any legal effect: see *Ex parte Taylor, In re Grason*.

Mr. Reed's point on section 3 of the Partnership Act was very ingenious, but I do not think that my decision ought to be affected by it; the money was lent to a firm, and the person who represents the firm has been adjudged bankrupt, which seems to me to bring this case within the section.

Appeal dismissed.

Solicitors for the appellant, *Robbins, Billing, & Co.*

Solicitor for the respondent, *S. Myers*.

Prob. Div. & Adm. Div. } Nov. 14.
Probate. }

SPICER *v.* SPICER. (*a.*)

Probate—Practice—Costs—Proof in solemn form—Notice by defendants to cross-examine only—R. S. C., ord. 21, *r.* 18.

The court at the hearing of a probate suit being of opinion that the defendants—who were opposing a will and codicil, and had given notice under ord. 21, *r.* 18, *that they merely insisted on the will being proved in solemn form of law, and that they only intended to cross-examine the witnesses produced in support of the will—had no reasonable ground for opposing the will, condemned the defendants to pay the costs of the plaintiffs who were propounding the documents.*

Hearing before the court itself of a probate action in which the plaintiff, Mary Jane Spicer, widow of Frederick Spicer, as executrix, and Frederick John Shaw, as executor, propounded the will and codicil of Frederick Spicer, deceased, Trinity House pilot.

The defendants were three daughters of the testator by a former marriage, and with their defence gave notice (before the 15th of August, 1898) under the old ord. 21, r. 18, that they merely insisted on the will being proved in solemn form of law and that they only intended to cross-examine the witnesses produced in support of it.

The attesting witnesses were called, and after they had been examined and cross-examined, the cross-examination eliciting nothing to throw a doubt on the will, the court held the will to be duly executed. The question of costs was then argued.

Barnard, for the plaintiffs, asked for costs under ord. 21, r. 18. The defendants applied for a common jury, stating there would be a plea of undue influence, but withdrew the application. The plaintiffs' solicitors wrote to the defendants' solicitors asking them to withdraw their defence, and giving them notice that if they did not the plaintiffs would apply for costs. They have had plenty of time since the 15th of August, when the new rule came into operation, to do so, but they have refrained from doing so, thus putting the plaintiffs to the expense of proving the will in solemn form, and they ought to pay the costs.

Bayford, for the defendants.—The defendants gave the notice under the old rule when it was in force, and ought therefore to be protected by it. There was nothing to draw their attention to the new rule; it was not publicly circulated until after it came into force.

JEUNE, P.—In this case I have to deal with the new rule, ord. 21, r. 18, which says that "In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists on the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so." The following words are new, "and shall not, in any event, be liable to pay the costs of the other side unless the judge shall be of opinion that there was no reasonable ground for opposing the will." That rule effected an alteration of the old practice which, as provided by the old rule, was that "the defendant shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances, according to the practice of the Court of Probate, before the principal Act came into operation," the practice of the Court of Probate was that the party giving such notice was not liable for costs. I confess I never could see the reason of the rule. I suppose its origin was historic. I have been unable to see why a party should not make up his mind one way or the other, and either admit or dispute a will rather than be allowed to join in a skirmish at no risk of paying costs but at the expense of the estate. The question under the new rule is whether I am of opinion that there was reasonable ground for opposing the will. It has been said the defendants' solicitors did not know of the alteration of the rule, but when they did know of it they could have withdrawn and might then have had a good ground for asking for costs up to then. I am clearly of opinion that there was no reasonable ground for opposing the will. The new rule was intended to prevent people opposing wills where they have no case, therefore the defendants must pay the costs of the plaintiffs.

Solicitor for the plaintiffs, *G. F. Gray*.

Solicitors for the defendants, *Shaw, Tremellen, & Kirkman*, for *Mitchell & Macartney*, Gravesend.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Probate. } Nov. 7.

In the Goods of BRAZIER. (*a.*)

Probate — Will — Obliteration — Words obliterated, "apparent"—Wills Act (1 *Vict. c.* 26), *s.* 26.

A holograph will originally contained two devises and gift of a legacy to the testator's son "Daniel." The name had been obliterated in all three places, but when there was nothing to show, and the testator had written in the names of Daniel in one, and of another son Thomas in two other places.

The court, on the evidence of an expert that, with the aid of a magnifying glass, he could read the original name Daniel in all three places, on motion by consent of all parties interested, granted administration with the will annexed, with the original word "Daniel" substituted in all three places, on the ground that the original words were "apparent" within the meaning of section 26 of the Wills Act.

Motion on behalf of Daniel Brazier for administration to the estate of his father, Thomas Brazier, who died the 9th of January, 1897, with a will of 1874 a codicil of 1881 and a will of 1884, annexed, with a substituted name in the latter for names written over erasures.

The will of 1884 was a holograph will containing no revocatory clause, and did not dispose of the whole of the property, but it contained a clause in respect of which the difficulty had arisen. By the clause in question the testator bequeathed a cottage to "my son Daniel Brazier," another cottage to "my son Thomas Brazier," and £300 "unto Thomas Brazier." An expert in handwriting, T. H. Gurrin, on affidavit, deposed that he had examined the will with a magnifying glass, that the three above-mentioned Christian names were written over erasures, and that in each case the name originally written was Daniel. The surviving attesting witness was unable to say whether the alterations were made before the execution of the will. The application was made with the consent of parties interested.

Priestley, in support of the application.—As the name Daniel is visible to an expert, as deposed by him, it is "apparent" within the meaning of section 26 of the Wills Act, and the court ought to grant administration with the obliterated word Daniel in all three places restored.

BARNES, J., considered the evidence sufficient, and made the order.

Motion allowed.

Solicitors, *Gibson, Weldon, & Bilborough*, for *R. F. Haslewood*, Bridgenorth.

Prob. Div. & Adm. Div. Divorce. } Aug. 12, 1898.

DOWLING v. DOWLING. (*a.*)

Divorce—Wife's suit—Separation deed not pleaded—Cruelty before separation deed—Covenant not to sue—Undefended suit.

The court granted a wife a decree for dissolution of the marriage on the ground of her husband's cruelty and adultery, the cruelty being before the date of a separation deed, notwithstanding a covenant in the deed providing that no proceedings should be taken in respect of such misconduct, on the ground that the deed had not been pleaded.

Hearing of an undefended suit by Elizabeth Mary Dowling for dissolution of marriage on the ground of her husband's cruelty and adultery.

The parties were married in 1870 and in 1897 they separated on the terms of a deed which provided that no proceedings should be taken by either party in respect of any misconduct prior to the date of the deed, but that the covenants of the deed should be void if the marriage were dissolved or the parties judicially separated by reason of any subsequent misconduct. Cruelty prior, and adultery subsequent to the deed were proved. The husband did not set up the deed, and did not defend the suit.

Barnard, for the petitioner.—The covenants in the deed of separation are different from those in *Rose* v. *Rose*, 30 W. R. 736, 7 P. D. 225, before Sir J. Hannen, and 31 W. R. 573, 8 P. D. 98, in the Court of Appeal. Moreover, the respondent has not pleaded the deed, and therefore the court should follow the case of *Tress* v. *Tress*, 35 W. R. 672, 12 P. D. 128, and assume that the respondent knew that he could not successfully do so.

BARNES, J., granted the decree *nisi*, distinguishing the case from *Rose* v. *Rose* on the ground that the deed had not been pleaded.

Decree nisi.

Solicitors, *Layton, Sons, & Lendon.*

Prob. Div. & Adm. Div. Divorce. } Aug. 8, 1898.

STANLEY v. STANLEY. (*a.*)

Divorce—Dissolution of marriage on wife's petition—Maintenance of wife and children—Payment of capital sum without settlement—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act*, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 4.

Upon a dissolution of marriage at the suit of the wife, where the husband disappeared, and the only asset available was a sum of money standing in his name in a suit in the Chancery Division, the wife being entirely without means, the court, on a petition, ordered the balance (about £200), after payment of costs, to be paid to the wife (without any settlement) for the benefit of herself and children.

Morris v. Morris, 31 *L. J. P. & M.* 33, 10 W. R. Div. Dig. 24, *followed.*

Motion to confirm the registrar's report on a petition by Margaret Anne Stanley against her former husband for maintenance of herself and children. The marriage was dissolved on the ground of the husband's cruelty and adultery, and the husband disappeared about eight years ago, taking with him all the money he possessed. In 1895 the husband, by the death of his mother, became entitled to a sum of £320 now in court standing to his credit in a suit in the Chancery Division.

This petition was then presented and the registrar's report recommended that after payment of the costs to the petitioner's solicitors, the balance should be paid to the mother without any settlement for the maintenance of herself and children, she being without means and supported by relations.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Le Bas, in support of the motion.—After payment of the solicitors' costs there will be a sum of about £200. It would not be for the benefit of the children to settle this, as the amount is so small. The court has power under the Matrimonial Causes Act, 1859, s. 4, to make any order it likes for the maintenance of the children. In *Morris* v. *Morris*, 31 L. J. P. & M. 33, 10 W. R. Div. Dig. 24, the court made an order under the Matrimonial Causes Act, 1857, s. 32, for the payment by the husband to the wife of a lump sum for her maintenance.

BARNES, J.—I think that on the authority cited I can and I do make the order asked for, for payment of the costs to the petitioner's solicitors, and the balance to be paid to the petitioner for the benefit of herself and children.

Solicitors, *Martyn & Martyn*, for *Leigh & Horley*, Cardiff.

Court of Appeal.

From Q. B. Div. (A. L. Smith and Collins, L.JJ.) — Feb. 14.

TILLING (LIMITED) v. BLYTHE. (*a*.)

Practice—Receiver—Equitable execution—Summons for appointment of receiver—Personal service—Ord. 67, *rr.* 4, 5.

Where the defendant has not entered an appearance to the writ in the action, a summons for the appointment of a receiver cannot be served upon him by filing it at the Central Office under ord. 67, *r.* 4, *but must be served personally, or an order obtained for substituted service.*

Appeal from Ridley, J., at chambers.

The plaintiffs recovered judgment against the defendant upon default of appearance for a sum of money, and applied *ex parte* to the judge at chambers for the appointment of a receiver, by way of equitable execution, of the defendant's reversionary interest in certain property. The judge, however, refused to make the order *ex parte*.

The plaintiffs accordingly took out a summons for the appointment of a receiver, and served it by filing it at the Central Office in accordance with ord. 67, r. 4, and upon the summons coming on for hearing the defendant did not appear. Ridley, J., made the order asked for, but upon the order being taken to the Central Office the officer refused to draw it up upon the ground that the summons had not been personally served. The plaintiffs thereupon applied again to Ridley, J., at chambers, when a memorandum, setting out the practice at the Central Office in such matters, was laid before him, and he held in accordance therewith that the summons for the appointment of a receiver must be served personally, and he rescinded his order.

The plaintiffs appealed.

Morton Smith, for the plaintiffs.—The defendant not having entered an appearance to the writ in the action, ord. 67, r. 4, provides that all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer. There is no rule requiring a summons for the appointment of a receiver to be served personally. Ord. 50, r. 15A, and following rules relate to the appointment of a receiver, and there is nothing in them requiring personal service. In *Dymond* v. *Croft*, 24 W. R. 700, 3 Ch. D. 512, at p. 514, a notice of motion for judgment where the defendant did not appear was held to be properly served by filing it with the proper officer; and in *Evans* v. *Noton*, 41 W. R. 230, [1893] 1 Ch. 252, it was held that a notice of motion for leave to issue a writ of attachment was properly served by filing it in the same way. The service of the summons was therefore properly effected.

The defendant did not appear.

A. L. SMITH, L.J.—In my opinion the decision of Ridley, J., was right. At first the application for the appointment of a receiver was made *ex parte*, but the learned judge very properly refused to make an order upon such an application. Formerly at common law chambers an order for a receiver was obtained very easily upon an *ex parte* application. It was then laid down in this court, more particularly by Lindley, L.J. (see *Lucas* v. *Harris*, 35 W. R. 112, 18 Q. B. D. 127, and *In re Potts, Ex parte Taylor*, 41 W. R. 337, [1893] 1 Q. B. 648), that such an order should not be made *ex parte*, except in a case of emergency. The meaning of that is that an order appointing a receiver should not be made except upon notice to the other party, so as to give him the opportunity of appearing and contesting it. It is said that the rules relating to receivers do not require personal service. It is, however, pointed out by Collins, L.J., that ord. 67, r. 5, contemplates the necessity for personal service in cases other than those in which it is specifically required by the rules, for that rule speaks of personal service being "required by these rules or otherwise." It seems to me that this is one of those cases in which personal service is required. I do not think that the plaintiffs will have much difficulty in serving the defendant because they know where he lives, but if they are unable to do so, they can then apply for an order for substituted service.

COLLINS, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the plaintiffs, *H. Foskett*.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 7.

WHITE v. HEADLAND'S PATENT ELECTRIC STORAGE BATTERY CO. (*a*.)

County court—Costs—Remitted action—Judgment under order 14 *for part of claim—Judgment in county court for residue—Scale of costs—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

An action was commenced in the High Court for £73. On an application under order 14, *an order was made by a master giving the plaintiff leave to sign judgment for £53, and giving the defendants leave to defend as to £20, and directing the action to be tried in a county court. In the county court the plaintiff recovered judgment for £20.*

Held, that the plaintiff, having recovered in the action a sum exceeding £50, was entitled to have his costs taxed upon scale C.

Keeble *v.* Bennett, 42 *W. R.* 539, [1894] 2 *Q. B.* 329, *approved.*

Bailey *v.* Watson & Co., [1898] 2 *Q. B.* 270, 46 *W. R. Dig.* 40, *overruled.*

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal from the judgment of a Divisional Court (Lawrance and Channell, JJ.) on an appeal from the Westminister County Court.

The action was commenced in the High Court to recover £73 8s. 3d. for goods sold and delivered. On an application by the plaintiff under order 14, the defendants stated that they desired to set up a counterclaim. The master made an order giving the plaintiff leave to sign final judgment for £53 8s. 3d., and giving the defendants leave to defend as to the balance of £20, and directing the action to be tried in the Westminster County Court under section 65 of the County Courts Act, 1888. The order gave no directions as to costs. At the trial in the county court, judgment was given for the plaintiff for £20 on the claim, with costs, and for the defendants for £13 upon the counterclaim, with costs.

The question was whether the plaintiff's costs in respect of the proceedings subsequent to the master's order ought to be taxed upon the county court scale A, the scale applicable where the sum recovered exceeds £10 and does not exceed £20, or upon the county court scale C, the scale applicable where the sum recovered exceeds £50. The registrar of the county court taxed the said costs upon scale A.

The county court judge and the Divisional Court, following the case of *Bailey* v. *Watson & Co.*, [1898] 2 Q. B. 270, 46 W. R. Dig. 40, affirmed the decision of the registrar.

The plaintiff appealed.

Hansell, for the plaintiff.—The plaintiff has recovered over £50 in the action, and he is therefore entitled to have his costs subsequent to the master's order taxed upon scale C. The case is governed by *Keeble* v. *Bennett*, 42 W. R. 539, [1894] 2 Q. B. 329.

Eldridge, for the defendants.—The plaintiff's claim, so far as regards £53 8s. 3d., was finally disposed of by the judgment under order 14. The only part of the action which was remitted to the county court was the claim to the balance, and in the county court the plaintiff only recovered £20. He is therefore only entitled to have his costs taxed upon scale A.

A. L. SMITH, L.J.—The county court judge and the judges of the Divisional Court decided this case on the assumption that they were bound by *Bailey* v. *Watson & Co.* The action was commenced by a writ indorsed with a claim for £73 8s. 3d. The plaintiff took out a summons under order 14, and was successful up to the amount of £53 8s. 3d., but as to the residue of £20 he was unsuccessful, and the action was remitted to the county court under section 65 of the County Courts Act. In the county court the plaintiff succeeded in obtaining judgment for £20. He therefore recovered in the action £73 8s. 3d. I am clearly of opinion that, when the case was remitted to the county court, the action was not cut into two. It is not right to say that the action as to £53 8s. 3d. remained a High Court action, and as to £20 became a county court action. Section 65 of the County Courts Act says that "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds"—that is this case—"it shall be lawful for either party . . . to apply to a judge of the High Court at chambers to order such action"—not a part of the action, but such action—"to be tried in" a county court. And the section proceeds to say that "thereupon the plaintiff shall lodge the original writ and the order with the registrar" of the county court, "and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." It is clear, therefore, that the whole action goes down to the county court. "And the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county court." Here the plaintiff recovered in the action £73 8s. 3d., the whole of the sum indorsed on the writ. He is therefore entitled to have his costs taxed upon scale C, the scale applicable where the sum recovered exceeds £50. I think that *Keeble* v. *Bennett* was rightly decided. As to *Bailey* v. *Watson & Co.*, I cannot see any difference between it and *Keeble* v. *Bennett*, and I think that it cannot be supported.

CHITTY and COLLINS, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *T. G. Bullen.*

Solicitors for the defendants, *Lucas & Ward.*

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 4.

PRICE v. MARSDEN & SONS. (a.)

Master and servant—Employers' liability—Accidental injuries—Amount of compensation—Average weekly earnings—"If he has been so long employed"—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *Schedule I.*, 1 (b).

The words "if he has been so long employed" in Schedule I., 1 (b), *to the Workmen's Compensation Act*, 1897, *mean "if he has been so long employed by the same employer," and not "if he has been so long employed in the same grade of employment."*

Appeal from the decision of the judge of the Bolton County Court in an arbitration under the Workmen's Compensation Act, 1897.

The claim to compensation was made by a workman who at the time of the accident had been in the employment of his employers as a factory hand for more than three years. Prior to the 9th of September, 1898, he was employed as a little-piecer, earning wages at 9s. 6d. a week. On that day he was promoted to be a side-piecer, earning wages at 13s. 8d. a week. The accident happened on the 28th of September. The question was as to the amount of compensation to which the applicant was entitled under the Workmen's Compensation Act, 1897.

By the First Schedule, s. 1, "The amount of compensation under this Act shall be . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

The county court judge calculated 9s. 6d. a week for 49 weeks and 13s. 8d. a week for three weeks, and divided the total by 52, which gave an average weekly earning of about 9s. 10d., and he made an award for a weekly payment of half that sum.

The workman appealed.

Clarke Hall, for the appellant.—The question is as to the meaning of the words "if he has been so long

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

employed" in section 1 of the First Schedule to the Act. The county court judge erroneously construed them as meaning merely "if he has been so long in the employment of the same employer." They ought to be construed as meaning "if he has been so long employed in the same kind of employment." Here the appellant entered into a new kind of employment three weeks before the accident. The case comes within the second part of sub-section (*b*), and the appellant's average weekly earnings for the three weeks was 13s. 8d. The award ought to have been for a weekly payment of half that sum.

Lochnis, for the respondents, was not called upon to argue.

A. L. SMITH, L.J.—I think that the appeal must be dismissed. It is argued for the appellant that the words "if he has been so long employed" in section 1, sub-section (*b*), of the First Schedule of the Workmen's Compensation Act, mean "if he has been so long employed in the same grade of employment." I do not think that is right. Sub-section (*a*) says that, where death results from the injury, the compensation is to be a sum equal to the workman's earnings in the employment of the same employer during the three years next preceding the injury, and if the period of his employment by the said employer has been less than three years, then the amount of his earnings during the three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer. Then sub-section (*b*) says that, where total or partial incapacity for work results from the injury, the compensation is to be a weekly payment "not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed"—that is, as it seems to me, by the same employer—"but if not, then for any less period during which he has been in the employment of the same employer." It will be seen that "employment of the same employer" is spoken of in sub-section (*a*) and in the second part of sub-section (*b*), and I am of opinion that the words now in question must be taken to be used in the same sense, and must be construed as meaning "if he has been so long employed by the same employer," and not as meaning "if he has been so long employed in the same grade of employment."

CHITTY and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Chester, Broome, & Griffithes*, for *Fielding & Fernihaugh*, Bolton.

Solicitors for the respondents, *Rowcliffes, Rawle, & Co.*, for *Hall & Son*, Bury.

From Q. B. Div.
(Earl of Halsbury, L.C., and A. L. Smith and Chitty, L.JJ.) Jan. 24.

NORTON *v.* DAVISON. (*a.*)

Sale of goods—Oral contract—Part payment—Agreement that seller should retain sum previously overpaid him—Statute of Frauds, s. 17—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-section* 1.

Where one of the terms of an oral contract for the sale of goods of a greater value than £10 was that the seller should retain in part payment a sum which the buyer had by some mistake previously overpaid him,

Held, that there had been no part payment sufficient to satisfy section 4, *sub-section* 1, *of the Sale of Goods Act*, 1893.

Walker *v.* Nussey, 16 *M. & W.* 302, *followed.*

Appeal from the judgment of a Divisional Court (Wright and Darling, JJ.) in an appeal from a county court.

The action was brought to recover the price of twelve stationery cabinets which by an oral contract the plaintiff had agreed to manufacture and supply and the defendant had agreed to buy. In a previous transaction for the purchase of six similar cabinets the defendant had by some mistake overpaid the plaintiff £1, and it was made a term of the oral contract that the sum of £1 so overpaid should be retained by the plaintiff and accepted by him as part payment in respect of the twelve cabinets. The defendant having refused to accept delivery of the twelve cabinets, the plaintiff commenced this action, and the question was whether there had been a part payment sufficient to satisfy the requirements of section 4, sub-section 1, of the Sale of Goods Acts, 1893, which substantially re-enacts section 17 of the Statute of Frauds.

The county court judge held that the statute had not been complied with, but the Divisional Court reversed his decision.

The defendant appealed.

Lewis Thomas, for the defendant.

G. Thorn Drury, for the plaintiff.

Earl of HALSBURY, L.C.—I take the facts of this case to be these, that the defendant, who had previously ordered some cabinets from the plaintiff, gave a new order for an additional number of cabinets, and at the same time agreed that the sum of £1, which he had overpaid the plaintiff in respect of the earlier order, might be retained by the plaintiff as appropriated to, and as part payment in respect of, the new order. The dry question of law arises, whether that satisfies the Statute of Frauds, or the Sale of Goods Act, which has superseded it. In my opinion it does not. The Legislature has provided that, whenever a contract is made for the sale of goods of the value of ten pounds or upwards, there must be a note or memorandum in writing of the contract, or there must be acceptance of part of the goods, or something must be paid. It is argued that, where an order for goods worth more than £10 is given orally, if something passes by the same oral contract, which by the contract is to be treated as part payment, that satisfies the statute. But if that argument were correct the statute would be idle. The policy of the statute is that in cases to which it applies the court shall require something more than mere words. The statute assumes that there is a dispute between the parties as to what the agreement was, and it says that reliance shall not be placed merely on oral testimony as to what was said. This view of the meaning of the statute was taken in the case of *Walker* v. *Nussey*, 16 M. & W. 302, which has stood the test of half a century, and must now be taken as decisive. In my opinion the appeal ought to be allowed.

A. L. SMITH, L.J.—I am of the same opinion.

CHITTY, L.J.—I also am of the same opinion. The statute requires something more than a mere oral contract. Here the supposed part payment was part of the contract itself.

Appeal allowed.

Solicitors for the plaintiff, *Ransom & Williams.*

Solicitors for the defendant, *Ashurst Morris, Crisp, & Co.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Chan. Div.
(Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) Dec. 8.

HEMANS v. HOTCHKISS ORDNANCE CO. (LIMITED). (a.)

Company—Articles of association—Classes of shareholders—General meetings of each class—Quorum.

The articles of association of a limited company provided that whenever the capital was divided into different classes of shares, the rights of each class might be modified by agreement duly confirmed by resolution passed at a general meeting of that class, the quorum at the meeting being members holding or representing three-fourths of the nominal amount of the issued shares of that class. Another article provided that the quorum at general meetings of the company were to be at least three mmebers present, and holding or representing not less than one-tenth of the issued capital of the company. If the meeting was adjourned, a quorum not being present, the members present at the adjourned meeting should form a quorum for the transaction of the business of such meeting.

Held, that the provisions with regard to the general meetings of the company did not apply to general meetings of classes of shareholders; and therefore, at a meeting of a particular class of shareholders summoned to deal with the rights and privileges of that class, the necessary quorum was members of that class holding or representing three-quarters of the nominal amount of such issue, and not members holding or representing one-tenth of the issue of the company.

Defendants' appeal from Kekewich, J.

The action was brought by the plaintiff on behalf of himself and all others the shareholders of the above-named company, both ordinary and preference, for a declaration that certain resolutions purporting to have been passed on the 3rd of August, 1898, at separate meetings of the ordinary and preference shareholders were not duly passed and were not binding and operative; also for an injunction to restrain the directors and their agents and the company from acting on the resolutions.

The company was formed in March, 1887, with a capital of £800,000 divided into 80,000 shares of £10 each. Power was given by the articles for the division of the shares into different classes, with such preferences, priorities, restrictions, or special incidents as might be attached thereto.

The material articles were as follow: Art. 12. "The company in general meeting may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient. The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto as the general meeting resolving upon the creation thereof shall direct, and, if no direction be given, as the directors shall determine; and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the company, and with special or without any right of voting."

Art. 13. "Whenever the capital, by reason of the issue, of preference shares or otherwise, is divided into different classes of shares, all or any of the rights and privileges attached to each class may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided such agrement is confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class; and all the provisions hereinafter contained as to general meetings shall, *mutatis mutandis*, apply to every such meeting, but so that the quorum thereof shall be members holding or representing by proxy three-fourths of the nominal amount of the issued shares of the class."

Art. 66. "Three members personally present shall be a quorum for a general meeting for the choice of a chairman, the declaration of a dividend, and the adjournment of the meeting. For all other purposes the quorum for a general meeting shall be members personally present, not being less than three in number, and holding or representing by proxy not less than one-tenth part of the issued capital of the company. No business shall be transacted at any general meeting unless the quorum requisite be present at the commencement of the business."

Art. 68. "If within half-an-hour from the time appointed for the meeting a quorum is not present the meeting if convened upon such requisition as aforesaid [*i.e.*, a requisition by holders of one-tenth of the capital] shall be dissolved, but in any other case it shall stand adjourned to the same day in the next week at the same time and place, and if at such adjourned meeting a quorum is not present, those members who are present shall be a quorum, and may transact the business for which the meeting was called."

The whole of the share capital had been issued.

On the 15th of July, 1898, notices were sent out for separate meetings of the ordinary and preference shareholders for the 27th of July, 1898, to confirm certain agreements made for the reduction of the company's capital; at neither meeting was there a quorum of shareholders present as required by article 13, and consequently the meetings stood adjourned to the 3rd of August. At the adjourned meetings the requisite quorums were not present, and resolutions for the confirmation of the agreements were put to each of the meetings and purported to be passed.

The plaintiff then commenced his action and moved before Kekewich, J., for an interim injunction as above stated.

KEKEWICH, J., made the order.

The company appealed.

Swinfen Eady, Q.C., and *Kirby*, for the appellants—Article 68 must be applied unless it is repugnant to article 13, and it is no more repugnant to article 13 that is article 66. There is no express provision as to the procedure if at a meeting of either class of shareholders a three-fourths quorum is not present, and therefore the provisions of article 68 must be resorted to. The articles are in the common form: see Palmer's Company Forms (7th ed.), p.410.

Warrington, Q.C., and *Martelli*, for the respondents were not called upon.

LINDLEY, M.R.—My own opinion is tolerably plain that the construction put upon this article 13 by Kekewich, J., is the right one. Now, just observe what it is. Article 12, which is important, says, in substance, that the shares may be issued with special privileges. That means that you immediately get a class of shareholders with rights and privileges unlike those of the ordinary shareholders. Then there is no provision made for altering those rights and privileges, and that may be done in the way pointed out by article 13, which says that the privileges may be altered and modified by agreement between the company and anybody purporting to contract on behalf of the class. Of course that would be far too wide; therefore you have to safeguard that, and provision is made for safeguarding it. "Provided such agreement"—that is to say, an agreement mentioned for altering the rights and privileges

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

of a class — "is confirmed by an extra-ordinary resolution passed at a special general meeting of the holders of shares of that class" — that is to say, it must be confirmed by an extraordinary resolution of that class of shareholders. Then it goes on to say, "and all the provisions hereinafter contained as to general meetings shall, *mutatis mutandis*, be applied to such meeting"—that is, to every class meeting—"whether adjourned or not"—all those provisions are to apply *mutatis mutandis*, but subject to this, and this is put in for the protection of the classes—"but so that the quorum thereof"—that is, the quorum of every class meeting which is to alter the privileges of the others—"shall be members holding or representing by proxy three-fourths of the nominal amount of the issued shares of that class." Now, what does that mean? That means, to my mind, exactly what it says: Work in all the regulations as to general meetings; but, if you are going to alter the rights of the class, you must not take those provisions in the articles relating to general meetings to relate to the quorum. You are to have a quorum for every class meeting, "the quorum thereof"—adjourned or not, it does not matter—"shall be members holding or representing by proxy three-fourths of the nominal amount of such issue." To my mind, that is the plain meaning of article 13, and unless you adopt this, the other construction would imply this: that the rights and privileges of the members of the class may be modified, taken away, and destroyed without the protection of this quorum at all, because they are too supine to look after their own interests. That is not at all likely, at all events to me, to be the true construction. If on the adjourned meeting they have not the necessary quorum, the meeting must be adjourned until they have, or they cannot alter the special rights and privileges of the class.

I think, therefore, that the judgment appealed from is right, and the appeal must be dismissed.

CHITTY, L.J.—I am of the same opinion. Under their memorandum of association the company had power, consistently with the articles, to attach special preferences to certain shares, and that the company did. Article 13 deals with meetings of the persons who have such priority or privileges attached to their shares, and provides for having a separate meeting of the class of persons whose rights are proposed to be modified. The point appears to me to be a very simple one. Do these words which are found at the end of the 13th article as to a quorum run throughout the provisions which are incorporated by reference? If the articles had run thus, "substituting three-fourths for one-tenth," the case would have stood entirely differently; but it appears to me that the right reading is that the quorum of three-fourths is required for all the purposes of the provisions which are here incorporated—namely, not merely in the 66th, but in the 68th article also. The 68th article would, if it applied without the variation which I think is to be found in it, admit of two persons only, members of the class, at an adjourned meeting giving away all the privileges which had been attached to the shares held by that class. That is a strong reason for construing the 13th article as it stands; and I think that as it stands it does not substitute three-fourths merely for one-tenth, but it maintains the requirement of a quorum of three-fourths right throughout all the articles that have been referred to.

For this reason I think the judgment was right.

VAUGHAN WILLIAMS, L.J.—I agree.

Appeal dismissed.

Solicitors, *N. Herbert Smith; Braunstein & Skelton.*

High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 22; Dec. 1, 7.

In re BAIRD.
BAIRD *v.* STAVELEY HILL. (*a.*)

Trustee—Breach of trust—Principal debtor—Surety—Indemnities—Release of debt.

Where the life tenant (a married woman) of the income from investments of a settled fund of £30,000, having a power of appointment by will over the capital and income of the same, requested the trustees to sell so much as would realize the sum of £10,000, which she was desirous of handing to her husband, himself one of the trustees; and where, all parties understanding that the said sale and payment were breaches of trust, the other trustee only consented on the life tenant and the co-trustee agreeing to enter into a covenant to indemnify him against all claims; and where the said sum was not repaid to the life tenant prior to her death nor to her estate since her death upon the demand of the other trustee,

Held, that the husband of the life tenant was the principal debtor to his wife's estate, and that she was surety.

Held, further, that, upon the true construction of the will of the life tenant, the £10,000 passed to the husband.

Action and summons.

By her will, dated the 24th of November, 1876, Mrs. Dorothea Baird, after appointing as her trustees the plaintiff George Baird and Thomas Tower, since deceased, in whose place the defendant the Rt. Hon. Alexander Staveley Hill was appointed on the 5th of March, 1891, bequeathed to them the sum of £30,000 upon trust to invest the same in certain authorized securities and to pay the income thereof as it should become due and not by way of anticipation to Mary Frances Staveley Hill, then Mary Frances Baird, for her separate use, and after her death as to both capital and income thereof on trust for such person or persons for such purpose and in such manner as the said Mary Frances Staveley Hill should by will or codicil appoint, and in default of and subject to such appointment in trust for such persons (exclusively of a husband) as should be the next-of-kin of the said Mary Frances Staveley Hill.

In 1876 the said Mary Frances Baird was married to the defendant Alexander Staveley Hill. In the year 1895 there had been no child born of the marriage and it was regarded as certain that there would be no issue of the marriage. In that year the defendant Hill required the sum of £10,000 for his own personal purposes, and Mrs. Staveley Hill requested the plaintiff to concur with the defendant as co-trustee with the plaintiff in raising that sum out of the said trust funds. The plaintiff consented on Mr. and Mrs. Staveley Hill agreeing to enter into a covenant to indemnify him against all claims in respect of the breach of trust. The whole of the said sum was accordingly paid to Mrs. Staveley Hill, and she paid to the defendant the sum of £2,500 as a gift, and as a mortgage advanced to the defendant the sum of £7,500 on the security of an equitable mortgage of certain estates dated the 26th of November, 1895.

By a deed of indemnity dated the 19th of November, 1895, Mr. and Mrs. Staveley Hill and each of them covenanted to indemnify the plaintiff in respect of the breach of trust and, further, to repay or secure the repayment of the said sum when required. By another deed of indemnity dated the 16th of December, 1896,

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

Mrs. Staveley Hill alone covenanted to indemnify the trustees in respect of a further sum of £2,600 raised out of the same trust fund and paid to her. The defendant did not repay the £10,000 prior to the death of Mrs. Staveley Hill, which occurred on the 7th of August, 1897, and has not since repaid it to her estate, as the plaintiff had requested him to do.

By her will dated the 20th of January, 1897, Mrs. Staveley Hill, after reciting that the trustees had raised and paid to her the said sums of £10,000 and £2,600, and after reciting the said deeds of indemnity, appointed that her trustees should hold "the residue of the said sum of £30,000, and all other moneys, securities, and property held by the trustees of my said mother's will over which I have any power of appointment in the first place to satisfy indemnities given by me by the said indentures," and she further appointed "that the said sum of £30,000 or so much thereof as shall remain after providing such indemnities as aforesaid and all other moneys over which I have power of appointment under my said mother's will shall be held by my trustees" upon trusts, after payment of certain debts and legacies, to pay the income to Mr. Staveley Hill for his life and after his decease to residuary legatees as therein appointed. "And as to all the rest, residue, and remainder of my property of whatsoever nature or kind over which I have a disposing power I give, devise, and appoint the same unto my said husband absolutely."

The action was brought to obtain the payment of the £10,000 to the trustees of Mrs. Baird's will, and in the alternative specific performance of the covenants of indemnity on behalf of the plaintiff. Simultaneously with the action, a summons was heard in the matter of the estate of Mrs. Staveley Hill, in which Mr. Staveley Hill was plaintiff and Mr. H. Staveley Hill and Mr. J. C. F. Tower, the two remaining executors and trustees of Mrs. Staveley Hill's will, and Mr. G. Baird, and Miss M. A. Baird as representing all other parties other than Mr. Staveley Hill beneficially interested in the said will, were defendants.

Bramwell Davies, Q.C., and *Eustace Smith*, for the plaintiff, who sued upon the covenant in the deed of the 19th of November, 1895, by which Mr. Hill covenanted to pay Mr. Baird the £10,000.

Mr. Hill had benefited by the breach of trust; he and his wife had both covenanted to repay on demand, and the demand had been made but had not been satisfied. Until the liability of Mr. Hill was determined Mr. Baird the plaintiff could not say whether he would require to fall back on the indemnity given him by Mrs. Hill's will. For that reason, and by reason of an order of the 26th of May, 1898, and because the residuary legatees pressed for the £30,000, the plaintiff was obliged to sue for the repayment of the £10,000. The plaintiff, recognizing that everything depended upon whether Mr. Hill was surety or principal debtor, contended that there was nothing to show that Mr. Hill did not occupy the position he did under the deed—viz., that of principal debtor. It was evidently intended that he should repay Mrs. Hill, and there was nothing to prevent the normal operation of the deed. Everything in the evidence was consistent with the assumption that she was surety only: *Paget* v. *Paget*, 46 W. R. 232, [1898] 1 Ch. 47, 470, following *Huntingdon* v. *Huntingdon*, 2 Wh. & Tud., Lead. Cas., 6th ed., 1147, and *Hudson* v. *Carmichael*, 2 W. R. 503, Kay, 613, at p. 620.

J. F. Waggett, for the executors of Mrs. Hill, asked for the directions of the court and whether, on the words of Mrs. Staveley Hill's will and in the event of it being held that the £10,000 should be repaid to the estate, the £30,000 was the primary fund chargeable or whether it should be borne by the rest of the estate *pro rata*.

H. H. Cozens-Hardy, Q.C., T. R. Warrington, Q.C., and *F. P. Onslow*, for the defendant.

It is shown by the correspondence, documents, and oral evidence of the solicitors, that Mrs. Staveley Hill was the principal debtor, as between herself and her husband on the one hand and the plaintiff on the other, and the defendant a surety only. The authorities showed that it was competent for the defendant to show that he was a surety, assuming the deed to be a simple one without recitals; here there were recitals, but not such as to preclude the present defence. These recitals and the execution of the mortgage for £7,500 on the same day went to show that she herself instigated the breach of trust; she was minded to do what she was at liberty to do—viz., to lend the money; and she did lend it. Assuming that Mrs. Hill was the principal, the plaintiff could not sue her executors for the £10,000, for he would have at the same moment as he received that sum to repay it to them for the £30,000; and no action could be brought by her executors against the plaintiff for breach of trust, for she had in her will exercised her power of appointment, making the fund applicable for her debts. The defence was based on two grounds: (1) that if you once get an action by the creditor against a surety, it is competent to the surety to show that the creditor could not sue the principal debtor, so that he was surety for nothing; (2) that if a surety is sued by the creditor, he is entitled to all the securities that the creditor has. It had been held by the Court of Appeal that all circumstances and facts in the relations of husband and wife could be examined to discover who was principal debtor and who was surety, and whether there was any right of indemnity, *Paget* v. *Paget*. The defendant owed the money, not to the plaintiff, but only to Mrs. Hill's estate; it was impossible that he could owe £7,500 to that estate and £10,000 to the plaintiff.

W. C. Renshaw, Q.C., and *Douglas Eyre*, for the residuary legatees, claiming the residue of the £30,000, and coming in under Mrs. Hill's will, so far as it exercised the power under Mrs. Baird's will.—Under the deed of the 19th of November, 1895, the plaintiff alone was entitled to the first indemnity given by Mr. and Mrs. Hill; Mrs. Hill's will did not touch that part of the deed which operated as an indemnity given by Mr. Hill himself. Mrs. Hill intended only to protect her own estate if her husband's estate failed; if as between herself and her husband her estate was called upon to indemnify the plaintiff, it was to be as her will directed, but not so, if Mr. Hill did not become liable. The real truth was that a breach of trust had been committed in respect of the £10,000 entirely for Mr. Hill's purposes; that his indemnity was not worth much, as he was under imminent risk of bankruptcy proceedings, and the joint covenant of indemnity by Mr. and Mrs. Hill was only worth his separate estate, consisting of the furniture. Mr. Hill was the principal debtor and Mrs. Hill only a surety; the mortgage for £7,500, all he could give, was executed as a counter-security to protect Mrs. Hill against Mr. Baird. This £7,500 was not in fact paid by her "out of her separate estate," but was raised out of moneys in which she had a life interest by a breach of trust consisting of (1) the neglect to give regard to the restraint on anticipation, (2) the paying over of the *corpus* of the fund to the extent to which it was paid: Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), s. 5; *Reid* v. *Reid*, 31 W. R. 332, 31 Ch. D. 402. The presumption that

the wife is the surety was capable of being rebutted, and *Paget* v. *Paget* does not therefore apply to the present case.

Dec. 1.—KEKEWICH, J., said that the only contention, as between Mr. and Mrs. Staveley Hill, was, who under the deed of indemnity and covenant dated the 19th of November, 1895, was the person primarily liable to the plaintiff and who was surety. His lordship was of opinion that the defendant was in the position of principal debtor and that Mrs. Staveley Hill had been surety.

The case was stood over for further hearing as to the effect of Mrs. Staveley Hill's will.

Dec. 7.—KEKEWICH, J., having intimated that the question remaining to be decided was whether in the interests of all parties the right of action in respect of the covenant ought to be exercised, and that there was a difference between the terms of the two deeds of indemnity,

H. H. Cozens-Hardy, Q.C., T. R. Warrington, Q.C., and *F. P. Onslow,* for Mr. Staveley Hill, contended that there never was a point of time when anyone could make the plaintiff liable to be sued for breach of trust. Under the will of Mrs. Baird, Mrs. Staveley Hill was entitled to the separate use of the estate, in the events which happened, with a power of appointment by will which she did in fact exercise. The two deeds of indemnity were on the same footing, the terms of the covenants being *reddendo singulo singulis.* The direction contained in Mrs. Staveley Hill's residue was one as to the residue *rebus extantibus—i.e.,* the £30,000 less the £10,000 and the £2,600. There was nothing on the face of the will to justify the liability of the plaintiff; rather, the true effect of the will was to give the sum the subject of the debt to the defendant, that sum, in fact, if not in law, having been originally paid to Mrs. Staveley Hill by the trustees. The final clause of the will exercises every power hitherto unexercised, and the £10,000 passed under that appointment to Mr. Staveley Hill, to whom alone the plaintiff, if he could recover, could pay it back.

W. C. Renshaw, Q.C., and *Douglas Eyre,* for the residuary legatees, relied on the distinction between the deeds of indemnity, and contended that the will simply satisfied the indemnity given by Mrs. Staveley Hill, the surety, and not those given by the defendant, and that nothing was left to pass to the defendant under the general appointment at the end of the will.

KEKEWICH, J., said that the question had really become one of the construction of Mrs. Staveley Hill's will. It was clear that the indemnities were not to be considered in ascertaining "the residue of the said sum of £30,000" of which the testatrix spoke. She recognized on the face of the will that the two sums of £10,000 and £2,600 had been taken from the £30,000 and had passed to her. By the indemnities for which she did provide, she possibly meant indemnification for the costs under the covenant or for the breach of trust in respect of certain Canada debenture investments. The awkward mention of the sum "£30,000" later in the will had to be explained by what had gone before, and it would be quite an absurdity to suppose that she meant to refer to the whole £30,000, when she had said in effect that it was the sum of £17,400 which represented the residue of the £30,000. Some little violence was done to the grammatical meaning of words. Mr. Staveley Hill was the principal debtor in respect of the £10,000, but she was liable, as far as a married woman could be, to be sued, and she had, in fact, something to give; so that if the plaintiff were to recover, he would have to pay to the defendant, which his lordship preferred to take as an argument in aid of what he had said above.

His lordship declared that, in the events which had happened, and according to the true construction of the will, the £10,000 passed under the residuary bequest to Mr. Staveley Hill; one order in action and summons, and no other order except a direction that the costs of all parties should be taxed as between solicitor and client, including any charges and expenses of the plaintiff, and that the trustees of Mrs. Baird's will should transfer and hand over to Mrs. Staveley Hill's executors the funds in question, out of which to pay and retain the costs ordered to be taxed.

Solicitors, *H. S. Holt; Guscotte, Wadham, & Bradbury.*

Chan. Div. }
Byrne, J. } Dec. 7, 8, 9, 21.

DINGLE v. COPPEN. (*a.*)

Mortgage—Statutes of Limitations (21 *Jac.* 1, *c.* 16 *and* 3 *&* 4 *Will.* 4, *c.* 27, *s.* 42)—*Statute-barred arrears of interest—Statute-barred debt—Mortgage of reversion—Mortgagee the tenant for life—Foreclosure and redemption action—Accounts between mortgagor and mortgagee.*

A tenant for life, with the duty of keeping the property in repair, became mortgagee of the reversion. After her death her executors brought an action for foreclosure. The mortgagor counter-claimed for redemption and also for damages for non-repair, and he was held entitled to them. The tenant for life had lent him a sum of money greater than the amount of such damages, but this debt was statute-barred. There were arrears of interest owing under the mortgage deed for more than six years.

Held, that the executors of the tenant for life could not treat the mortgagor as having been repaid his damages out of the statute-barred debt.

Held, also, that, in taking the accounts between mortgagor and mortgagees, all the arrears of interest must be brought in, and not merely those which had accrued within six years.

In this case the testator, J. L. Coppen, gave all his real estate to trustees, of whom the plaintiff Fortescue was the survivor, upon trust to permit his wife, Elizabeth Coppen, to receive the rents and profits for her life for her separate use, she keeping the buildings insured and in good tenantable repair, and subject to such life interest upon trust as regards fifteen acres of land at Dagenham and six cottages, together known as "New Years" for the defendant Coppen in fee simple. The testator died on the 20th of June, 1878. On the 13th of April, 1882, the defendant Coppen mortgaged his reversionary interest in New Years to the widow, Elizabeth Coppen, the tenant for life, to secure £500 and interest at 5 per cent. per annum. In 1884, the defendant Coppen again mortgaged the property to the defendant Temple. There was also a third mortgagee whom it was arranged should be made a defendant. Elizabeth Coppen died in 1897, and the plaintiffs were the executors of her will. The sum of £500, and considerable arrears of interest, were still owing to her estate by the mortgagor. The plaintiffs brought this action for an account of what was due to them

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

under the mortgage of the 13th of April, 1882, and for payment of what should be found due, and in default foreclosure; but did not claim under the covenant in the mortgage deed. The defendant Coppen put in a defence which was substantially abandoned at the trial, and a counterclaim claiming damages for neglect and non-repair of the premises by the widow as tenant for life, and redemption upon payment of the balance of what should be found due to the plaintiffs under the said account after deducting rents and profits come to the hands of the plaintiffs since the death of Mrs. Coppen and the damages for non-repair. The plaintiffs in their defence to the counterclaim submitted that the defendant's claim for damages should be limited to defaults within six years before the death of Mrs. Coppen. They also stated that Mrs. Coppen had lent the defendant Coppen £220, which, with interest, was still owing to her estate and claimed that if any damages were awarded against her estate they might retain such damages against the said sum of £220 and interest. This sum was statute-barred, and the defendant pleaded to it the statute 21 Jac. 1 c. 16. It was agreed at the trial that the judge should decide summarily what was due from the estate of Mrs. Coppen for damages (if any), and his lordship found that damage had been sustained to the amount of £85. It was also agreed that this amount should go in reduction of what the defendant Coppen would otherwise have to pay upon redemption. This was called the first question in the action. The second question was whether the plaintiffs were entitled to the benefit of the statute-barred debt of £220 in reduction or discharge of the damages; and the third question was whether on taking the account between the plaintiffs and the defendant Coppen, the plaintiffs could claim to bring into the account all arrears of interest, or only the arrears of interest for six years. It was agreed that the third question should be determined as though it had arisen in an action by the defendant Coppen to redeem the plaintiffs.

Astbury, Q.C., and *H. L. Fraser*, for the plaintiffs.—We admit that there cannot be strict set off between the damages we have to pay and the statute-barred debt due to us: *Rawley* v. *Rawley*, 24 W. R. 995, 1 Q. B. D. 460. But we say that the defendant must be treated as having repaid himself these damages out of the debt: *Jeffs* v. *Wood*, 2 P. Wms. 128; *Mills* v. *Fowkes*, 5 Bing. N. C. 455; *In re Cordwell*, 23 W. R. 826, L. R. 20 Eq. 644; *In re Compton*, 30 Ch. D. 15; even although the damages were not ascertained: *In re Morris*, 23 W. R. 120, L. R. 10 Ch. App. 68; *Courtenay* v. *Williams*, 3 Hare 539, 15 L. J. Ch. 204. We also submit that this is an action to recover land, and time does not begin to run against us till we came into possession upon the death of Mrs. Coppen: *Pugh* v. *Heath*, 30 W. R. 553, 7 App. Cas. 235; *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *Hugill* v. *Wilkinson*, 36 W. R. 633, 38 Ch. D. 480; *In re Owen*, 43 W. R. 55, [1894] 3 Ch. 220; and that this being a redemption suit does not come within 3 & 4 Will. 4, c. 27, s. 42, and consequently we can bring all our arrears of interest into the account: *Edmunds* v. *Waugh*, 14 W. R. 257, L. R. 1 Eq. 418; *In re Marshfield, Marshfield* v. *Hutchings*, 35 W. R. 491, 34 Ch. D. 721.

J. G. Wood, for the defendant Coppen.—The cases cited upon the first point are either cases of the bankruptcy of a testator or cases of contract, and do not apply to a case of damages. The plaintiffs are only entitled to claim six years' arrears of interest. There is no case exactly deciding this, but the observations of the judges are in favour of this view in the cases of *Du Vigier* v. *Lee*, 2 Hare 326; *Sober* v. *Kemp*, 6 Hare 155; *Sinclair* v. *Jackson*, 1 W. R. 400, 17 Beav. 405; and *Mason* v. *Broadbent*, 12 W. R. 118, 33 Beav. 296.

Ingpen, for defendant Temple.

Cur. adv. vult.

Dec. 21.—BYRNE, J.—Now I come to the second question. The plaintiffs say they are entitled to treat the amount recovered by way of damages as being repaid to the extent of the statute-barred debt of £220, or to retain an amount of assets otherwise applicable in payment of damages in discharge of such damages. They admit they could not set off, but they say that this is not set off, but analogous to the right to retain a legacy in discharge of a statute-barred debt. They say that they have no authority establishing their contention, but they refer to the case of *Courtenay* v. *Williams*, 3 Hare 539, as showing the principle upon which they assert this claim, and as fairly enumerating the previous cases upon which the plaintiffs rely. [His lordship read the passage (p. 551) commencing: "The statute of limitations that governs" to "rebutter to the plaintiff's demand" on p. 554.] Now, it is to be observed that the decision in that case relates to a legatee, there being a bounty intended by the testator, and the same remark applies to *Jeffs* v. *Woods*, and the learned judge in *Courtenay* v. *Williams* expressly recognises that the debtor cannot plead by way of set off a debt barred by the Statute of Limitations. Then the case of *Courtenay* v. *Williams* came on for appeal, 15 L. J. Ch. 204, and the decision was affirmed. At p. 207 the Lord Chancellor says: "Now it is quite certain —[His lordship read the passage to "in the course of this argument," p. 208]. What, then, do these decisions amount to? To my mind they come to this, that in the case of a legacy the person indebted to the testator's estate is not entitled to claim that legacy, unless he treats the legacy in one way or another as being *pro tanto*, or wholly satisfied, as the case may be, by the amount due from him to the testator, although barred by the Statute of Limitations. Counsel for the plaintiff was unable to refer me to any authority which would make it applicable to a case like the present where, there being a statute-barred debt due by a person to a testator who was dead, an action is brought against the executors of the testator in respect of waste committed during his lifetime. If this had been a simple action for waste brought against the tenant for life during his lifetime it would have been no answer to say, "But you are indebted to me." Of course that would have been a simple set off. Is there any difference here? If a right exists at all, it appears to me that it must be a right existing by reason of set off. In the absence of authority I am not going to be the first to decide that there is any such right as that claimed.

On the other point I have been referred to the earlier cases, and invited to accept certain *dicta* in those earlier cases rather than *dicta* in the later cases. [His lordship then referred to the judgments in the cases of *Du Vigier* v. *Lee*, *Sober* v. *Kemp*, *Sinclair* v. *Jackson*, *Mason* v. *Broadbent*, and *Edmunds* v. *Waugh*, in which latter case proceeds of sale of the estate by the trustees of the mortgagee had been paid into court, and the trustees were held entitled by Kindersley, V.C., to more than six years' arrears as the suit was not one to recover interest under the 42nd section of 3 & 4 Will. 4, c. 27:] The Vice-Chancellor there says, "I am bound to say that, with all deference, I cannot concur in the conclusion that a bill by a mortgagor to recover the surplus moneys comes within the terms of the 42nd section as being a suit by which arrears of interest are sought to be recovered. Moreover, it

does not appear to me to come within the spirit of the Act, which, it must be remembered, is an Act taking away existing rights, and which must be construed with reasonable strictness. The intention of the Legislature, I think, was that if a man chose to let interest run for more than six years, and then come to a court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest which he ought to have paid less culpable than the omission of the mortgagee to demand and enforce payment of it?"

Now, like Kay, L.J., in *In re Marshfield*, I confess I am not able to resist the reasoning of Kindersley, V.C., in *Edmunds* v. *Waugh*. The truth is this. Before the passing of the Act in question there were certain rights as between a mortgagor and a mortgagee in existence. In respect of the recovery of arrears of interest, the 42nd section has affected the right of the mortgagee when coming to recover money, but not his right when he has exercised his power of sale and holds the proceeds, or where his mortgagor comes to redeem and take away from him his legal rights. I think, therefore, that the true view is that in a suit to redeem there is no such right as that contended for on behalf of the defendant.

Solicitor for the plaintiffs, *John Greenfield*.

Solicitors for the defendant Coppen, *Wrested & Sharp*.

Solicitor for the defendant Temple, *J. Turner*.

Chan. Div. }
Wright, J. } Dec. 20, 21.

In re ROXBURGHE PRESS (LIMITED).
SPIERS & BEVAN'S CASE. (*a*.)

Company—Winding up—Contract—Consideration for shares other than cash—Registration of contract—Matter of prejudice—"Just and equitable"—Companies Act, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

Before granting relief under the Companies Act, 1898, *the court will consider the consideration given for the shares which were issued and the nature of the contract sought to be registered. It lies on the applicant to show that, when entering into the contract which he is applying to register, he acted with due caution and conscientiousness, and that he did nothing to disentitle him to a relief at the cost of innocent persons.*

Summons by Messrs. Spiers & Bevan to vary the list of contributories by inserting their names in the list of fully paid up shareholders with regard to certain shares which had been allotted to them, or in the alternative for relief under the Companies Act, 1898.

The applicants were accountants in a large way of business. One Rideal had converted his publishing business into a limited company under the name of the Roxburghe Press (Limited); as vendor he was to have allotted to him 30,000 fully-paid shares. These his co-directors resolved should be 7 per cent. cumulative preference shares. Nothing, however, was said in the contract as to allotment to his nominees. Rideal also became a "governing director" of the company. The applicants agreed with him that they would issue the prospectus of the company to 600 of their customers with personal letters recommending the shares in consideration of receiving from Rideal as his nominees, 200 of his shares and also the sum of 6d. for every share applied for on their recommendation. The shares were allotted direct to the applicants by the company and not to Rideal. No contract as to this transaction was ever registered under section 25 of the Companies Act, 1867. The company having gone into liquidation, the names of Messrs. Spiers & Bevan were placed on the list of contributories by the liquidator as holders of unpaid shares. They now applied to have their names removed from the list of contributories, or in the alternative for relief under the Companies Act, 1898.

Wright, J., held that they were not entitled to have their names removed from the list of contributories, but took time to consider their application under the Act of 1898.

S. O. Buckmaster, for the applicants.—The applicants are entitled to relief as they are "persons interested," and it is "just and equitable" that the contract should be filed.

R. Neville, for the liquidator:—The contract with the vendor was a mere speculation, and the applicants are not entitled to relief.

Cur. adv. vult.

Dec. 21.—WRIGHT, J.—This case raises a question of great importance under the Act of this year for giving relief against the provisions of the 25th section of the Companies Act, 1867—namely, whether under this Act relief can properly be refused on the ground of what may be called matter of prejudice, as distinguished from bad faith, or gross negligence, or illegal conduct. The applicants would, in my judgment, have been entitled to relief if the shares which they took in the belief that they were fully-paid shares, and which the company issued to them as fully paid, had been taken by them at their real or supposed value as payment for services of an ordinary business kind. Ought it to make any difference if the services rendered were the recommending or puffing of the vendor's shares with the view of helping him to unload them on the public, and in ignorance or without full inquiry whether they were valuable or worthless, and if, instead of taking them at an estimated value sufficient to pay the real worth of the services given, the claimants took them by way of a large commission of 100 shares for every 200 or 300 persons to whom they might recommend a purchase, besides a commission of 6d. per share, the sale of which their introduction might effect? It is argued with much force against the applicants that on this view of the facts this was a speculative and questionable transaction, in which they must be left to protect themselves by their own vigilance, and that they ought not to be relieved at the expense of creditors or *bonâ fide* contributories. In some cases of this kind the amounts involved are very large. To allow the relief may be to deprive creditors of the principal or the only fund for their payment, or to subject to a greatly increased burden contributories who have already paid money on their shares. To refuse the relief may mean ruin to applicants who have done nothing contrary to law. In some instances, especially where relief is sought by vendors, the questions which will have to be solved in this court—and in other courts if regard is to be had to considerations of the kind now in question—

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

will be of the most difficult kind, governed by no definite principles of law, and varying with every complexity of circumstance. Yet to disregard them is hardly possible when it is left to the court to exercise a discretion as to what is "just and equitable." It seems to me that such considerations cannot be wholly disregarded, and that it must in each case be a question of degree and fact. I cannot attempt to lay down any general rule beyond this—that I think it lies on the applicant to show that he has acted with due caution and conscientiousness, and that he has done nothing to disentitle him to a relief at the cost of other innocent persons. In the present case I have come to the conclusion that the applicants ought not to be so assisted. They are accountants in a large way of business. One Rideal had converted his own publishing business into a company named the Roxburghe Press (Limited), of which he made himself "governor director," and he was to get as vendor about 30,000, 7 per cent. cumulative preference shares issued as fully paid. Then he was anxious to unload, and he asked the present applicants to help him by circulating the prospectus of his company among their customers with what are called personal letters recommending the shares. They agreed to issue copies with such letters to 600 persons on the terms that they should be given for themselves as nominees of the vendor 200 of his shares, and also the sum of 6d. for every share applied for on their recommendation. It does not appear that they made any inquiry, except from Rideal himself, as to the truth of the statements in the prospectus or the real value of the shares which they were recommending to the public. Under these circumstances, I am not disposed to relieve them from the consequences of their not having taken the trouble to look at the filed contract. If they had looked at it they would have seen that it omitted all mention of the most material part of the real contract under which the vendor's shares were actually issued—namely, that they were to be 7 per cent. cumulative preference shares. I think the application must be dismissed with costs.

Leave to appeal was given, and execution stayed in the meantime on the terms of an appeal being lodged within a week.

Solicitors, *Ward, Perks, & McKay*, for the applicants; *Weatherfield, Son, & Baines*, for the liquidator.

Q. B. Div.
(Lawrance and Channell, JJ.) Jan. 31.

MCXHAM *v.* GRANT. (*a.*)

Company—Director—Unauthorized payment of capital to shareholders—Liability of shareholders to refund.

The directors of a company owning ships, having received a sum of money under a policy of insurance of one of the ships which had become a total loss, distributed the money among the shareholders in the company, with their knowledge and consent. Subsequently the company was wound up. An order was made in the winding up, under section 10 *of the Companies Act,* 1890, *declaring that the payments to the shareholders were payments in reduction of the capital of the company, and were unlawful, and the directors were ordered to repay the amount to the liquidator. This order was made without prejudice to the right of the directors to be recouped by the shareholders.*

Held, that the directors were entitled to recover from the shareholders the money paid to them.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Appeal by the defendant from the Swansea County Court.

The plaintiffs were the directors of a company called Cory's Steamers (Limited). The defendant was a shareholder in the company. In 1894 *The Primrose*, a steamer which was the property of the company, became a total loss. *The Primrose* was insured and the underwriters paid to the company £719 2s. 6d. in respect of the loss. In April, 1894, the directors of the company sent the following circular to the shareholders, including the defendant: "We have a sum of money in hand from insurance received on account of the loss of *The Primrose*. We propose remitting 10s. per share. If you see no objection we will send you £——, being 10s. on your —— shares, on your sending a receipt on enclosed form and provided all the shareholders consent. There will be a considerable sum more to receive for insurance of *The Primrose*." The receipt was as follows: "Received of Cory's Steamers (Limited) the sum of £——, being a reduction of 10s. per share on the —— shares held by me." The defendant wrote a letter in answer to the circular, in which he said: "I quite agree with the proposition of your letter of the 10th of April and enclose my receipt for £13, being 10s. on my twenty-six shares." Further payments were made to the shareholders out of the insurance money of *The Primrose*, the total amount received by the defendant being £35.

On the 29th of December, 1896, a winding-up order was made against the company, and on the 22nd of December, 1897, the liquidator of the company obtained an order under section 10 of the Companies Act, 1890, declaring that the payments made to the shareholders out of the moneys received in respect of the insurance of *The Primrose*, amounting in all to £719 2s. 6d., were payments of part of the capital of the company, and were unlawfully and improperly paid in reduction of the capital of the company, and it was further ordered that the directors should pay to the liquidator the sum of £719 2s. 6d. This order was expressly made without prejudice to the right of the directors to be recouped by the shareholders the sums paid to them. This action was brought by the directors against the defendant to recover the £35 paid to him.

The county court judge gave judgment for the plaintiffs.

The defendant appealed.

Witt, Q.C. (*Poley* with him), for the appellant.—This action will not lie. The directors and the shareholders were joint tortfeasors, and as such there is no right of contribution between them. Further, the directors were in the position of trustees, and a trustee cannot recover money paid under a mistake of law to a third person who has full knowledge of the facts.

He cited *Rogers* v. *Ingham*, 25 W. R. 338, 3 Ch. D. 351; *Whittaker* v. *Kershaw*, 39 W. R. 22, 45 Ch. D. 320; Lindley on Company Law (5th ed.), p. 389.

Meager, for the respondents.—This is not a case of joint tortfeasors. In the case of a trustee who has committed a breach of trust, he may follow the property, for it is his duty to get the fund back: Godefroi on Trusts (2nd ed.), p. 687, and cases cited there. A *cestui que trust* who has instigated a breach of trust is liable to indemnify the trustee: *Trafford* v. *Boehm*, 3 Atk. 440; *Raby* v. *Ridehalgh*, 3 W. R. 344, 7 De G. M. & G. 104; *Sawyer* v. *Sawyer*, 33 W. R. 403, 28 Ch. D. 595. The right of directors, who have been ordered to repay money paid to shareholders out of capital, to recover from the shareholders was recognized by Jessel, M.R., in *In re National Funds Assurance Co.*, 27 W. R. 302, 10 Ch. D. 118; and by

Fry, J., in *In re Alexandra Palace Co.*, 30 W. R. 771, 21 Ch. D. 149.

Witt, Q.C., replied.

LAWRANCE, J.—In my opinion the decision of the county court judge in this case was right. The facts of the case are as follow: The plaintiffs are the directors of a company which for some years had carried on the business of shipowners. One steamship belonging to the company was lost, and the company received about £700 insurance money from the underwriters. For some reason the directors of the company determined to divide this money among the shareholders of the company. A notice was sent to the shareholders asking them whether they agreed to the proposed division of the money. The shareholders did agree, and the money was accordingly distributed. In 1897 the company was wound up under the Act of 1890. The transaction as to the distribution of the insurance money was discovered by the liquidator. He considered that the payment was improper, because the effect of it was to diminish the capital of the company by the amount in question, to which the creditors of the company were entitled. The liquidator obtained an order against the directors for repayment of the money, and now the directors bring their action against one of the shareholders to recover the amount paid to him. The position of the parties is this. The shareholders have all benefited by the payment, which they assented to, and they have no good answer to the claim which the directors now make against them. As between the shareholders and the directors, it is perfectly right and just that the directors should not be held personally liable for payments made to the shareholders, who acquiesced in the payments. This appeal must, therefore, be dismissed.

CHANNELL, J.—I am of the same opinion. As to the law, the case is not free from difficulty, but on the merits, apart from any question of law, there is no difficulty whatever, because it is clear that the shareholders who received payment of this money ought to be the persons to repay it rather than the directors, who were merely the instruments—whether by a mistake of law or of fact—in paying away the money. The directors did improperly pay this money to the shareholders, but as between the shareholders and the directors, the shareholders ought to repay the money, for the directors committed no real fault, other than an error of judgment and company law, which might have been put right by getting an order in the Chancery Division for the reduction of the capital of the company. The substance of the defendant's contention is that in this case the technical rule as to there being no right of contribution between joint tortfeasors applies. In my judgment this is not a case of joint tortfeasors. At first I was in some doubt as to the position of a trustee who commits a breach of trust through paying away money, not dishonourably, but through a mistake due to the misconstruction of a trust deed, as, for example, where a trustee makes a wrongful payment to the tenant for life. But when the cases are looked at, it is clear that that is not a case in which the trustee and the tenant for life are considered to be *in pari delicto*. *Trafford* v. *Boehm*, 3 Atk. 440, is the earliest case on this question which is usually quoted. The doctrine is also clearly stated in *Sawyer* v. *Sawyer*, and most clearly of all in *Raby* v. *Ridehalgh*, which is referred to by Chitty, J., in *Sawyer* v. *Sawyer*, where he says: "The well-known case of *Raby* v. *Ridehalgh* proceeds upon the footing that each person at whose instance the trustees have committed a breach of trust is liable to recoup the subject of that breach of trust to the trustees." In *Raby* v. *Ridehalgh*, personalty was bequeathed upon trust for tenants for life, with executory trusts in remainder, but without directions as to investment. The trustees, at the instance of the tenants for life, abandoned their original intention of investing in the funds, and invested on mortgage so as to obtain an increased income, but it did not appear that the tenants for life approved of the particular securities which were taken and which proved insufficient. The trustees had to make good the loss, and it was held that the tenants for life were liable to recoup the trustees. Turner, L.J., in giving judgment, said: "Now, the *cestuis que trustent* for life who instigated the trustees to commit the breach of trust have derived from that breach of trust the advantage of enjoying the increased income of the fund not duly invested according to the trust, and the consequence of that is, that the *cestuis que trustent* in remainder have a right to have that income refunded and made good by the *cestuis que trustent* for life. It is trust money received by them under a breach of trust to which they were privy, and the effect, I apprehend, must be that, as the loss which ought to fall on those who instigated the breach of trust has been laid by the court upon the trustees, the trustees are entitled to stand in the place of the *cestuis que trustent*, in remainder, for the purpose of recovering against the *cestuis que trustent* for life who instigated the breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust." It seems to me that if it can be said that in this case the shareholders instigated a breach of trust, the case is perfectly clear. It is said that trustees in these circumstances are entitled to stand in the shoes of the *cestuis que trustent*, and that is equivalent to saying that in this case the directors are entitled to stand in the place of the liquidator for the purpose of recovering against the shareholders who received the money. Jessel, M.R., in *In re National Funds Assurance Co.*, and Fry, J., in *In Re Alexandra Palace Co.*, both made orders against directors without prejudice to the right of the directors to recover over against parties privy to the transaction. It is difficult to suppose that such orders would have been made if the right to recover over did not exist. It was probably with a view to putting the directors in that position that the orders were expressly made without prejudice to the right of the directors to recover over. On the whole, therefore, when the matter is fairly considered the point seems to me to be one in which there is no substantial difficulty, and in my opinion there is no doctrine which prevents us from deciding that the shareholders and not the directors should bear the loss in this case.

There is one other point which might have caused a difficulty, and that is the question whether the judgment should have been for an indemnity and not for the recovery of the actual money paid. In my opinion the proper form of the judgment would be a judgment for an indemnity, but the point was not taken before the county court judge, and therefore it is not open to the appellant to take it here. The point is not one of any considerable importance, because most of the money has been repaid by the shareholders since this action was brought. We therefore need not interfere with the judgment of the county court judge, which will stand.

Appeal dismissed.

Solicitor for the appellant, *Du Bois*.

Solicitors for the respondents, *Evans, Richards, & Marriott*, for *J. R. Richards*, Swansea.

Q. B. Div.
(Bruce and Ridley, JJ.) Jan. 26, 27.

BEARDSLEY v. BEARDSLEY. (a.)

Estoppel—Res judicata — *Probate — Practice — Heir-at-law party as one of next-of-kin only—Decision establishing will—Action of ejectment by heir-at-law alleging intestacy—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *ss.* 61, 62, 63.

In an action for establishing a will in the Probate Division to which the heir-at-law of the deceased is a party as one of the next-of-kin, it is not necessary also to cite him in his character of heir-at-law in order that he should be bound as to the real estate of the deceased by the decision of the court.

Held, therefore, that an heir-at-law who had been a party to a probate suit as one of the next-of-kin only, was bound by the decision of the court establishing the will, and was estopped from afterwards bringing an action of ejectment founded upon the alleged intestacy of the deceased.

Point of law raised by the pleadings in an action and set down for hearing under R.S.C., ord. 25, r. 2.

The statement of claim alleged that on the 15th of February, 1897, Solomon Beardsley, who was seized in fee in possession of real property at Ilkeston, known as 65, North-street, died intestate as regards that property; and that the plaintiff as his eldest son and heir-at-law was entitled to the possession of the said premises; but that the defendant wrongfully took possession of the said premises, pretending to be entitled thereto under an alleged will and codicil of the said deceased, and wrongfully withheld possession of the said premises from the plaintiff. The claim was for possession of the premises with mesne profits from the death of the deceased.

The defendant Mary Elizabeth Beardsley, widow of the deceased Solomon Beardsley, in her defence, denied that the latter died intestate, and alleged that she was entitled to a life estate under a will made by the deceased dated the 30th of December, 1891. The defence then proceeded as follows: "(5) On the 2nd of June, 1897, an action was commenced in the Probate, Divorce, and Admiralty Division (Probate) of the High Court of Justice, 1897, B No. 2,325, in which this defendant, Mary Elizabeth Beardsley, was the plaintiff and Solomon Beardsley (the above-named plaintiff) and others were respectively defendants, for the purpose of having the above-named will of the said Solomon Beardsley, deceased, established. (6) The above-named plaintiff, Solomon Beardsley, duly entered an appearance in the said action and delivered a defence therein, and was represented by counsel, and was himself present in person at the trial of the said action, in which judgment was given on the 13th of December, 1897, and a final decree pronounced for the force and validity of the will. (7) By reason of the matters stated in the above two paragraphs of this defence the above-named plaintiff, Solomon Beardsley, ought not now to be heard to impeach the force and validity of the said will of the said Solomon Beardsley, deceased, or the title of this defendant to (*inter alia*) the said premises under and by virtue thereof, and of the said gift and devise therein contained."

In reply the plaintiff admitted that he was a party to the action in the Probate Division, but pleaded that he was a party, "not as heir-at-law, but as one of the next-of-kin of Solomon Beardsley, deceased, and the said action concerned the goods of the said Solomon Beardsley, deceased, and in no way related to his real estate. The defendant, Mary Elizabeth Beardsley, wholly neglected and refused to cite the plaintiff as such heir-at-law to attend the proceedings in the said action or by summons or otherwise to make him a party thereto as heir-at-law of the deceased, and took no steps to give the Probate Division of this honourable court jurisdiction to determine the validity of the alleged will and devise by the said Solomon Beardsley, deceased, of his real estate, by reason whereof the said Probate Division had no jurisdiction to decide, and did not decide the validity of the alleged will and devise of the said Solomon Beardsley's real estate, and the plaintiff is in no wise estopped or prevented from contesting the force and validity of the alleged will and devise by the said Solomon Beardsley of his real estate."

It was admitted that the plaintiff was not cited in the probate proceedings as heir-at-law of the deceased: the question was whether, having been a party as one of the next-of-kin, he was estopped by the decision of the Probate Division in favour of the will from calling its validity in question in an action of ejectment relating to the real estate of the deceased.

The Court of Probate Act, 1857, s. 61, provides that "where proceedings are taken under this Act for proving a will in solemn form . . . or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next-of-kin . . . and may be permitted to become parties or intervene for their respective interests in such real estate."

Section 62 provides that where probate is granted "after such proof in solemn form" the probate "shall enure for the benefit of all persons interested in the real estate affected by such will . . . and the probate copy of such will . . . shall in all courts and in all suits and proceedings affecting real estate be received as conclusive evidence of the contents and validity of such will."

Section 63 provides that nothing in the Act shall make it necessary to cite the heir-at-law or others interested in the real estate unless it is shown that the deceased was entitled to real estate, "provided that the probate decree or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate unless such heir or person has been cited or made party to the proceedings or derives title under or through a person so cited or made party."

W. H. Stevenson, for the plaintiff.—The plaintiff not having been a party to the probate proceedings as heir-at-law is not estopped from disputing the will in an action of ejectment. The fact that he was a party as one of the next-of-kin is immaterial. To give the Probate Court jurisdiction as to the real estate and to bind the heir, it is necessary to cite the heir as such or otherwise to bring him before the court in his capacity of heir. That this is so is clear from the established practice of the Probate Court, which requires the heir to be cited as such in cases where he was already a party as one of the next-of-kin: Tristram and Coote's Probate Practice (12th ed.), p. 392; *Lister* v. *Smith*, 10 W. R. 429, 3 Sw. & Tr. 53; *Young* v. *Ferrie*, 4 Sw. & Tr. 210, 8 W. R. Prob. Dig. 7; *Purdey* v. *Field*, 12 W. R. 1088, 33 L. J. P. & M. 73; *Moore* v. *Holgate*, 14 W. R. 515; L. R. 1 P. & D. 101. These cases involve the proposition

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

that the heir-at-law will not be bound by the decision of the Probate Court unless he has been cited as such. This view is supported by the Court of Probate Act, 1857, ss. 61, 62, 63; I rely in particular on section 63. There is no authority to the contrary except the *dictum* of Sir Cresswell Cresswell in *Emberley* v. *Trevanion*, 29 L. J. P. & M. 142.

He also referred to *Gaunt* v. *Wainman*, 3 Bing. N. C. 69; *Barrs* v. *Jackson*, 1 Yo. & Coll. Ch. C. 585; *Reg.* v. *Hutchings*, 29 W. R. 724, 6 Q. B. D. 300.

Hextall, for the defendant.—The plea of estoppel is good, otherwise the court would be called on to retry in the present action the question which has been already tried in the Probate Division between the same parties. [After referring to *Smyth* v. *Wilson*, 36 L. J. P. & M. 82, 15 W. R. Prob. Dig. 13, and *Rayson* v. *Parton*, 18 W. R. 232, L. R. 2 P. & D. 38, he was stopped.]

BRUCE, J., after reading the material paragraphs of the pleadings, said: The question is whether the plaintiff, who was a party to the action brought in the Probate Division for the purpose of establishing the will, is bound by the decision of that court establishing it. It is said that he is not bound, because although he was a party he was not before the court in his character of heir-at-law. It seems to me that it is immaterial in what character he was a party, provided he was duly made a party. The issue to be tried in the probate action was as to the validity of the will; that issue was the same and was governed by the same considerations whether the will related solely to personal property or related to realty also. The plaintiff was a party to that action and is bound by the decision of the court. In *Emberley* v. *Trevanion*, Sir Cresswell Cresswell is reported to have said: "I have always been of opinion that if parties are before the court in a suit in whatever capacity and take part in the litigation they are bound by the decision of that suit, and that the practice of issuing a separate citation to parties as heirs-at-law who have already appeared as next-of-kin is a work of supererogation." I entirely agree with that statement of the law. It is true that the practice has prevailed in the Probate Court of issuing citations to a person who has already appeared as one of the next-of-kin for the purpose of bringing him before the court in his character of heir-at-law; but it appears to me that this is done merely *ex abundanti cautelâ*. Moreover, I have consulted my brother Barnes as to this question, and I have his authority for saying that the practice is merely a survival of the practice of the ecclesiastical courts and that it is in no way necessary that the heir-at-law should be cited as such if he is already before the court as one of the next-of-kin; he entirely assents to the remarks of Sir Cresswell Cresswell which I have quoted. As to section 63 of the Court of Probate Act, 1857, which was relied on, the important words are those of the proviso: the heir-at-law is not to be affected unless he "has been cited or made party to the proceedings"; now, here the heir-at-law was a party to the proceedings, although not as heir-at-law; he is therefore bound by the decision and cannot have the whole matter tried over again; it would be scandalous if the law permitted that to be done.

RIDLEY, J.—I agree.

THE COURT being of opinion that the decision of the point of law disposed of the whole action, dismissed the action with costs.

Solicitors for plaintiff, *Atkinson & Druce*, for *Truman*, Nottingham.

Solicitors for defendant, *Purkis & Co.*, for *J. Ormond*, Chesterfield.

IN BANKRUPTCY.

Q. B. Div.
(Wright and Darling, JJ.) } Nov. 11, 14; Dec. 21.

In re HIGGINSON & DEAN.
Ex parte THE ATTORNEY-GENERAL. (*a*.)

Bankruptcy—Proof—Application to expunge—Claim by the Crown to dividends on the proof of an extinct corporation—Bona vacantia—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule II., rr.* 23, 25.

A corporation was admitted to proof in a bankruptcy, and subsequently became extinct, having been dissolved by order of the court. Some years after such dissolution a fund became available for the payment of further dividends in the bankruptcy.

Held, that the dividends due to such corporation in respect of its proof passed to the Crown as bona vacantia.

Appeal from a decision of the county court at Manchester.

In 1847 the firm of Higginson & Dean became bankrupt with liabilities amounting to over £900,000. A trustee was appointed, proofs of creditors were admitted, dividends were declared, the trustee was released, and the official receiver became, *ex officio*, trustee in the bankruptcy. Among the creditors admitted to prove was a corporation known as the Royal Bank of Liverpool, which was dissolved by an order of the court under the Companies Act upon the 29th of October, 1887, when its books were destroyed.

In 1897 the official receiver discovered that the bankrupts had been the owners of a large number of shares in an undertaking called the Leeds and Thirsk Railway, which had been subsequently taken over by the North-Eastern Railway. He obtained the allotment to himself of shares in the North-Eastern Railway equivalent to the bankrupt's holding in the Leeds and Thirsk Railway and sold them for the sum of £6,500, which was now available for the payment of a further dividend on the admitted claims.

Messrs. Littledale & Co., who were among the creditors admitted to prove, thereupon moved in the county court at Manchester to expunge the proof of the Royal Bank of Liverpool on the ground that that corporation was now extinct.

The Crown opposed the motion, claiming to be entitled to the dividends which would have been payable to the Royal Bank of Liverpool, as *bona vacantia*. The official receiver also opposed the motion, and suggested that the money in question ought to be paid into the Bankruptcy Estates (Unclaimed Dividend) Account.

The county court judge decided in favour of Messrs. Littledale & Co. and expunged the proof.

The Crown appealed.

Sir R. B. Finlay, S.G., *Ingle Joyce*, and *Horace Avory*, for the Crown, the appellant.—The county court judge had no power to expunge the proof at all; the only ground for expunging a proof is that it has been improperly admitted, which is not contended in this case: the Bankruptcy Act, 1883, Schedule II., r. 23. The judgment was also wrong in deciding that the debt was gone, for the personal estate of extinct corporations vests in the Crown. Moreover, this is a case where there is a trust with no *cestui que trust*, and the benefits of the trust go to the Crown: *Cunnack* v. *Edwards*, 45 W. R. 99, [1896] 2 Ch. 679; *Barclay* v. *Russell*, 3 Vesey, 424; *Taylor* v. *Haygarth*, 14 Sim. 8.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Herbert Reed, Q.C., and *Locke Scott*, for Messrs. Littledale & Co., the respondents.—The Crown has no *locus standi* to claim here until the *chose in action* has been converted into a chattel, which will not take place in this case until a dividend has been declared: *Ex parte Wackerbath*, 2 Gl. & Jam. 151. The appellants are not entitled to appeal at all, for they are not "persons aggrieved" within section 104, sub-section 2, of the Bankruptcy Act, 1883. "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal." They cannot claim this dividend as entitled to the benefits of a trust which has failed, for the only trust is to administer the estate in accordance with the law of bankruptcy—that is, to distribute dividends among the persons entitled to them at the time when the dividends are declared.

M. Muir Mackenzie, for the Board of Trade, suggested that the dividend should be paid into the Bankruptcy Estates (Unclaimed Dividend) Account.

Stewart Brown appeared for the official receiver.

Sir R. B. Finlay, S.G., replied.

THE COURT reserved judgment.

Dec. 21.—WRIGHT, J., read the considered judgment of the court, which, after stating the facts, continued as follows: Subject to one difficulty I think that the grounds of the learned county court judge's decision cannot be maintained, and that the Crown is entitled to succeed. From the time of Lord Thurlow's decision in *Middleton* v. *Spicer*, in 1783, 1 Bro. C. C. 201, it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are, as a general rule held by him as a trustee for the Crown of *bona vacantia;* and during all the period which has elapsed since that decision no exception from the rule seems to have been established. It has been illustrated by many cases which show that the possession conferred on the trustee for the purposes of jurisdiction or administration gives no beneficial title, as by occupancy or otherwise, which he can conscientiously set up against the Crown. Such cases are (1797) *Barclay* v. *Russell*, 3 Ves., at p. 430, per Lord Loughborough; (1853) *Powell* v. *Merrett*, 1 W. R. 243, 1 Sm. & G. 381; (1854) *Cradock* v. *Owen*, 2 W. R. 319, 2 Sm. & G. 241; (1859) *Read* v. *Stedman*, 26 Beav. 495, 7 W. R. Ch. Dig. 106; *Cunnack* v. *Edwards*, 45 W. R. 99, [1896] 2 Ch. 679. And in *Dyke* v. *Walford*, 5 Moo. P. C. 434, the right of the Crown as against the ordinary to *bona vacantia* in cases of intestacy is traced back to very early times. Nor, I think, is there any authority for holding that the Crown is in any worse position in relation to chattels real in trust for a corporation which has become dissolved than in relation to chattels held in trust for a natural person deceased. The same principle seems applicable in both cases. The courts will not allow a person who has obtained title or possession as a mere trustee of chattels to set up unconscientiously any beneficial title by occupancy, possession, or otherwise. The text-books, such as those of Kyd, Grant, and Lewin, agree, though in some cases with an "it seems," that the Crown is entitled to the personal estate of a dissolved corporation aggregate. Nor is there any authority for holding that the creditors other than the dissolved bank have any *jus accrescendi* or benefit of survivorship entitling them to the share of the creditor who has become extinct without successor or representative. In *Ashley* v. *Ashley*, (1876) 25 W. R. 356, 4 Ch. D. 757, where, in a suit for administration, such a claim was made and failed, James, L.J., asked why the Crown might not take out representation to the missing petitioners. *Primâ facie*, therefore, as it seems to me, the Crown is entitled.

The difficulty is that, as it is argued, on the dissolution of the bank not only did its artificial personality come to an end, but the debt due to it from the bankrupts lapsed or was extinguished. The existence of a debt, it is said, imports the existence of two parties to the obligation, and the obligation of the debtors to the bank is not, upon the dissolution of the bank, converted into an obligation of the debtors to the Crown. The bank, therefore, has ceased to be a creditor, and the Crown has not become a creditor, and the ground of the proof has gone as completely as if it had never existed, and the proof ought to be expunged, with the consequence that the official receiver is now a trustee of the fund for the remaining creditors as if there never had been any others. Therefore, it is argued, there is no failure of *cestui que trustent* and no property which, for default of any *cestui que trust* to claim it, can be said to be held in trust for the Crown. The authorities for the proposition that on the dissolution of a corporation aggregate debts due to or from it are extinguished are by no means clear or satisfactory. In 1 Bl. Com., p. 484, and in 2 Kyd on Corporations, and in Grant on Corporations, p. 303, such a proposition is stated, but in terms which suggest that no more is meant than that, after the dissolution, the individuals who were members or officers of the corporation cannot sue or be sued in respect of its rights or obligations, and this is all that is established by the cases there cited. "The debts of a corporation," Blackstone says, "either to it or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them, in their natural capacities; agreeable to that maxim of the civil law, *si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent*," citing Co. Lit. 13, which, however, does not seem to illustrate the proposition. The American decision in the case of *The State Bank* v. *The State*, (1823) 1 Blackford's Indiana Rep. 267, relies on those authorities as supporting the general proposition, but it does not advert to this qualification, or add new references to authority, and the authorities cited do not in any way support the proposition except as so qualified. Grant on Corporations (published in 1850), p. 303, is explicit in the same sense as the American case last cited, but does not refer to any authority which, so far as I can see, has any bearing on the matter. Nor do the old authorities as to the effect of dissolution of municipal or other corporations add anything decisive of the question. In the 17th and 18th centuries corporations aggregate, constituted by charter or letters patent, were numerous, and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival, and re-incorporation with or without change of name or constitution. Many references to such cases will be found in Anderson's Reports and in *Rex.* v. *Pasmore*, 3 T. R. 199. I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided where the corporation had not been revived or some provision made by statute or charter with reference to its obligations. In *Mayor, &c., of Colchester* v. *Seaber*, (1766) 3 Burr. 1866, the revived corporation sued in its own name on a bond given to the dissolved corporation, and succeeded. Sir F. Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its *choses in action*, such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a

charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the court is not reported to have expressed any opinion on this point, it being held that there was only a qualified dissolution, and no absolute break of continuity. Suppose the bank at the time of its dissolution had been in credit at another bank, or held notes of another bank, or had issued notes of its own, would the dissolution have destroyed the obligation in these cases? In the United States of America there have been two decisions of Story, J., which are against such a conclusion. In *Wood* v. *Dummer*, 3 Mason 308, the charter of a bank had expired. Before dissolution the bank had distributed its capital amongst its stockholders without providing for payment of outstanding notes. It was held that after the dissolution the noteholders were entitled to make the stockholders account for moneys impressed with a trust of which the stockholders had notice. In *Mumma* v. *The Potomac Co.*, 8 Peters, 281, it was contended that the dissolution of an insolvent incorporated company under a statute of the Legislature of a State was inoperative as being contrary to the Constitution which prohibited the impairing of obligations by the Legislatures of particular States. Story, J., however, held that the obligations were not impaired by the dissolution—"the obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bonâ fide* purchasers, but is still held in trust for the company or for the stockholders thereof at the time of its dissolution in any manner permitted by the local laws." This statement of the law may not perhaps be entirely applicable in this country, but it requires consideration. It might be reasonable to enact that in analogy the immemorial law of executors and administrators and the statute of 31 Edw. 3, st. 1, c. 11, on the dissolution of a corporation aggregate all its rights, including its rights of action on executed contracts, such as those evidenced by bank notes or bonds or on claims in debt devolve upon the Crown subject to payment of the corporation's own debts. It would, however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases except where it can allege a trust. Such a declaration may have to be made or advisedly refused in the case of some of the rapidly-increasing number of companies which are being dissolved under the Companies Acts. But in the present case it is not necessary to decide this question. Even if it be the law that a debt due to a corporation aggregate is extinguished by the dissolution of the corporation, I do not think that it follows that the Crown's claim fails in this case. The original assignees in the bankruptcy and their successors in office have from the time of the bankruptcy been entitled to the old railway shares in trust for such creditors as had been or might be admitted to proof. The bank immediately before its dissolution was not a mere creditor. It was a creditor whose claim was in proof. Its claim was no longer a mere right of action for a debt. It could no longer have maintained an action as for a debt. The debt had been at any rate provisionally merged in an equitable execution (1 Atkyns, 67; *Twiss* v. *Massey*, per Lord Hardwicke; Cooke's Bankruptcy Law (4th ed.), ch. 1, p. 5), and the right to sue had been replaced, not, indeed, by any particular interest in any specific chattels, but by a right to have all the assets as and when realized applied *pro rata* for the bank's benefit with the other creditors. This right, as it seems to me, existed as an equitable interest or chattel at the time of the dissolution, and upon the dissolution of the bank that chattel or interest was not annihilated, but continued to be existing personal property which devolved upon the Crown as *bona vacantia* as completely as any other equitable interest. Alternatively, the case may be stated in a different way, but with the same result. From the time of the bankruptcy a title to the shares has been vested in the bankrupts' assignees and their successors in trust down to 1887 for the bank and the other creditors. In 1887 the bank disappeared. The assignees thereupon did not cease to hold the title to the shares, nor did they cease to hold it as trustees. Their title did not depend upon the continued existence of any particular debt or of any particular creditors, nor did it become extinct upon the extinction of particular creditors. It continued to be a title upon trust, and the Crown takes the place of the extinct *cestui que trust*. Suppose all the creditors had been corporations aggregate and all had become dissolved, it seems clear that the assignees could not have taken the property as their own as against the Crown. It does not seem necessary to examine minutely the provisions of the old Bankruptcy Acts in order to determine whether the money can be regarded as unclaimed dividends belonging to the statutory fund. If the proof is to stand good for the Crown's benefit, that is another way of saying that the moneys are not unclaimed dividends. If, on the other hand, the proof ought to be expunged on the ground that the creditor and the creditor's claim are absolutely extinguished, then the case must be the same as if the proof had never been admitted, and the money ought to be divided amongst the other creditors. Unclaimed dividend seems to me to mean dividend which has been declared upon admitted and existing proofs, but which the persons entitled to it neglect to claim; it supposes the existence of someone who could claim and who omits to claim. Here the dividend belongs either to the Crown or to the other creditors, and it is claimed, and therefore it is not unclaimed dividend. For these reasons I think that the appeal must be allowed. The costs of all parties will be allowed out of the fund.

Appeal allowed.

Solicitor for the appellants, *The Solicitor to the Treasury.*

Solicitors for the respondent, *Dowson, Ainslie, & Martineau*, for *Gibbons & Arkle*, Liverpool.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Solicitors for the official receiver, *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

Prob. Div. & Adm. Div. Probate. } Nov. 14.

In the Goods of HARTLEY. (*a.*)

Probate—Bastard—Intestacy—Real and personal estate—Administration to the Crown—Form of grant—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.

Where a person dies a widow (or bachelor) without issue, a bastard and intestate, entitled to real and personal estate, the grant of administration to the nominee of the Crown will be of the personal estate only, as before the Land Transfer Act, 1897. *The Crown is not bound by that Act.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Motion for a grant to the Crown of letters of administration to the personal estate of Elizabeth Bartley, who died at Wortley, near Leeds, on the 22nd of July, 1898, a widow without issue, a bastard, and intestate.

The deceased was entitled to personal estate and also to an estate in fee simple in six cottages.

Newson, for the Crown, in support of the motion.—The Crown is not bound by section 1 of the Land Transfer Act, 1897, and therefore the real estate passes by escheat direct to the Crown, and is not by that section vested in the nominee of the Crown as administrator. The law officers have given an opinion that the Crown is not bound by the Land Transfer Act, 1897, and that its rights remain as before. The grant should go as before the Act—simply as to the personalty, not mentioning the realty.

JEUNE, P.—I think that is so. There will be a grant of letters of administration of the deceased's personal estate to the Solicitor of the Treasury without any mention of real estate.

Motion allowed.

Solicitor, *Solicitor to the Treasury.*

Prob. Div. & Adm. Div. Admiralty. } Dec. 7.

"THE BRUNEL." (a.)

Ship—Limitation of liability—Unregistered steam-tug under fifteen tons burden entitled to limit her liability—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 2, 3, 72, 503—*Meaning of ship "not exceeding fifteen tons burden."*

The 2nd section of the Merchant Shipping Act, 1894, *provides:* "(1) *Every British ship shall, unless exempted from registration, be registered under the Act.* (2) *If a ship required by this Act to be registered is not registered under this Act, she shall not be recognized as a British ship"; whilst amongst the ships exempted from registration under the Act are, by section* 3 *of the same Act, "ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom." By section* 503, *the owners of a steamship shall not, where without their actual fault or privity any loss or damage is caused to any other vessel by reason of the improper navigation of their steamship, be liable to damages beyond £8 for each ton of the "gross tonnage" of the steamship without deduction on account of engine room, but deducting the space "certified" under the Act to be occupied by seamen.*

Held, that the words "tons burthen" in section 3, *meant the tonnage measured in accordance with the provisions of the Act and the tonnage regulations thereof.*

Held, consequently that a ship, employed solely in navigation on the rivers or coasts of the United Kingdom and not exceeding fifteen tons burthen so ascertained, was properly exempted from registry; and that her owners were entitled to limit their liability under section 503 *to £8 per ton of her "gross tonnage."*

This was an action of limitation of liability instituted on behalf of the Mayor, Aldermen, and Burgesses of the City of Bristol, the owners of the steamship *Brunel*, a steam-tug, used by the plaintiffs in the River Avon and the Bristol Docks for the purpose of limiting their liability in pursuance of the eighth part of the Merchant Shipping Act, 1894, in respect of a collision which occurred on the 27th of October, 1897, when *The Brunel* came into collision with the steam-tug *Iris* at a time when *The Iris* was towing the steamship *Glanmere*, which took the ground and sustained damage.

The plaintiffs, in their statement of claim, pleaded that *The Brunel* was exempted from registry under the Merchant Shipping Act, 1894, and that her gross tonnage ascertained in accordance with the provisions of the Merchant Shipping Act, 1894, without deduction on account of engine-room space was 35·99 tons, and deducting 6·73 tons occupied by seamen and appropriated to their use and certified pursuant to the said Act, was 28·26 tons.

The defendants, the owners of *The Glanmere*, denied that *The Brunel* was exempted from registry under the Merchant Shipping Act, 1894, and also denied the above-mentioned statements in the statement of claim as to the tonnage of *The Brunel*.

Nov. 14.—The action was heard before Barnes, J.

It appeared that *The Brunel* was not registered, and that her tonnage, if measured in accordance with the tonnage regulations contained in the second schedule of the Merchant Shipping Act, 1894, would not, after deducting the appropriate allowance for engine room and her certified allowance for crew space, exceed the tonnage of fifteen tons.

Pyke, Q.C., Batten, and *White*, for plaintiffs.

Aspinall, Q.C., and *Butler Aspinall*, for defendants.

The statutes cited by counsel and the arguments advanced by them are fully stated in the judgment.

Dec. 7.—BARNES, J.—This is a suit of limitation of liability brought by the plaintiffs, the owners of a small steam-tug called *The Brunel*, used by them in the River Avon and the Bristol Docks, to limit their liability in respect of damage caused by the negligent navigation of *The Brunel* on the 27th of October last, whereby she came into collision with the steam-tug *Iris*, which was towing the defendants' steamship *Glanmere*. The defendants alleged that in consequence of the collision their vessel took the ground and sustained damage. In a suit of damage in this court by the defendants against the plaintiffs, the latter have admitted that the said collision occurred by reason of the negligent navigation of *The Brunel* by the plaintiffs' servants, but have denied that the damages sustained by the defendants were the result of such collision. The plaintiffs have, however, agreed to submit to judgment in respect of such damages as should hereafter be proved to have been caused by such collision. The collision happened without the actual fault or privity of the plaintiffs. They have settled with the owners of *The Iris*, and they now claim to be entitled to limit their liability in respect of the damages for which they may be liable to the defendants.

The question in the case is whether they are so entitled. *The Brunel* was not registered under the Merchant Shipping Act, 1894. Section 3 of that Act is as follows: "The following ships are exempted from registry under this Act—(1) Ships not exceeding fifteen tons burden employed solely in navigation upon the rivers or coast of the United Kingdom or on the rivers or coast of some British possession within which the managing owners of the ships are resident. . . ." As *The Brunel* was employed solely in navigation in the River Avon it was contended by the plaintiffs that if she did not exceed fifteen tons burden she would be exempted from registry by the 3rd section above cited and that owners would be entitled to the protection of limited liability conferred by the 503rd section of the same Act; but it was admitted by the plaintiffs that if she exceeded fifteen tons burden the effect of the 2nd, 72nd, and 503rd sections of the

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Act would be to prevent her from being recognized as a British ship, and her owners from obtaining the protection of the 503rd section. It was admitted by the plaintiffs that *The Brunel* could carry more than fifteen tons weight in her cargo spaces and have a proper freeboard, but it was proved before me that if she were measured in accordance with the Merchant Shipping Act, 1894, her gross tonnage would be 35·99 tons and that her boiler and engine space would measure 17·80 tons and her crew space 6·73 tons; so that if those spaces were deducted from the gross tonnage her tonnage would be under fifteen tons. If the allowance for propelling power is made in accordance with the Act, the evidence shows that one and three-quarters the amount of the engine and boiler space and the amount of crew space would be deducted, according to the Act, from the gross tonnage, to arrive at the register tonnage, and the result would be a minus quantity. This is owing to the allowance for propelling power being fixed by the Act at one and three-quarters the actual boiler and engine-room space. The plaintiffs maintain that the words "fifteen tons burden" in the 3rd section of the Act mean fifteen tons measurement according to the Act of 1894; while the defendants contend that they mean a capacity to carry fifteen tons' weight of cargo. It was not disputed, as I understand the argument, that, ordinarily speaking, fifteen tons burden means a capacity to carry fifteen tons; but the point made by the plaintiffs was that the words "tons burden" in the Act of 1894 are used in a sense in which they have been used in prior Acts of Parliament relating to the registration of British vessels, and refer to tons of capacity as measured by the Act. The first Act to which I need refer is 7 & 8 Will. 3, c. 22 (1696). This Act required English ships to be registered in order to be qualified to trade to or from the plantations in America, and proof had to be made on oath in a form set out in the 17th section of the Act, which amongst other things described the ship as of "—— (burthen) tons," but there was no provision as to the mode of arriving at the tonnage. By the Act 6 Geo. 1, c. 21 (1719) it was provided (section 29) that no brandy should be imported on any ship "of the burthen of 50 tons or under," and that ships of the burthen of 50 tons or under, in part or fully laden with brandy at anchor or hovering within two leagues of the shore might be compelled to come into port. And the 33rd section is as follows: "And for the preventing disputes that may arise respecting the admeasurement of ships laden with brandy and other spirits or ships hovering on the coast, be it further enacted by the authority aforesaid that the following rule shall be observed therein—that is to say, take the length of the keel within board (so much as she treads on the ground) and the breadth within board by the midship-beam from plank to plank and half the breadth for the depth, then multiply the length by the breadth and that product by the depth, and divide the whole by ninety-four, the quotient will give the true contents of the tonnage according to which rule the whole of such ships or vessels shall be measured and ascertained any law, custom, or usage to the contrary notwithstanding. It is, I think, clear that the tonnage arrived at in the above manner was to be considered as fixing the burthen of the vessel. The reason for this appears to have been that at the time as ships were then constructed the measurement in the manner above stated gave approximately the burthen of the vessel. In an old work on Shipbuilding, by William Sutherland, published in 1729, which has been lent me by the Elder Brethren of the Trinity House, it is stated (Part 2, p. 3) that it was a general rule to find the tonnage of a vessel by taking the length of the keel and the breadth from outside the ship on one side to the outside of the other and multiplying that breadth with the length, and again by half the said breadth and dividing the product by ninety-four. The author points out that there is no exact rule to find the tonnage, and two ships may be of equal length, breadth, and depth, and yet one shall carry two or three hundred tons more than the other, and he makes certain suggestions as to measurement. In the first part of the work (p. 1) it is stated that the rule made use of to find the tonnage is a medium rule, and there is little doubt that the provisions of the above-mentioned 33rd section were derived from the general rule. The Act of 15 Geo. 2, c. 31 (1742) contains further provisions for regulating the plantation trade, and gives a form of oath by the master in which he is to state the burthen of his vessel in tons. In 1773 the Act 13 Geo. 3, c. 74, entitled an Act for the better ascertaining the tonnage and burthen of ships and vessels importing and exporting goods into and from this kingdom or hovering on the coasts thereof . . . was passed. Section 1 of that Act enacted: "The tonnage and burthen of any ship or vessel importing or exporting brandy or other spirituous liquors or any other goods whatsoever into or from this kingdom or hovering upon the coasts thereof, or where the owner or proprietor or other person shall be entitled to any bounty or allowance according to the tonnage of any ship or vessel, and in any other case whatsoever, where the tonnage or burthen of any ship or vessel shall be necessary to be ascertained and known by any Act or Acts of Parliament made or hereafter to be made concerning the revenues of customs, excise, or salt duty, the rule for admeasuring such ships or vessels shall be as follows—that is to say, the length shall be taken in a straight line along the rabbet of the keel of the ship, from the back of the main stern-post to a perpendicular line from the fore part of the main stern under the bowsprit, from which subtracting three-fifths of the breadth the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from the outside of the outside plank in the broadest part of the ship be it either above or below the main whales exclusive of all manner of doubling planks that may be wrought upon the sides of the ship, then multiplying the length of the keel by the breadth so taken, and that product by half the breadth and dividing the whole by ninety-four, the quotient shall be deemed the true contents of the tonnage." By section 2 the Act was not to alter the method of measuring coal vessels and vessels employed in the white herring fishery. It will be noticed that the words "tonnage" and "burthen" are used in the Act as if they denoted the same thing. By section 3 of 26 Geo. 3, c. 60 (1760) the provisions of 7 & 8 Will 3, c. 22 were extended, and every vessel having a deck or being of the burthen of fifteen tons or upwards belonging to Her Majesty's subjects in Great Britain . . . and the colonies was required to be registered, and a certificate obtained in the form set out in the Act. This form shows what particulars of the vessel had to be given, and with regard to the tonnage uses these words: "——admeasured (burthen) tons." Section 14 prescribes the method to be adopted for ascertaining the tonnage of vessels when afloat, which is arrived at by multiplying the length, measured as directed by the Act by the breadth and the product by the half breadth and dividing by ninety-four. When steam vessels were introduced the rules prescribed for sailing vessels were not suitable for ascertaining the true tonnage of steamers. And in 1819 the Act 59 Geo. 3, c. 5 was passed, which determined how the tonnage of steam vessels was to be ascertained. The length of the

engine-room was to be deducted from the length of the vessel and the calculation then proceeded in a similar way to that of sailing vessels. The effect of this was to give the tonnage of the cargo-carrying space in a steam vessel. The Act for the Encouragement of British Shipping and Navigation (6 Geo. 4, c. 109), and the Act for Registering British Vessels (6 Geo. 4, c. 110) (1825) preserved the exemption from registry of British vessels under fifteen tons burthen used in navigating in British rivers and upon British coasts, and prescribed similar rules to those then in force for measuring vessels and ascertaining their tonnage. The certificate of registry was to be in the form set out in the second of these Acts, which required the burthen of the ship to be set out in tons, and it appears to follow that the number of tons was that ascertained according to the provisions of the Act. Similar Acts with amendments were passed in 1833 (3 & 4 Will. 4, c. 54 and c. 55), but the said exemption and the mode of measurement remained the same. As the mode of ascertaining the tonnage of vessels under the 3 & 4 Will. 4, c. 55 and previous Acts led to inaccurate conclusions, it was felt desirable that a change should be made, and a committee was appointed in 1834 to consider the subject, and as a result of their recommendations the Act 5 & 6 Will. 4, c. 56 (1835) was passed. That Act recites the Act of 1833, and then recites as follows: "Whereas it is considered that the capacity of a ship is the fairest standard by which to regulate its tonnage, that internal measurement will afford the most accurate and convenient method of ascertaining that capacity, and that the adoption of such a mode of admeasurement will tend to the interests of the shipbuilder and the owner as well as to the proper collection of the dues which by law are payable on tonnage, and it is expedient to alter and amend the law in this respect"; and it then proceeds to lay down an elaborate mode of measurement in order to ascertain steam vessels, sailing vessels, and laden vessels. In steamers the cubical contents of the engine-room were to be deducted from the total tonnage in order to arrive at the true register tonnage. The 3rd section of the Act is as follows: "And be it further enacted that the tonnage or burthen of every ship belonging to the United Kingdom ascertained in the manner hereinbefore directed shall in respect of any such ship which shall be registered after the commencement of this Act (except as hereinafter mentioned) be inserted in the certificate of the register thereof, and be taken and deemed to be the tonnage and burthen thereof for the the purposes of the said recited Act." Tonnage and burthen are treated as having the same meaning. The recital shows that the object of the Act was partly to take away the temptation to build vessels of such a form that they might measure less than their burthen. In the Act for the General Regulation of the Customs (8 & 9 Vict. c. 86), passed in 1845, the 138th section provided that the tonnage and burthen of every British ship, within the meaning of the Act, should be the tonnage set forth in her certificate of registry, and the tonnage or burthen of every other ship should, for the purpose of the Act, be ascertained in the same manner as the tonnage of British ships was ascertained. Here, again, the words "tonnage and burthen" are used as if they had the same meaning. The Merchant Shipping Act, 1854, which amended and consolidated the Acts relating to merchant shipping, introduced further improvements as to the mode of measuring the tonnage of vessels, though it is well known that the tonnage arrived at by this mode is generally much less than the quantity of tons' weight of cargo a ship can carry. The 19th section contained an exception from registry of vessels not exceeding fifteen tons or under, and similar words are contained in the 3rd section of the Merchant Shipping Act, 1894, which Act consolidated the Merchant Shipping Acts up to that date. The limitation of liability which had been introduced by earlier Acts, in particular by 53 Geo. 3, c. 159, was in the cases mentioned in the Act of 1854 the value of the ship and freight, provided that in case of loss of life or personal injury to passengers the value of ship and freight was not to be taken at less than £15 per registered ton; but in the Merchant Shipping Act Amendment Act, 1862, the limit was to be £8 per ton for the loss of ship and goods, and £15 per ton for loss of life or personal injury either alone or jointly with damage to ship or goods.

This examination of the above-mentioned Acts prior to 1894 brings me to the Merchant Shipping Act, 1894, and has led me to the conclusion that in the legislation from first to last prior to this Act the words "burthen" or "tons burthen" have been used with a meaning which was the same as that of the tonnage of a vessel ascertained in the manner directed by the Acts for the time being—that is to say, the registered tonnage.

The Merchant Shipping Act, 1894, is an Act consolidating the enactments relating to merchant shipping, and in order to ascertain the meaning of the words "tons burden" as used therein, it is legitimate to ascertain whether these words have been used in any special sense in prior Acts of Parliament dealing with the same subject (see Maxwell on the Interpretation of Statutes, 3rd edition, p. 50). This I have shown to have been the case, and I am of opinion that these words in section 3 of the Act of 1894 are used in reference to the tonnage of a vessel measured in accordance with the provisions of the Act and the tonnage regulations thereof. The words "tons burden" are found in other places in the Act—namely, the 3rd, 90th, and 625th sections, but there is nothing in these sections inconsistent with the aforesaid meaning. The same words are also to be found in that part of the Act headed Engagement of Seamen, where the words "tons burden" and registered tonnage are clearly used in the same sense. Moreover, the meaning placed upon those words by the defendants would give rise to great difficulty in fixing the exact burthen of a vessel. The quantity a vessel can carry depends in part on the season of the year and other variable circumstances, whereas the measurement gives definite results. The Act 61 & 62 Vict. c. 44 and rule 8a thereof do not, in my judgment, affect this case.

I find, therefore, that *The Brunel* did not exceed fifteen tons burthen within the meaning of the 3rd section of the Act of 1894. Then the 503rd section of the same Act limits the liability of a ship, British or foreign, in the case of such claims as that of the defendants to £8 per ton of their ship's tonnage, which in the case of a steamship is to be her gross tonnage without deduction on account of engine-room, and in the case of a sailing ship is to be her registered tonnage, with a proviso that there shall not be included in such tonnage any space occupied by seamen or apprentices or appropriated to their use, which is certified under the regulations scheduled to the Act with regard thereto. It was not argued before me that as *The Brunel* was not in fact registered, although she did not exceed fifteen tons burthen, her owners were not entitled to limit their liability in the present case, no doubt because the effect of the 72nd, 77th, 503rd, and 508th sections of the Act appears to be to entitle the owners of a British vessel which is exempted from registry under section 3, and has not therefore

been registered nor had her tonnage ascertained for the purpose of registry, to limit their liability by an amount calculated upon the vessel's tonnage ascertained by measuring her according to the Act and the tonnage regulations thereof. The tonnage of *The Brunel* for the purpose of the calculation is 35·99 tons, and as in the circumstances, there is no certificate as to crew space, the amount thereof cannot be deducted owing to the express provisions of section 503 and the 6th schedule to the Act. In the result there will be the usual decree of limitation of liability in an amount calculated at £8 per ton on 35·99 tons, and the costs of the suit must as usual be borne and paid by the plaintiffs. The affidavit verifying the claim is not quite complete; it does not exclude any claim for loss of life, and I think I intimated that there is no distinct statement that *The Brunel* belongs to the plaintiffs. Subject to an affidavit being filed dealing with these two points, the decree will be in the usual form.

Solicitors for plaintiffs, *Robins, Hay, Waters, & Hay.*

Solicitors for defendants, *Cooper & Co.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 30; Dec. 1, 20.

LYONS & SONS *v.* WILKINS. (*a.*)

Trade union — Strike — Picketing — "Watching and besetting"—Nuisance — Injunction—Conspiracy and Protection of Property Act, 1875 (38 *&* 39 *Vict. c.* 86), *ss.* 3, 7.

To watch or beset a man's house with a view to compel him to do or not to do what it is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct would support an action on the case for a nuisance at common law. Proof that the nuisance was "peaceably to persuade other people" would be no defence to such an action.

In section 7 *of the Conspiracy and Protection of Property Act,* 1875, *the words "such other person" must be read as "any other person."*

Decision of Byrne, J., 46 *W. R.* 461, *affirmed.*

Appeal of the defendants from the judgment of Byrne, J. (reported 46 W. R. 461).

The plaintiffs were a firm of leather bag manufacturers. The defendants were members and officials of a registered trade union, called the Amalgamated Society of Leather Workers.

The action arose out of a strike of the plaintiffs' workpeople, instigated by the trade union. The workpeople refused to continue to work for the plaintiffs after the expiration of their current engagements, and the plaintiffs' premises were picketed by direction of the union.

A strike was also ordered against a bag maker named Adolph Schoenthal, who employed his own workpeople, and did work for the plaintiffs on his own premises. His premises were also picketed.

In February, 1896, an *interim* injunction had been granted by North, J., and this was affirmed by the Court of Appeal with a slight modification (see 45 W. R. 19, [1896] 1 Ch. 811).

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Byrne, J., on the trial of the action, granted a perpetual injunction restraining the defendants, Percy Cornwall Wilkins, Charles Clarke, Alexander Thompson, John Laverick, and Frederick Goodhall, from watching or besetting the plaintiffs' works or place of business and the approaches thereto for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, or for any purpose except merely to obtain or communicate information, and from watching or besetting the premises of Adolph Schoenthal for the purpose of persuading or otherwise preventing him from working for the plaintiffs, or for any purpose except merely to obtain or communicate information.

By the Conspiracy and Protection of Property Act, 1875, s. 7: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority" (*inter alia*) "(4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

The defendants appealed.

W. H. Cozens-Hardy, for the appellants.

Eve, Q.C., and *Ward Coldridge*, for the respondents.

The arguments sufficiently appear from the judgments.

Cur. adv. vult

Dec. 20.—The following written judgments were delivered:

LINDLEY, M.R.—The construction put by this court on 38 & 39 Vict. c. 86, ss. 3 and 7, when this case was heard in March, 1896, is adverse to the appellants, and was, in my judgment, correct. Having reconsidered my own judgment, I see nothing to recall or qualify. Upon the present appeal, however, one or two important questions were raised which do not appear to have been considered on the former occasion, and to them I will confine myself.

The great point made by the appellants' counsel turned on the word "wrongfully" in section 7 and on the effect of *Allen* v. *Flood*, 46 W. R. 258, [1898] A. C. 1, on the meaning of that word. He contended that to "watch and beset" another person's house was only illegal if done—(1) with a view to compel him to abstain from doing or to do some act which he has a right to do or not to do; (2) wrongfully and without legal authority. He further contended that nothing could be said to be wrongful which did not violate some right of the complainant; and that there was nothing wrongful in watching or besetting a house simply in order peacefully to persuade others to conduct themselves in some particular way which was not unlawful for them to follow. This argument is, in my opinion, based on a misconstruction of section 7. This section is a penal section, and the words "wrongfully and without legal authority" must be inserted in an indictment or information framed on the enactment, and the specific acts which the complainant was to be compelled to do or not to do ought also to be specified

in a conviction by a magistrate: see *The Queen* v. *McKenzie*, 41 W. R. 144, [1892] 2 Q. B. 519. Moreover, if on the trial the evidence before the court is consistent with the legality of the acts complained of, this reasonably possible legality must be excluded by evidence, before the accused can be properly convicted. But it is not necessary to show by other evidence than that which proves the overt acts complained of, the legality of them if no justification or excuse for them is reasonably consistent with the facts proved. This is the principle always applied in criminal prosecutions in which the words "feloniously," "wrongfully," or "maliciously" are introduced into the charge and have to be proved before the person accused can be properly convicted: see Archbold's Criminal Pleading and Evidence (19th ed.), pp. 64-67. That this is the correct method of construing and dealing with the words "wrongfully and without lawful authority" in section 7 is, in my opinion, perfectly plain if attention is paid to subheads 1, 2, 3, and 5, to which those words are as applicable as they are to sub-head 4. If the overt acts mentioned in sub-head 1, for example, in using violence or intimidation are proved, and it is proved that they were done with a view to compel, &c., and there is no reasonable ground for justifying them, it is unnecessary to give further evidence to prove that they were committed "wrongfully and without legal authority": see *The Queen* v. *McKenzie*, at pp. 521-3. If this be true of all the sub-heads except 4 (watching and besetting) I can discover no justification for giving the words "wrongfully and without lawful authority" any different meaning or effect when applied to 4—viz., "watching or besetting." The truth is that to watch or beset a man's house with a view to compel him to do or not to do what it is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for a nuisance at common law: see *Bamford* v. *Turnley*, 10 W. R. 803, 3 B. & S. 62; *Broder* v. *Saillard*, 24 W. R. 1011, 2 Ch. D. 692, at p. 701, per Jessel, M.R.; *Walter* v. *Selfe*, 4 De G. & Sm. 315; *Crump* v. *Lambert*, 15 W. R. 417, L. R. 3 Eq. 409. Proof that the nuisance was "peaceably to persuade other people" would afford no defence to such an action. Persons may be peaceably persuaded provided the method employed to persuade is not a nuisance to other people.

Another point made by the appellants' counsel was that what was done to Schoenthal gave the plaintiffs no cause of action. This point was raised and considered and decided by the court on the former appeal, and I might say no more. But as I do not remember whether the particular argument urged by Mr. Hardy was used on that occasion, I will add that, in my opinion, his contention cannot be supported. It is based on the expression "such other person." It is said that to beset one person's house with a view to compel someone else is not within the section. Such a construction would render the Act nugatory in a great number of cases clearly within the mischief intended to be remedied. But a more direct answer to the argument is that "such other" means "any other." This seems plain if attention is paid to the language of the first part of the section where these words first occur. Moreover, the word "person" in the singular must be read so as to include "persons" in the plural (see 52 & 53 Vict. c. 63, s. 1), and if this is borne in mind the argument is seen at once to be untenable.

I do not think it necessary to refer to the older Acts to which Mr. Hardy called our attention; nor to the authorities he cited. They are instructive, and the late Mr. Russell Gurney's charge to the grand jury in the *Cabinetmakers' case* (*Reg.* v. *Hibbert*, 13 Cox C. C. 82) is a masterly statement of the law as it stood in April, 1875. But there is nothing in those authorities or in that charge which shows that the interpretation put upon the present Act by this court in this case on the former appeal, and by Byrne, J., since, is wrong. Nor is *Allen* v. *Flood* of any real use in construing the statute with which we have to deal.

As regards the facts the evidence was amply sufficient to prove the plaintiffs' case. The whole object of what was done was to compel the plaintiffs to comply with Mr. Wilkins's terms, and although there was no violence or overt threat of violence, it is quite plain that the relays of men set to watch and beset the plaintiffs' house (and the house of Schoenthal, who worked for him) were sent to do, and that they did, a great deal more than "attend" where they were "in order merely to obtain or communicate information." It is all very well to talk about peaceable persuasion and to draw fine lines between persuading and giving information. In this case there is no difficulty whatever in coming to the conclusion that what was done was watching and besetting as distinguished from attending "in order merely to obtain or communicate information." That the provisions of the Act were infringed appears to me to be plain and beyond all reasonable doubt. The appeal must be dismissed, with costs.

CHITTY, L.J.—This appeal by the defendants is limited to the injunction granted by Byrne, J., against watching and besetting. The injunction is in the terms of the order pronounced by the Court of Appeal on the motion. He postponed giving judgment until after the decision of the House of Lords in *Allen* v. *Flood*, and after consideration he held that *Allen* v. *Flood* did not affect the decision of the Court of Appeal on the motion, but that it did preclude him from granting a further injunction which the plaintiffs asked for. From that decision there is no appeal by the plaintiffs.

The facts proved at the trial were to the same effect as those given in evidence on the motion, except that in two instances Byrne, J., held that the evidence of actual interference was not so strong. He found that it was clearly proved that the appellants watched and beset the plaintiffs' works or place of business and the approaches thereto for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, and for purposes other than that of merely obtaining or communicating information. This finding of facts is accepted by counsel on both sides. It was admitted by the plaintiffs' counsel that the pickets (as they are called) used no violence or intimidation or threats. The picketing extended over some months, covered all the working hours of the day, and was conducted by relays of men in succession. The object in view was clearly shown by the white cards distributed by the pickets and the other documents referred to. The picketing and the acts done by the pickets were done with a view to compel the plaintiffs to abstain from doing or to do acts which the plaintiffs had a legal right to do or abstain from doing—viz., to compel them to change the mode of conducting their own business. To avoid any possible misapprehension, I state that the strike itself was lawful.

The question on the appeal in my opinion turns on the 7th section of the Conspiracy and Protection of Propery Act, 1875. The construction and effect of that section were dealt with by this court on the motion, and the decision then arrived at is

binding on us, subject only to the point whether it can be shown to be erroneous as being in conflict with *Allen* v. *Flood*. I am unable to see that it is. The point decided in *Allen* v. *Flood* is that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. No such general question of motive arises in the present case. The sole question is whether upon the facts the case is brought within the 7th section. To bring a case of watching or besetting within the section it must be shown that the watching or besetting was done with a view to compel a person to abstain from doing or to do any act which such person has a legal right to do or abstain from doing. That the watching and besetting were done with that view is found by the judge and not disputed. "View" does not import motive. It imports purpose. Speaking for myself, I prefer standing by the words which the Legislature has thought fit to employ. The acts complained of were done with the view stated in the section. Then it was urged that the watching and besetting mentioned in the 4th sub-section was not rendered unlawful by the section where it was done for the purpose of persuading workmen to abstain from taking work from the person sought to be compelled. I cannot accept that proposition. I think that where the view is established, the only case in which watching or besetting is allowed, or, in other words, is not unlawful, is that mentioned in the proviso at the end of the section—viz., where the attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place is "in order merely to obtain or communicate information." Attending in order to persuade is not within the proviso.

It is noticeable that the first section of the Act of 1871, which Act is repealed by the Act of 1875, contained no such proviso, and that the 7th section is more favourable to those who watched or beset. Mr. Cozens-Hardy, in his argument for the appellants, fastened on the words "wrongfully and without legal authority," and contended that they showed that the watching or besetting mentioned in the 4th sub-section were acts lawful in themselves unless it were shown in some way other than by proof of the facts of watching or besetting with the view mentioned at the beginning of the section, that the acts done were done wrongfully or without legal authority. But this argument cannot be sustained. "Wrongfully and without legal authority" applies equally to all the five sub-sections; and to take (by way of illustration) the 1st sub-section, the using of violence or intimidation or injury to property there specified are all of them unlawful acts in themselves. No just or sound construction of the section would permit words which in terms apply to all the sub-sections being confined to one sub-section only. But further, the acts of watching and besetting here proved in reference to the 4th sub-section and done with the view mentioned were acts in themselves unlawful at common law and are not made lawful by the Legislature. In my opinion they constitute a nuisance at common law. True it is that every annoyance is not a nuisance; the annoyance must be of a serious character and of such a degree as to interfere with the ordinary comforts of life. To watch or beset a man's house for the length of time and in the manner and with the view proved would undoubtedly constitute a nuisance of an aggravated character. It must be borne in mind that the 7th section, although it probably arose out of trade disputes, is not confined to trade disputes or to disputes between masters and men. It applies equally to all her Majesty's subjects of every class. It would embrace the case of besetting a man's house with a view to compel him not to receive guests or visitors. Further, I think that the whole argument on the words "wrongfully and without legal authority" is founded upon a misapprehension. The acts mentioned in the 4th sub-section being in themselves unlawful, the words "wrongfully and without legal authority" are inserted to provide for any unforeseen case in which the evidence of the overt acts may possibly show some lawful excuse or justification, or, to speak perhaps more correctly (as "authority" is said to cover "excuse," see *The Queen* v. *Harvey*, 19 W. R. 446, L. R. 1 C. C. R. 284), lawful authority or justification. The term "wrongfully" and its meaning in law were dealt with incidentally by many of the Lords who advised the House in *Allen* v. *Flood*. It will suffice to quote one passage to be found in Lord Herschell's speech, where he cites with approval the statement by Crompton, J., in his judgment in *Lumley* v. *Gye*, 1 W. R. 432, 2 Ell. & Bl. 216, that it must now be considered clear law that a person who "wrongfully and maliciously or, which is the same thing, with notice interrupts the relation subsisting between master and servant commits a wrongful act."

With regard to Schoenthal it was decided on the motion that the watching and besetting of his house or shop with a view to compel the plaintiffs were illegal acts on the part of the defendants for which the plaintiffs could sustain an action against them. On this appeal Mr. Cozens-Hardy raised what may have been a new point founded on the words "such other person," which run throughout the 7th section. It was urged that that besetting the house of one person with a view to compel another is not within the section. I think it is. Grammatically, "such other" refers to "any other person," the immediate antecedent. Besetting a workman to compel a master and besetting a master to compel a workman are both plaints within the mischief aimed at. Schöenthal was an outworker for the plaintiffs. The result is that the appellants have failed to show that the decision of the Court on the motion is in any way overruled by *Allen* v. *Flood* or by any principle laid down in that case.

VAUGHAN WILLIAMS, L.J.—I concur because I think this case is concluded by the judgment of this court on the interlocutory application. I agree that the case of *Allen* v. *Flood* in the House of Lords has no application to the case before us. I wish, however, to say a word or two on the construction of section 7 of the Act of 1875 upon which the judgment of this court turned. The section runs thus: [His lordship read the section, and continued:] Now, I think these words "wrongfully and without legal authority" mean unwarranted by law, which in an indictment for a nuisance is ordinarily expressed by the word "injuriously." The late Stephen, J., defines a common nuisance as "an act not warranted by law or an omission to discharge a legal duty which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all her Majesty's subjects." This is a different thing from holding the words "wrongfully and without legal authority" to mean without lawful excuse, which would shift the onus from the prosecution to the defence. At common law, watching and besetting, apart from the law of conspiracy, might or might not be so conducted as to amount to a nuisance. Then comes the Act of 1875, which, in my opinion, is intended to define what watching and besetting shall in future be warranted by law, and the definition, in my opinion, means that watching and besetting shall in

future be confined to "watching and besetting merely for the purpose of obtaining or communicating information." I think that the fact that a communication which invites the men to discontinue working for the master as soon as they lawfully may, does not thereby cause the communication to cease to be a communication within the meaning of the proviso. If the persuading takes any other shape than that of a communication within the meaning of the proviso of section 7, this would, in my opinion, make it unwarranted by this section, even though this persuasion might not otherwise be of such a character as to constitute a nuisance at common law; and even if the persuasion does take the shape of such a communication, yet it may be made in such a manner as to constitute a common law nuisance, and thus be wrongful. It is not, as I understand, suggested or found by Byrne, J., that there are any facts in the present case to constitute the present persuasion a common law nuisance.

I agree that "any other person" in sub-section 4 includes masters sought to be compelled, and not only the servant to whom the communication or persuasion is addressed. You must find the meaning of "such other person" by looking at the first part of section 7. These are my views, but I am, as I have already said, bound by the previous decision of the court.

Appeal dismissed.

Solicitors for the appellants, *Warburton & De Paula.*

Solicitors for the respondents, *Shaen, Roscoe, Massey, & Co.*

From Chan. Div.
(Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 23, 24.

GREY v. CURTICE. (a.)

Solicitor—Costs—Taxation—Purchase of land in register county—Scale fee—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44); *General Order, r.* 4; *Schedule I., Part I.*

The scale fee allowed to a purchaser's solicitor on a purchase of land, under the General Order to the Solicitors' Remuneration Act, 1881, *for "completing the conveyance" covers the expense, in the case of a register county, of registering a memorial of the conveyance.*

Appeal of the plaintiff from Kekewich, J.

An action having been brought by Mr. Grey, a solicitor, against a former client, an order was made in the action on the 14th of April, 1896, directing certain accounts to be taken between the plaintiff and defendant.

The plaintiff's bills of costs were brought in for taxation. One of these bills was for charges made by the plaintiff as solicitor in connection with the purchase by the defendant of certain land in Middlesex.

The taxing-master had allowed the plaintiff the scale fee on this purchase according to Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)." Upon that the question was raised whether the charges connected with the registration of the conveyance in the Middlesex Registry should not be allowed in addition to the scale fee, or whether such fee covered that business. The practice in the taxing-master's office had been to treat the scale fee as covering the registration.

The plaintiff carried in objections to the master's taxation, and the master answered and overruled them. The plaintiff then took out a summons asking that his objections might be allowed, and that it might be referred back to the master to vary his certificate accordingly.

Kekewich, J., dismissed the summons.

The plaintiff appealed.

Wheeler, Q.C., R. F. Norton, and *Arthur May,* for the appellant.—The registration is not part of the completion of the conveyance, even in a register county. The conveyance is valid without it. Nor does it come under "completion of contract." By Schedule I. an extra charge for obtaining the acknowledgment of a married woman to a deed is allowed, and that is a stronger case than this, because the acknowledgment by the married woman is necessary, but registration is not necessary for the validity of the conveyance. If it is not allowed solicitors who conduct purchases in register counties will have to do more work for their fees than solicitors conducting purchases in other counties: *Drielsma* v. *Manifold,* 42 W. R. 578, [1894] 3 Ch. 100. [CHITTY, L.J.—A solicitor need not work under the scale unless he wishes to do so.]

Church, for the respondent, was not called upon.

LINDLEY, M.R.—We have had an opportunity of consulting one of the taxing-masters and hearing his views. This appeal from the taxing-master involves a question of importance, which is, whether the scale fee allowed to a purchaser's solicitor for completing the conveyance does or does not cover the expense, in the case of a register county, of registering the conveyance. The expense of registering a conveyance in a register county is occasioned as follows: First, there is the preparation of the memorial which has to be registered. That is a matter which requires care and such professional skill as is to be expected from any solicitor who understands conveyancing. It cannot be done by the client himself. The memorial is a legal document; and we know perfectly well from experience that there are cases in the books where the effect of registration has been lost by reason of some defect in the memorial. Secondly, a clerk must be sent down to the office to register the memorial. Thirdly, there is the payment of a fee at the office for registering. That fee is, of course, a disbursement. Nobody supposes the scale covers that; but it is natural, with reference to this question, to observe that in rule 4 of the General Order under this Act the fee for registration is alluded to, and is excluded from the scale. The rule runs thus: "The remuneration prescribed by Schedule I. is not to include," among other things, "stamps, . . . fees paid on searches to public offices, on registrations, or to stewards of manors," and so on. The importance of that is that, when this scale was settled, the parties who settled it had their attention called to registration, among other things, and they say that the scale fee shall not include out-of-pocket expenses, and they leave the rest unexpressed. It was contended that in the expression "completing the conveyance" in the schedule is included the completion of it by registering a memorial of it when such step is necessary—that is to say, when the property is in Yorkshire or Middlesex. In answer to that it was said that, if so, solicitors in Yorkshire or Middlesex have more to do for their scale fee than solicitors in other counties. That may be so; but that result is un-

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

avoidable. Solicitors conducting purchases of property in Yorkshire or Middlesex must go and look at the register—that is quite obvious; and, on inquiry, I think the practical answer to Mr. Norton's contention is that experience shows the scale fee to be liberal enough to cover such a service as preparing and registering the memorial.

On these grounds, we are of opinion that this scale fee does cover the registration of deeds in register counties, and that registration does come, in a business sense, under the expression "completing the conveyance." That is the only point to which our attention has been called which deserves to be called a question of principle.

The appeal will be dismissed, with costs.

CHITTY, L.J.—I am of the same opinion, and will add a few words on the point as to registration. We have not to consider in the abstract the meaning of the phrase "completing the conveyance," but what it means in regard to this particular case. The second rule of the General Order provides that the remuneration of the solicitor "in respect of business connected with sales, purchases, . . . and other matters of conveyancing . . . is to be regulated as follows—namely, in respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business . . . is to be that prescribed in Part I. of Schedule I. to this order," that is, in other words, the remuneration is to be according to the prescribed scale. This rule, then, contemplates the application of the scale to the remuneration of the solicitor in respect of the business connected with sales and purchases completed. It is perfectly plain that if the property purchased is in a register county it is the duty of the purchaser's solicitor to advise his client that his conveyance should be registered, and if he did not give him such advice it would be a breach of duty for which he would be responsible to his client. Unless the client tells him positively not to do it—which would be most improbable—it would be his duty to propose and to do that which was necessary for the purpose of making the conveyance a complete deed of title: because if there was no registration of the deed, the title of the purchaser might be defeated under the statutes which require a registration, whether in Yorkshire or Middlesex.

That being so, I think there is good ground for saying that the language of the second rule should be regarded in construing the particular words used in Part I. of the schedule. Then, turning to the 4th rule, which deals in substance with costs out of pocket, which are not included in the scale for remuneration, I find that the fee for registration is particularly mentioned; and that shows that registrations, which plainly refer to registrations in register counties, were in the contemplation of the framers of the rule. Putting these things together, it appears to me that the reasonable intention of the framers of the rules, and the true meaning of the rules as they stand, are that the duty of preparing the memorial and of causing it to be registered in the proper office is included in the term "completing the conveyance." It is the doing of an act without which the conveyance might be avoided.

I concur in the observations of the Master of the Rolls with reference to the general liberality of the scale fees. Cases occur in which solicitors will not insist on the scale fee because it is considered more than ample to remunerate them for the services performed. But however this may be, I think that the scale fee is calculated on such a footing that the solicitors will not be mulcted in anything they are justly entitled to by way of remuneration by our holding, as we do, that this particular business is within the rule.

VAUGHAN WILLIAMS, L.J.—I agree; but I prefer to base my decision, so far as relates to this registration point, simply upon the practice. That is to say, we have got here a scale, and the words in Schedule I., Part I., undoubtedly are such as to render the construction which in practice has been put on those words a possible construction. Under those circumstances it seems to me that when in practice that construction has been acted upon for a series of years one ought not to put a different construction upon the words, even though the balance of one's opinion may be that, on the mere words themselves, the charges of the solicitor in respect of the registration are not included in the work that is covered by the fee. On that ground of the practice heretofore I concur in the judgment that has been pronounced.

But I wish to say that, in so far as an argument has been based upon rule 4, I cannot myself quite assent to that argument. Rule 4 deals entirely with out-of-pocket expenses, and it is as if the rule had said "The following out-of-pocket expenses shall not be covered by the fee." It does not seem to me that with regard to charges which are not for out-of-pocket expenses, as, for instance, for the professional skill and labour which are included in the preparation of the memorial, it can possibly be said that those charges are covered by the scale fee because of rule 4, which expresses the things that are to be omitted, and that therefore everything else must be included which is not expressed in rule 4. It seems to me that rule 4 is dealing entirely with out-of-pocket expenses and nothing else.

I have one other observation to make, and that is that I doubt whether one ought, in dealing with a matter of this sort, to take into consideration the *quantum* of remuneration allowed by the scale.

Appeal dismissed.

Solicitors, *H. A. Grey; Cooper & Sons.*

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — Aug. 4, 8, 1898.

FIELDING v. MORLEY CORPORATION. (a.)

Costs — Solicitor and client costs—Public authority—Action for injunction—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (b).

Section 1 *of the Public Authorities Protection Act,* 1893, *gives a right to solicitor and client costs in actions for injunctions as well as in actions for damages; but it does not apply to interlocutory applications or to appeals.*

The title of an Act of Parliament is now to be read as part of the Act.

Appeal from Byrne, J.

The defendant corporation were by statute the water authority of their district. The plaintiff brought an action against them, alleging that they were committing a breach of their statutory obligation to keep certain pipes, &c., on his land "water-tight." He claimed an injunction, and damages. Byrne, J., dismissed the action with costs. Holding himself bound by *Harrop* v. *Mayor and Corporation of Ossett,* 46 W. R. 391, [1898] 1 Ch. 525, his lordship directed that the costs should, in accordance with section 1 of the Public Authorities Protection Act, 1893, be taxed as between solicitor and client. The plaintiff appealed.

The Court of Appeal dismissed the appeal with costs;

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

after which the question of the right to solicitor and client costs in the court below was argued.

O. L. Clare, for the appellant.—The section does not apply to an action for an injunction. Sub-section (*b*), which applies to this case, gives the judge a discretion.

Eve, Q.C., and *R. J. Parker*, for the defendants.

Cur. adv. vult.

Aug. 8.—LINDLEY, M.R., delivered the judgment of the court as follows: This case has been restored to the paper in order that we might dispose of the question of costs. The action was brought against the Mayor and Corporation of Morley in respect of an aqueduct and waterworks which they were empowered, by a special Act of Parliament, to erect on the plaintiff's land. Byrne, J., dismissed the action with costs, and, pursuant to a statutory authority which I will read presently, directed that the defendants' costs should be taxed as between solicitor and client. Mr. Clare contends that that direction is wrong. The question is raised upon the construction of the Public Authorities Protection Act, 1893, s. 1. The title of the Act is important. I read the title advisedly, because for some time past the titles have formed part of Acts of Parliament. Formerly it was not so, but now the title forms part, and a very important part, of the Act. The title is "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." [His lordship read section 1, and proceeded:] It appears to me and to all the other members of the court that the section which I have just read, occurring in an Act of Parliament passed in 1893, applies to all actions, including actions in the Chancery Division, and to actions for injunctions as well as to actions for damages. The dismissal of an action is equivalent to judgment for the defendants. The section does not apply to appeals, nor to interlocutory applications, but to judgment in the action. Although the language is wide, the key to the enactment is its design to protect public bodies from expense when unsuccessfully sued in respect of acts done or omitted in the execution of statutory or other public duties or authorities. The present case clearly falls within that enactment. It is not necessary to consider what cases do not fall within the Act. It is enough for us to say that this particular case is within it. The judgment of Byrne, J., on the question of costs will therefore stand, and the appeal will simply be dismissed with costs.

Solicitors, *Firth & Co.*, for *J. E. Craven*, Todmorden; *Sharpe, Parker, & Co.*, for *R. B. Hopkins*, Morley.

High Court of Justice.

Chan. Div. North, J. } July 15, 1898.

WHITELEY EXERCISER CO. v. GAMAGE. (*a*.)

Company — Winding up — Jurisdiction — Proceedings commenced before winding up—Companies Act, 1862, 25 & 26 *Vict. c.* 89, *s.* 143—*Stay of proceedings—Defendant preparing affidavits.*

Where proceedings have been commenced before the period after which, under section 143 *of the Companies Act*, 1862, *a company ceases to exist, the court has jurisdiction over such proceedings after that period.*

In re Crookhaven Mining Co., 15 *W. R.* 28, *L. R.* 3 *Eq.* 69, *followed.*

When a motion stands over to enable the defendant to file affidavits by a certain date, the defendant may prepare his evidence and file affidavits, although in the meantime the defendant has got an order ordering the plaintiffs to give security for costs and staying proceedings until such security has been given.

Summons to review taxation under the following circumstances.

The plaintiffs had commenced an action for infringement of patent against the defendants, and on the 18th of June, 1897, the case came before the court on motion for injunction, but stood over until the 2nd of July to enable the defendants to file affidavits, and an arrangement was made as to the time when they should be filed. On the day that the motion first came on in court a summons taken out by the defendants was heard by the master asking that the plaintiffs should give security for costs of the action and staying further proceedings until security given. The master made the order asked for. Subsequently, in the course of correspondence between plaintiffs' and defendants' solicitors, the plaintiffs' solicitors intimated that they intended giving the security, but ultimately, on the 12th of July, the plaintiffs' solicitors wrote to the defendants that the plaintiffs did not intend to give the security. On the 29th of July the defendants took out a summons asking that the action should be dismissed with costs for non-compliance with the order of the 18th of June. On the 5th of August the judge made an order dismissing the action with costs and giving the defendants the costs of the motion. When the defendants came to tax their costs the taxing-master disallowed the costs of preparing the affidavits in opposition to the motion as well as the fees to counsel and to the expert witnesses whose evidence it had been necessary to get. He did this on the ground, as he stated in the answer to the objections dated the 28th of January, 1898, that until the plaintiffs had given security the defendants ought not to have gone on preparing their case, and that the plaintiffs could not be made to pay for the excess of zeal of the defendants. On the 4th of February, 1898, the defendants took out the summons to vary which now came on. On the 8th of January, 1898, as the plaintiffs had resolved on voluntary winding up, a general meeting of the plaintiff company was held in pursuance of section 142 of the Companies Act, 1862. On the 14th of January the return made by the liquidators of the holding of the above meeting was registered; and under section 143, after three months from the registration of such return, the company shall be deemed to be dissolved, and as the three months had expired the company had now ceased to exist.

H. Terrell, Q.C., and *Clayton*, for the defendants.—The court has still jurisdiction to deal with this matter although the three months have gone by, as these proceedings were commenced before that period: *In re Crookhaven Mining Co.*, 15 W. R. 28, L. R. 3 Eq. 69. This case is good law, and has not been impeached by *In re Pinto Silver Mining Co.*, 26 W. R. 622, 8 Ch. D. 273, and *In re London and Caledonian Marine Insurance Co.*, 27 W. R. 713, 11 Ch. D. 140. The defendants ought to have the costs of preparing their case. They had no reason to believe that the plaintiffs could not give the security, and they had to be prepared with their case when it should come on.

Swinfen Eady, Q.C., and *Kenyon Parker*, for plain-

(*a*.) Reported by R. SILLEM, Esq., Barrister-at-Law.

tiffs.—The late cases cited are inconsistent with *In re Crookhaven Mining Co.* The company has ceased to exist, and the proceedings cannot go on. As to the objections, the taxing-master was right, and the defendants were not entitled to go on preparing their case until the security was given.

NORTH, J., after stating the facts and stating that this summons had been taken out before the company had become dissolved by virtue of section 143 of the Companies Act, 1862, but had not come on for hearing before the company had ceased to exist under that section, continued: Is a suitor to lose his rights because the case has not come before me sooner? I do not think so. Lord Romilly said, in *In re Crookhaven Mining Co.*, "At the time when this petition was presented the court unquestionably had jurisdiction under the Companies Act to order the call to be made, and I am of opinion that the delay in hearing the petition, caused by the intervention of the long vacation, cannot affect the rights of the petitioner, and that he is entitled to stand in the same position as if the petition had been heard before the expiration of three months from the 4th of June." Then it is said that in some way this view has been impeached by the later cases cited. But I am satisfied that there is jurisdiction in the court to hear this summons now, as if it had come on immediately after it was issued on the 4th of February. [On the merits, after referring to the facts, the learned judge continued:] The defendant prepared his affidavits, that being the purpose for which the motion stood over, but the plaintiffs now brought it on again. Suppose the defendant had not prepared and the plaintiffs had given security, and that when the motion came on the defendant had asked for further time, he would have been laughed at. The defendant was not bound to stay his hand because there was a stay of proceedings. The taxing-master has acted under a mistake, and the matter must go back to him to be dealt with on its merits.

Solicitors, *Ward, Perks, & McKay; Guildford E. Lewis.*

Chan. Div. } July 15, 1898.
North, J. }

OXFORD MUSIC HALL (LIMITED) v. LONDON COUNTY COUNCIL. (a.)

Metropolis—London County Council (Improvement) Act, 1897, s. 43, Part 3—Construction.

In considering what property is liable to an improvement charge under the London County Council (Improvement) Act, 1897, section 43, Part 3, it is sufficient if part of the property held as a whole abuts on the street to which the improvement applies.

Motion.

The London County Council (Improvement) Act, 1897, made the "lands all or any part of which front or abut upon the west side of Tottenham Court-road and Boxier's-court between Oxford-street and Hanway-street" liable "to have an improvement charge placed on such lands or some of them . . . in respect or in consideration of any substantial and permanent increase in value which it is clearly shown has been derived from the improvements by this Act authorized." "Lands" shall extend to messuages, lands, tenements, and hereditaments (Part 3, s. 42).

The plaintiffs were lessees of a house in Tottenham Court-road, the ground floor of the house being used by the plaintiffs as an entrance to the plaintiffs' music hall situate in Oxford-street. The music hall did not itself abut on Tottenham Court-road and had been divided from the back of the house in Tottenham Court-road by a party wall.

The upper part of the house did not communicate in any way with the hall and was used as a shop, and the plaintiffs were under covenant with the lessors to replace at the end of the term the party wall on the ground floor which had been removed to make the communication with the hall.

The plaintiffs had been served by the defendants under the provisions of the Act with a notice in which the plaintiffs were described as being interested as owners or lessees of property falling within the improvement area on which the defendants proposed to place an improvement charge. The property so proposed to be charged included the music hall.

The plaintiffs contended that they were only liable to have a charge placed on the house in Tottenham Court-road and not on the rest of their property.

The defendants had appointed a valuer to assess the value of the plaintiffs' premises, including the hall.

This was a motion to restrain the defendants from proceeding with a valuation of the premises of the plaintiffs other than the house in Tottenham Court-road.

E. C. Macnaghten, Q.C., and *Lord Robert Cecil*, for plaintiffs.—The question is does the Oxford Music Hall fall within the Act so as to be said to "front" or "abut" on Tottenham Court-road. We submit that it does not, the only property of the plaintiffs which does abut is the house.

Vernon Smith, Q.C., and *Methold*, for the defendants.—The words of the Act are "lands the whole or any part of which" front or abut on Tottenham Court-road. It does not matter that the main entrance is not in that road. Although it is only a subsidiary entrance, still it makes the hall to "abut" on the road. The defendants will have to show, of course, that what they have done has improved the value of the plaintiffs' premises.

Macnaghten, Q.C., in reply.

NORTH, J., after stating the facts, said: "I do not see how the plaintiffs can say that their premises do not include more than the house. The house is used as an entrance to the hall, and it does not matter that there is another entrance in Oxford-street. Then do not the plaintiffs fall within the definition of owners "of messuages, lands, tenements, or hereditaments abutting on the west side of Tottenham Court-road"? I think they do. The ground floor of the house and the buildings behind used as a hall are held by the plaintiffs as one holding. I cannot say that only a part of the lands held by the plaintiffs as a whole is included in the improvement area.

Motion refused.

Solicitors, *Linklater, Addison, & Co.; W. A. Blaxland.*

Chan. Div. } Jan. 27, 28; Feb. 7.
Byrne, J. }

SANTLEY v. WILDE. (a.)

Mortgage—Redemption—Collateral advantage—Covenant for payment of rents to mortgagee after time for payment of last instalment of principal—Notice to pay off—Tender after notice—Withdrawal of notice.

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

There is no rule that a mortgagee may not stipulate for a collateral advantage, so that such advantage be fair and reasonable, and so that it do not prevent redemption on payment of principal, interest, and costs.

A provision in a mortgage which has the effect of preventing redemption on payment of principal, interest, and costs, in accordance with the bargain for payment thereof, is invalid, and cannot enable the mortgagee to maintain any action, whether in equity or at law.

A covenant in a mortgage of leaseholds for years, that the mortgagor would, during the residue of the leasehold term, notwithstanding that all principal moneys and interest might have been paid, pay to the mortgagee one-third of the net profit rent, with provisions for continuing the relative positions of mortgagor and mortgagee, and for continuing the mortgage for the purpose of securing the one-third,

Held, to be void as operating to prevent redemption.

A mortgagee who had given the mortgagor notice to pay off the principal moneys and interest owing on the mortgage,

Held, not entitled to withdraw the notice without the consent of the mortgagor.

Action.

On the 23rd of October, 1895, the plaintiff, being then underlessee of the Royalty Theatre, with an option to purchase the head lease, entered into an agreement with the defendant, by which it was stipulated that he should provide £2,000, the amount payable for the exercise of the option, and that on completion of the purchase the plaintiff should execute a proper legal mortgage of the lease so purchased, as security for the advance, such mortgage to contain a provision for payment of the principal by quarterly instalments of £100 each; also provisions for payment of interest at 6 per cent. and for payment to the defendant of "one-third part of the clear net profits received by the said Kate Santley from the under-tenants or tenants for the time being (after payment of the said interest and any legal or other necessary expenses) for and during the residue of the term for which the said lease is granted." The lease was acquired by and was assigned to the plaintiff by deed dated the 12th of December, 1895, the purchase-money (£2,000) being advanced to her by the defendant for that purpose. The term thereby granted had until June, 1905, to run.

By deed dated the 13th of December, 1895, between the plaintiff of the one part and the defendant of the other part, in consideration of the loan and advance by the defendant to the plaintiff of £2,000, the plaintiff covenanted with the defendant for payment of the £2,000 by twenty equal quarterly payments of £100 each, the first of such payments to be made on the 25th of December, 1895 (so that the last payment would be made on the 25th of September, 1900), and for payment of interest on the £2,000, or on so much as should from time to time remain due upon that security, at the rate of £6 per cent. per annum. The deed then proceeded as follows: "And this indenture also witnesseth that, in further pursuance of the said recited agreement and for the consideration aforesaid, the mortgagor hereby covenants with the mortgagee that she, the mortgagor, will during the residue of the term created by the said indenture of lease, notwithstanding that all principal moneys and interest may have been paid under the covenant hereinbefore contained, pay to the mortgagee a sum equal to one-third part of the clear net profit rent or rents to be derived from all or any leases or lease, tenancy agreements or agreement, which may now or hereafter be subsisting between the mortgagor and any under-tenants or under-tenant of the said demised premises or any part thereof, such share of net profit rental to become payable from time to time when and as soon as the same shall have been received by the mortgagor, and for the purpose of ascertaining the amount of such net profit rental the mortgagor shall be entitled to deduct from the rents payable to her the interest which shall for the time being be payable and paid to the mortgagee . . . and also the amount of the rent reserved by the said indenture of lease . . . and the insurance premiums," and also certain legal and other expenses.

By the same deed the plaintiff demised the premises to the defendant for the residue of the term, except the last day, subject to subsisting tenancies. The deed contained a proviso for redemption upon payment by the plaintiff of the £2,000 and interest, and all the other moneys thereinbefore covenanted by her to be paid, and a provision that the defendant would not call in the loan, if the instalments were paid within thirty days of their falling due respectively, together with the interest for the time being payable, and if the covenants on the plaintiff's part were duly observed by the plaintiff. The mortgage also contained a purchaser's indemnity clause, a covenant by the mortgagor to perform the covenants of the lease, and as to insurance, and also to use her best endeavours to let the premises, a power to the mortgagee to sell, notwithstanding the £2,000 and interest had been paid off, and power to the mortgagee to enter into possession and let or manage on the expiration of three months' notice requiring the performance of the mortgagor's covenants.

On the 20th of August, 1897, the sum of £350 was owing in respect of instalments, and on that day the defendant served on the plaintiff a notice that he required her to pay off within three calendar months from her receipt of the notice the principal moneys and interest owing to him on the mortgage, and that, in default, he intended to sell the mortgaged premises, and that, pursuant to the mortgage, he required her to pay him the instalments of the £2,000 and interest then due to him pursuant to her covenants, and that in case of her default in paying the said sum and in remedying and observing the covenants as required by the said mortgage, he intended to enter into possession of and let and manage the mortgaged property and to employ agents or receivers to collect the rents.

On the same day, the 20th of August, 1897, the plaintiff paid the defendant the amount of arrears of instalments, and offered to pay the amount of arrears of interest, but did not pay them until later.

The plaintiff afterwards declined to allow the notice to be withdrawn, and gave notice to pay off the principal and interest, and made a tender of the amount. This being refused, she brought the present action for redemption on payment of the £2,000 and interest only. The defendant counterclaimed for a declaration that for the residue of the term, notwithstanding payment of the principal and interest, he was entitled to one-third of the profit rental.

Eve, Q.C., and *à Beckett Terrell*, for the plaintiff.—The defendant having given notice requiring payment off, the plaintiff was entitled to pay off, and the tender made by her was a good tender. She was not bound to pay interest in lieu of notice: *Smith* v. *Smith*, 40 W. R. 32, [1891] 3 Ch. 550, at p. 552; *Bovill* v. *Endle*, 44 W. R. 523, [1896] 1 Ch. 648; and the defendant's notice could not be withdrawn by him without her consent. As to the covenant to pay one-third of the profits of the property to the defendant during the residue of the term, it is a clog on the plaintiff's equity of redemption, and therefore void.

Hughes, Q.C., and *R. J. Parker*, for the defendant.—The defendant was entitled to withdraw his notice.

If the plaintiff had the right to insist upon it, such right was waived by her. The mortgage no doubt contains a collateral agreement in favour of the defendant, but there is nothing to prevent redemption by the plaintiff of the mortgage on payment of principal and interest and the other amounts due in accordance with the deed, and the agreement is not a fetter on her equity to redeem. That it may operate to postpone redemption is true, but that is no objection. The defendant might sue on the agreement at law, though it cannot be relied on to prevent redemption. There would be no answer to an action at law on the covenant, and equity only interferes where there is a clog on the right of redemption. Moreover, the transaction is not a mere mortgage, and the technical rule relied on for the plaintiff is not applicable.

Eve replied.

Besides the cases referred to above and the cases noticed in the judgment, the following cases were cited—namely, *Broad* v. *Selfe*, 11 W. R. 1036; *James* v. *Kerr*, 37 W. R. 279, 40 Ch. D. 449; *Field* v. *Hopkins*, 44 Ch. D. 524, 38 W. R. Dig. 134; *Northampton* (*Marquis*) v. *Pollock*, 39 W. R. 66, 45 Ch. D. 190; *Salt* v. *Northampton* (*Marquis*), 40 W. R. 529, [1892] A. C. 1; *Newcomb* v. *Bonham*, 1 Vern. 7, 214, 231; *Chapple* v. *Mahon*, Ir. Rep. 5 Eq. 225; *Chambers* v. *Goldwin*, 9 Ves. 254; and *In re Edward's Estate*, 11 Ir. Ch. Rep. 367.

BYRNE, J.—"A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest, and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced." The rule is so stated by the Master of the Rolls in the case of *Biggs* v. *Hoddinott*, *ante*, p. 84, [1898] 2 Ch. 307, at p. 321, after an expression of opinion that the proposition in *Jennings* v. *Ward*, 2 Vern. 520, is too wide, but that if properly guarded it is good law and good sense. There is no rule that a mortgagee may not stipulate for a collateral advantage, so that such advantage be fair and reasonable, and so that it do not prevent redemption on payment of principal, interest, and costs. It is lawful to stipulate that the loan shall be repayable by instalments, or that the loan shall remain for a certain time, and so to postpone the time for redemption; and there are other stipulations which may be introduced into a mortgage which will have the effect of regulating the time and manner of redemption. Nevertheless, if it be once established that the transaction is in form and substance one of mortgage or loan on security, and that the mortgage contains a provision which has the effect of preventing redemption of the mortgaged property on repayment of principal, interest, and costs, in accordance with the bargain for repayment of those amounts, such provision is invalid.

I do not think that the view put forward in the present case—viz., that the provision, though unenforceable in a foreclosure or redemption action, may yet be otherwise effectual—can be supported. I think that any such provision cannot enable the mortgagee to maintain any action for specific performance or account, or for damages. It is clearly invalid in equity, and I think that a court of equity would, before the Judicature Act, have restrained an action at law grounded on a provision invalid in equity, as fettering the equity of redemption, just as in the case of an action grounded on a provision invalid on the ground of its being an unconscientious bargain. I apprehend that now, and probably since the passing of the Common Law Procedure Act, the fact that the provision was invalid upon the ground of fettering the equity of redemption might be effectually pleaded in the action brought upon it. Although a mortgagee may sue on the covenant for payment at the same time as he pursues his other remedies, I do not think that he can maintain an action grounded on a covenant or stipulation invalid upon equitable grounds. The fact that upon redemption, or, indeed, upon valid tender, the mortgagee would be bound to deliver up his securities, and would no longer have the documents upon which to sue at law, seems to me to be inconsistent with the argument put forward. There are cases in which the transaction, although in form a mortgage, is, in substance, a transaction of a different kind, as being, for instance, a settlement or family provision; and that is why I have spoken of the transaction being, in substance, a mortgage. In the present case there is no suggestion of oppression or of an unconscionable bargain. The plaintiff grounds her claim for relief upon the existence of certain provisions in a deed which, she says, are invalid as imposing a fetter upon the right to redeem. [His lordship stated the facts, including the earlier parts of the mortgage deed, and continued:] From what I have read it is clear that the transaction was in form and substance a mortgage transaction or loan on security, unless the other provisions to which I will now refer have in some way deprived it of that character. [His lordship referred to other provisions of the mortgage deed, and continued as follows:] The document is not happily expressed in that it does not in terms provide that the whole principal sum shall become due in default of payment of the instalments; but, in my judgment, it is a mortgage with certain provisions in effect making the mortgaged property practically irredeemable, although affecting to contain a redemption clause. I am of opinion that the provisions providing for the payment of one-third of the net profits, extending as they do to a period after the whole of the principal, interest, and costs shall have been discharged, and for continuing the relative positions of mortgagor and mortgagee, and for continuing the mortgage after such discharge for the purpose of securing the one-third of rents and profits, do, in fact, operate to prevent redemption, and that such provisions are consequently invalid. I do not think that I can take into consideration the fact that the object of the parties might, perhaps, have been attained in some different way. The parties have elected to effectuate their object by way of loan or mortgage, and I must take the transaction as it stands. I have considered whether or not I might sever the provisions in question, and hold them good during the subsistence of the security for the payment of principal, interest, and costs, and until redemption; but I do not see how I can do this. I should then in effect be reforming the deed including the proviso for redemption, and be making a new bargain for the parties.

There is another point in the case which arises for decision—namely, whether or not the plaintiff is now entitled to redeem on payment of the balance of the unpaid instalments with interest payable up to the 20th of November, 1897, and the amount of the defendant's costs, charges, and expenses to that date, tender having been duly made of those amounts and refused. On the 20th of August, 1897, a sum of £350 was due to the defendant in respect of instalments in arrear, and on that date the defendant served the notice set out in paragraph 4 of the statement of claim. [The notice, which his lordship read, was to the effect above stated.] I think he was entitled to serve the notice. On the same 20th of August, 1897, the plaintiff paid the defendant the £350 arrears of instalments and offered

to pay arrears of interest, although she did not, in fact, pay them until a later date. The result of the correspondence appears to be this: The plaintiff was at first desirous that the notice should be withdrawn, but the defendant declined and insisted upon what he conceived to be his strict legal rights. Ultimately the parties, having, as I think, taken advice, assumed different attitudes, and the defendant wrote withdrawing his notices. This withdrawal the plaintiff declined to accept, so far as related to the notice to pay off, and I think she was entitled to do so. When the defendant gave notice to pay off the mortgage he created a new position arising by virtue of the original agreement between the parties, and, in my opinion, the position so created could only be altered by the consent, express or implied, of both parties. The case of a notice to quit is in some respects analogous, and in *Blyth* v. *Dennett*, 13 C. B. 178, at p. 180, Maule, J., in distinguishing between the effect of a notice to quit and a forfeiture, points out that in the case of a notice to quit "the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both"; and Jervis, C.J., in the same case says: "The old tenancy was put an end to by the notice to quit; to make out a defence to the action the defendant was bound to show a new contract." In *Tayleur* v. *Wildin*, 16 W. R. 1018, L. R. 3 Ex. 303, Kelly, C.B., says: "It is clear that, whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both." If the law were otherwise a landlord or tenant might, by withdrawing a notice to quit the day before its expiry, inflict great damage upon the other party in rendering all the arrangements made in contemplation of the termination of the holding useless. In like manner a mortgagee might, by withdrawing his notice to pay off at the last moment, inflict serious injury upon a mortgagor who had made all his arrangements upon the footing of paying off the mortgage at the expiration of the notice. In this case I think an effectual tender was made and that the plaintiff is entitled to succeed. I think that the defendant is not entitled to the relief he asks for by his counter-claim, which therefore fails.

His lordship made no order as to costs.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Fladgate & Co.*

Solicitors for the defendant, *Page & Scorer.*

Q. B. Div.
(Wills and Bruce, JJ.) } Dec. 14, 21.

SWAYNE (*Appellant*) *v.* THE COMMISSIONERS OF INLAND REVENUE (*Respondents*). (*a.*)

Inland revenue—Stamp duty—Conveyance on sale—Consideration—Conveyance of property subject to the payment of money—Assignment of leaseholds—Rent—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 56, 57; *Schedule I.*

On a conveyance on sale of leasehold property subject the rent reserved by the original lease, or (in the case of such a conveyance of a part only of the demised property) subject to an apportioned part of the rent so reserved, such rent is not a part of the consideration in respect whereof the conveyance is chargeable with ad valorem *duty under section* 57 *of the Stamp Act*, 1891.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891, for the opinion of the court as to the amount of duty with which an indenture of assignment of leasehold property dated the 27th of December, 1897, was chargeable.

The following statement of the facts upon which the commissioners gave their decision is taken from the judgment of Bruce, J.:

By an indenture of lease bearing date the 16th of October, 1893, one Rowell demised to one Mills a parcel of ground and three dwelling-houses then in course of erection thereon for a term of ninety-nine years at the yearly rent of £3 16s. 6d., and by the said indenture Mills covenanted to complete the three houses, and expend on the building of each of such houses the sum of £100 at the least, and he also entered into numerous other stringent covenants such as are often inserted in what are known as building leases. The three houses were erected, and were numbered 6, 7, and 8, Bowden-hill-terrace.

Rowell, by another indenture of lease bearing date the 10th of March, 1894, demised to Mills a parcel of ground and two dwelling-houses then in course of erection thereon for a term of ninety-nine at the yearly rent of £2 11s. The covenants in this indenture were similar to the covenants in the indenture of the 16th of October, 1893. The two houses were erected, and were numbered 9 and 10, Bowden-hill-terrace.

By an indenture bearing date the 27th of December, 1897, made between Mills of the one part and Annie Penelope Swayne (the appellant) of the other part, Mills in consideration of the sum of £503 to him paid by the said Annie Penelope Swayne assigned and conveyed into the said A. P. Swayne—first, the two houses 7 and 8, Bowden-hill-terrace, being two of the three houses demised by the indenture of the 16th of October, 1893; and, secondly, the two houses 9 and 10, Bowden-hill-terrace, being the two houses demised by the indenture of the 10th of March, 1894, to hold the same unto the said A. P. Swayne for the residue then unexpired of the said several terms of ninety-nine years subject as to the hereditaments first thereinbefore described to the apportioned yearly rent of £2 11s., part of the yearly rent of £3 16s. 6d. reserved by the indenture of the 16th of October, 1893, and to the observance and performance of the covenants and conditions therein contained, and subject as to the hereditaments secondly thereinbefore described to the payment of the yearly rent of £2 11s. reserved by the indenture of the 10th of March, 1894, and to the observance and performance of the covenants and conditions therein contained. A. P. Swayne covenanted with Mills to pay the several sums of £2 11s. and to observe and perform the covenants and conditions in the said leases to Mills respectively contained and to keep Mills indemnified, and Mills covenanted with A. P. Swayne to pay the apportioned rent of £1 5s. 6d., the residue of the rent reserved by the indenture of the 16th of October, 1893.

The indenture of the 27th of December, 1897, was submitted to the commissioners under section 12 of the Stamp Act, 1891, for their opinion as to the amount of duty chargeable thereon.

The commissioners were of opinion that the instrument fell to be charged under the head "Conveyance on Sale" in the schedule to the Stamp Act, 1891. In accordance with their practice they did not assess duty upon the capitalized value of the yearly rent of £2 11s. payable in respect of the houses numbered 9 and 10, Bowden-hill-terrace. They were of opinion, however, that duty was chargeable upon the rent of the same amount payable in respect of the houses

numbered 7 and 8, Bowden-hill-terrace above-mentioned, and they assessed duty upon the said sum multiplied by twenty under section 56, sub-section 2, of the Stamp Act, 1891. They also assessed duty upon the sum of £503, the premium payable under the instrument.

It was admitted in the case that the houses 6, 7, and 8, Bowden-hill-terrace were of equal value.

Section 56 (2) of the Stamp Act, 1891, enacts that "Where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument."

Section 57 enacts that "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock, is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.

Vaughan Hawkins, for the appellant.—The apportioned rent was not part of the consideration for the sale. The property sold was the houses, subject to a rent, a rent being merely an incident of leasehold tenure; the consideration was the premium of £503, and *ad valorem* duty is payable upon that only. [He was stopped.]

Danckwerts (*Sir R. B. Finlay, S.G.*, with him), for the respondents.—The property was assigned subject to the rent, that is, subject to the annual payment of money; that money is, therefore, by virtue of section 57 of the Stamp Act, 1891, to be deemed a part of the consideration, and *ad valorem* duty was properly assessed upon the capitalized value of the rent. There is no distinction between such a case and the case of a conveyance of land subject to a mortgage debt and interest in which duty is clearly payable upon the debt and interest. The commissioners have power, under section 57, to claim *ad valorem* duty on the value of the rent where the whole of the property demised by the original lease is assigned subject to the original rent; but in practice the power is not exercised except where a part only of the demised premises is assigned subject to an apportioned rent. [WILLS, J.—But the commissioners have no power to make a rule of not claiming duty in a class of cases in which duty is payable; such a practice is wholly different from making a remission in a particular case.]

Vaughan Hawkins.—Section 57 does not apply to a charge or liability to payment which is inherent in the nature of the property itself such as rent in the case of leasehold property; it applies to a mortgage debt, because that is something outside the property. Where a liability is inseparable from the property sold, *ad valorem* duty is not payable upon the amount of the liability: *Christie* v. *The Commissioners*, 15 W. R. 258, L. R. 2 Ex. 46.

He also traced the history of the legislation now represented by section 57 of the Stamp Act, 1891, and referred to *The Commissioners* v. *The Liquidators of City of Glasgow Bank*, 8 Ct. Sess. Cas., 4th series, 389; *Marquis of Chandos* v. *The Commissioners*, 6. Exch. 464; 15 & 17 Vict. c. 59, ss. 10, 11; *Mortimore* v. *The Commissioners* 2 H. & C. 838; *Ulverston and Lancaster Railway Co.* v. *The Commissioners* 2 H. & C. 855; Stamp Act, 1870, s. 73; Dart's Vendors and Purchasers (6th ed.), p. 788.

Sir R. B. Finlay, S.G., in reply.—The amount of the premium paid is affected by the amount of the rent to which the property is subject, the rent is therefore part of the consideration, just as on the purchase of shares in a company on which there is a liability to pay calls the amount of the calls is part of the consideration.

Curr. adv. vult.

Dec. 21.—BRUCE, J., after stating the facts as above set out, said: The question raised by the case is what is the amount of stamp duty to which the indenture of the 27th of December, 1897, is subject. The indenture is taxable under the head "Conveyance or transfer on sale" contained in the schedule to the Stamp Act, 1891. The duty is an *ad valorem* duty on the amount or value of the consideration for the sale. It is quite clear that the *ad valorem* duty is payable in respect of the sum of £503, the consideration-money expressed in the indenture. But the commissioners contend that the *ad valorem* duty is also chargeable in respect of the yearly rent payable for the houses 7 and 8, Bowden-hill-terrace, because they say that rent is to be regarded as part of the consideration for the conveyance. This contention is founded upon the 57th section of the Stamp Act, 1891, which is in these terms: "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him or subject, either certainly or contingently, to the payment or transfer of any money or stock whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty." The particular words relied upon are these: "Where property is conveyed to any person subject to the payment of any money, the money is to be deemed part of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

It is said that the assignment to A. P. Swayne of the houses 7 and 8, Bowden-hill-terrace, was subject to the payment by her of the rent of £2 11s., and that therefore by the terms of the section above referred to the £2 11s. is to be deemed part of the consideration. The commissioners did not insist upon treating the payment of the rent of £2 11s. payable in respect of the houses 9 and 10, Bowden-hill-terrace in the same way, because we are told that in cases where there has been no apportionment of the rent reserved by the original lease, and the lease of the whole of the demised premises has been assigned subject to the payment of the rent reserved by the original lease, it has never been the practice of the commissioners to treat the rent reserved as forming any part of the consideration for the assignment. With the practice which the commissioners think right to pursue it seems to me we have nothing to do—they may have good reasons for enforcing the duty in one case and not in another—but I am satisfied that, as far as the construction of the statute is concerned, no distinction whatever can be drawn between a case in which the rent reserved on an assignment of a lease is the rent reserved by the original lease or is a part only of that rent.

If the commissioners have the right to require the sum of £2 11s. to be treated as part of the consideration as regards the assignment of the lease of houses 7 and 8, Bowden-hill-terrace, they have the same right with regard to the £2 11s. payable in respect of houses 9 and 10. But in my opinion they have no such right in either case. The question turns

upon the meaning of the words "subject to the payment of any money." Of course where leasehold property is assigned it is commonly assigned subject to the payment of rent, because the payment of rent is an obligation ordinarily incident to leasehold property. But when we come to look at the preceding words in the section—"conveyed to any person in consideration wholly or in part of any debt due to him"—which govern the words "or subject to the payment of any money," it seems to me that it is reasonable to construe the section as pointing to a liability to pay money arising in some way other than as incident to and inseparably connected with the property conveyed. Where a lease for years subject to the payment of an annual rent is conveyed or assigned the very property conveyed is in its nature a qualified property, and the liability to pay rent arises out of the nature of the estate conveyed. The liability to pay is not in the nature of a charge or incumbrance on the property, it does not even arise out of any independent stipulation that the money shall be paid, it is inherent in the nature of the property, and can never be extinguished so long as the character of the property remains. The history of the legislation on the subject, I think, confirms the view that I have expressed. It is related in the judgments delivered by the Lord President and the other judges of the Court of Session in the case of the *Glasgow Bank*, 8 Ct. Sess. Cas., 4th series, p. 389 Where property is incumbered and is sold subject to the incumbrance, or even subject to a bond or condition that certain money shall be paid in future, then upon payment off of the incumbrance or upon payment of the money stipulated to be paid in future the purchaser obtains an estate discharged from the incumbrance or bond or condition, and the money so paid in discharge of the incumbrance or bond or condition is paid indirectly as part of the purchase-money of the estate, and therefore it is right that the sums of money, upon the payment of which the purchaser is able to obtain an unincumbered estate should be taken into consideration as forming part of the purchase-money, and be added to the amount paid by the purchaser as the price of the incumbered estate or as the price of the estate sold burthened with the condition of the payment of money in future. It was to meet cases of this kind that various provisions have been made by the Legislature, the last of which is contained in the section now under consideration. No doubt the words in the section are very wide, but I think they cannot properly be applied to mean more than this, to use the language of Martin, B., in the case of *Mortimore* v. *Commissioners of Inland Revenue*, 2 H. & C. 838, "The *ad valorem* duty shall be paid on the entire consideration which, either directly or indirectly, represents the value of the free and unincumbered corpus of the subject-matter of the sale." Where as in this case the liability to pay is an incident of the corpus of the subject of the sale, and inseparable from it, and from which the corpus never can be freed, it seems to me that it would be giving too comprehensive a meaning to the words of the Legislature to hold that the rent to which the corpus is subject should be treated as if it were an incumbrance, or were in any sense to be regarded directly or indirectly as purchase-money. In the present case the lease of the 16th of October, 1893, contains various covenants by Mills—among others, covenants to repair, to keep the premises insured, and to execute all works that may be necessary in order to procure certain footways or roadways being taken over by the local authority of the district, and the indenture of assignment of the 27th of December, 1897, makes over the lease to A. P. Swayne, subject to the observance and performance on her part of the above covenants. In a sense, therefore, the property is conveyed to A. P. Swayne, subject to the payment of all the moneys that may require to be expended by virtue of these covenants, and yet I think it would be obviously unreasonable to hold that such sums should be treated as forming part of the consideration for the purchase. It was said in argument by counsel for the Crown that cases might arise in which an assignment or transfer of a lease might be made on terms imposing a higher yearly rent than the rent reserved by the original lease, and in consideration of such higher rent the purchase-money payable on the assignment or transfer might be reduced, and in such a case if the *ad valorem* duty were charged on the purchase-money alone without reference to the increased rent, part of what really formed the consideration for the transfer would escape the duty. On that I may make two observations. First, the circumstances suggested do not arise in the present case. It is an admitted fact in the case that the three houses 6, 7, and 8 comprised in the original lease of the 16th of October, 1893, are of equal value, and the rent reserved by the indenture of assignment of the 27th of December, 1897, for the two houses 7 and 8 is exactly two-thirds of the rent reserved in respect of the three houses comprised in the original lease. There is, therefore, in this case no room for the suggestion that the rent reserved by the indenture of assignment has been in any way manipulated so as to reduce or in any way affect the purchase-money of £503 upon which the *ad valorem* duty is payable. Secondly, the words of the 57th section are not directed to meet such a case as is suggested. The words of the section, if they apply at all, apply to all cases where property is conveyed subject to the payment of money whether the payment bears any relation to the consideration for the purchase or not, and for the reasons I have given I think it is unreasonable to ascribe to the words so wide a meaning as to include such a case as that now under consideration. If a case were established where it was clear that on an assignment of a lease the rent reserved by the assignment had been increased above the rent reserved by the original lease in order that the purchase-money payable on the assignment might be reduced, whether it might not be possible in some way to take into consideration the whole circumstances in order to ascertain the real amount or value of the actual consideration, paid directly or indirectly, on the simple words contained in the schedule to the Act, without reference in any way to the words of section 57, I give no opinion, because in the present case the question does not arise. All that we decide here is that the words of the 57th section do not meet the present case.

WILLS, J.—I entirely agree with the judgment of my brother Bruce, and I will not repeat the arguments used by him. The real question is—what is the meaning of the word "property" in section 57 of the Stamp Act, 1891? In the case of land subject to a mortgage, the word has been held to mean the physical property considered as unincumbered. I do not propose to deal with the subject historically so as to show how that decision came to be given; I do not in any way dissent from the reasonableness of that view; but the case of leaseholds is totally different. I would observe that the construction of these taxing Acts is not an exact science; it is rather a practical art; and the questions which arise under these sections of the Stamp Act, 1891, cannot be settled as if they were simple questions to be determined logically by reference to the principles of common law. Leasehold property is a class of property well known to the law. In nine cases out

of ten—or, I might say, in ninety-nine out of a hundred—it is burdened with a liability to pay rent; in the ordinary case of a lease of house property it is burdened with a rack-rent, and it has never occurred to anyone dealing with the subject to suppose that upon an assignment of such a lease the burden of the rack-rent is assumed by the purchaser as part of the consideration for the purchase. The commissioners have not hitherto acted on such a view. As I pointed out in the course of the argument, if the contention of the Crown is correct the commissioners have always been wrong in their method of assessing the stamp duty payable on an assignment of leaseholds; they ought, in all cases, to have treated the capitalized value of the rent as part of the purchase-money. It was said by Mr. Danckwerts that the commissioners could so treat it or not, as they pleased. I utterly dissent from that view. If the contention were right I think it would be their duty in all cases to consider the capitalized rent in assessing the duty. The commissioners cannot exercise a dispensing power and say what part of a taxing Act is reasonable, and enforce that part and reject the other parts. But in this case a mere statement of the result of the contention of the Crown is almost sufficient to warrant its rejection. What was the subject of the assessment in this case? What was sold was leasehold property—that is to say, property not unburdened, but subject to a liability to be distrained upon for an annual sum of £3 16s. 6d. The vendor could not convey any part of the property otherwise than subject to this burden, and it could make no difference whether it was expressed to be conveyed so subject or not. The vendor affected to convey it subject to an annual payment of £2 11s. only; but the only effect of that, coupled with his express covenant, was to give the purchaser an indemnity as to the balance of £1 5s. 6d. per annum, and that indemnity was a part of what was being sold, so that the purchase-money of £503 paid for the property was not made less on account of that indemnity, but more.

Judgment for the appellant.

Solicitors for the appellant, *Bridgman & Willcocks*, for *Baker, Watts, Alsop, & Woollcombe*, Newton Abbot.

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Q. B. Div.
(Lord Russell of Killowen, C.J.) } Aug. 8, 1898.

JONES & CO. v. SCULLARD. (a.)

Master and servant—Servant hired from another person—Liability for the negligence of hired servant.

The defendant kept his carriage and horses at a livery stable, and hired a man from the keeper of the livery stable to drive them; the driver being selected by the keeper of the livery stable. One day, when the defendant was out driving, owing to the negligence of the driver the horse bolted, and ran into and did damage to the plaintiff's shop. The driver was one who had driven the defendant continuously for some time, and he wore the defendant's livery, but he had only driven the horse in the shafts at the time of the accident some two or three times.

Held, that there was evidence on which a jury could find that the driver was the servant of the defendant, so that the defendant was liable for his negligence.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Action.

On the 22nd of June, 1897, the defendant's brougham and horse, driven by a man named Loveday, ran into the shop of the plaintiff, who was a jeweller carrying on business as Jones & Co., and injured the shop and the stock-in-trade. The plaintiff thereupon brought this action for damages, upon the ground of the negligence of the defendant or his driver. At the trial the defence was set up that the defendant was not liable inasmuch as the driver was not his servant, having been hired by him from a livery stable keeper. The jury found a verdict for the plaintiff for £350, and the question of liability was reserved.

The facts appear in the judgment.

Hammond Chambers, Q.C. (*Woodin* with him), for the plaintiff.—The test is the ownership, or, rather, the legal possession of the horse. If the defendant is in legal possession of the horse the authorities show that the driver is his servant: *Laugher* v. *Pointer*, 5 B. & C. 547; *Brady* v. *Giles*, 1 Moo. & Rob. 494; *Randleson* v. *Murray*, 8 A. & E. 109; and *Quarman* v. *Burnett*, 6 M. & W. 499. The rule of law is that where a man is in possession of property he has to take care that it is so managed as not to cause injury to other persons. The defendant was in possession of the horse, and was consequently liable to see that it was so managed by the person who drove it as not to cause damage to other persons. If a servant is lent by one person to another for a particular employment he is for the time being the servant of the person to whom he is lent: *Rourke* v. *White Moss Colliery Co.*, 25 W. R. 263, 2 C. P. D. 205; *Donovan* v. *Laing*, 41 W. R. 455, [1893] 1 Q. B. 629. The facts show that in the present case the driver was under the direction and control of the defendant.

Witt, Q.C. (*J. Watson Moyses* and *E. E. Humphreys* with him), for the defendant.—The defendant not having selected the driver is not responsible for his negligence. The driver was selected by the proprietor of the livery stables, who is therefore the person liable. [Lord RUSSELL OF KILLOWEN, C.J.—Cannot a selection and approval be implied from his continuing to employ the same man?] There was an absence of disapproval.

Cur. adv. vult.

Lord RUSSELL OF KILLOWEN, C.J.—Although this is only a running-down case the decision in it has caused me considerable trouble and anxiety, and I think it is desirable that it should ultimately go to receive the opinion of the Court of Appeal. The facts are these. The plaintiff is a jeweller, and carries on business at 368, Holloway-road. On Jubilee day a brougham, in which was being driven a horse, ran into his shop and caused damage to the window and its contents. The plaintiff thereupon cast about to discover whether he had any remedy, and against whom. He himself was certainly blameless. He discovers this. Inside the brougham at the time of the accident was the defendant and a lady friend. The brougham belonged to the defendant. The horse belonged to the defendant, and the harness belonged to the defendant. The man on the box had on boots, breeches, waistcoat, coat, and hat—all of them supplied to him by the defendant. But the person enveloped in these garments had been supplied to the defendant by a man with whom the defendant placed his horses at livery.

An action is brought against the defendant, and he says in answer to it: "I am not responsible for the damage done by this man's negligence because he did not represent me. He was not my servant, but the servant of another. In his action the plaintiff alleges generally that the occurrence was caused by

the negligence of those who were responsible for the brougham, horse, &c.

He gave particulars of the negligence which he alleged, and it is necessary to see what these particulars are.

They are as follows: That the horse being a hard-mouthed horse, and a puller, as the defendant and his servant ought to have known by inspection of his mouth, which showed unmistakeable signs of hardness caused by pulling; that the curb chain was not sufficiently tightened; that there was no brake on the carriage; and that the horse had recently been brought from the country, was unused to London streets, and ought not to have been driven in London on such a day as Jubilee day.

The only question left to the jury was the question of negligence, and they found a verdict for the plaintiff. The other question, as to who was responsible for Loveday's negligence, was left to me, and it was agreed that I should draw such inferences of fact as a jury could draw, so far as it was necessary to do so.

I have already said that the defendant owned carriages and horses, but, not having a stable of his own, liveried them with a tenant of his named Walker. The defendant is a publican, and Walker's stables adjoin one of the defendant's public-houses. The arrangement with regard to the defendant's carriages and horses began on the 3rd of January, 1897. On the 10th of May, Loveday began to drive for the defendant, and he continued to drive for him until the day of the accident. Loveday was not selected by the defendant, but the proper inference for me to draw from the facts is that the defendant told Walker that he required a man to drive and that Walker accordingly sent Loveday. It must be taken that originally there was no choice by the defendant of Loveday. Still, it is not unimportant to observe that there is evidence that the defendant showed satisfaction with, and approval of, Loveday; and though there was no power in the defendant to dismiss Loveday, he had power, nevertheless, to say to Walker, "You must not send me this man any more," and he could say to Loveday, "I dismiss you from the occupation of driving my carriage." He did not, however, do so.

Between the 24th of May and the 31st of May the defendant ordered that Loveday should be supplied, at his own cost, with a suit of clothes. One other date is material. The horse was brought to London from the country on the 14th of June, and was driven by Loveday for the first time on the 16th of June. Between then and the 22nd of June the horse was driven some two or three times only by Loveday. So far as I know these are all the material facts.

The question is whether there was evidence upon which the jury could find that Loveday was the servant of the defendant. It is impossible for me to say that there was not evidence to leave to the jury. The question for me to decide now is whether, in the circumstances of the case, I ought to say that the defendant is to be relieved from responsibility for the negligence of Loveday while driving him. It is clear from the authorities that, notwithstanding the Scriptures, a man may be in the position of serving two masters at a time. While in the general employment of Walker it was still possible for Loveday to be in the particular employment of the defendant, and to be the servant of the defendant in relation to the particular matter of driving the defendant's carriage.

I think it is desirable that I should draw attention to the leading authorities upon the subject, because, if it were not for those authorities, I should not have felt the perplexity that I have felt. No one of these cases is precisely on all-fours with this one. In no one of them does there exist the conjunction of facts presented by it—namely, the ownership by the defendant of the carriage, horse, and the harness, the fact that the livery was supplied by the defendant, and the fact that the horse that was being driven was one to which the driver was not accustomed. Nor does there come into the consideration the fact that among the acts of negligence alleged was the mode in which the horse was bitted taking into account the hardness of its mouth, &c.

The first of the cases I have referred to is *Laugher* v. *Pointer*, which was the subject of consideration by the whole body of common law judges. I have tried to find out how the judges were in fact divided, but I have been unable to do so. The case was only reported in the King's Bench, and the judges of that court were equally divided. The headnote of the report in Barnwell & Cresswell is as follows: "Where the owner of a carriage hired of a stable keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person: Held, by Abbott, C.J., and Littledale, J., that the owner of the carriage was not liable to be sued for such injury, Bayley and Holroyd, JJ., *diss.*" In that case all the defendant owned was the passive inert carriage. Abbott, C.J., in the course of his judgment says (p. 577): "I must own that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about London for a day, and hiring them to draw it for a stage on the road I am travelling, the driver being in both cases furnished by the owner in the usual way; nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions and hiring a carriage with them of their owner." With that observation I am inclined to agree. At p. 580 he says: "I have acknowledged the difficulty of drawing a line with reference to time or distance; and I think we must look to other circumstances in order to ascertain the obligation of the hirer. Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice, of the coachman." That is an observation pregnant with good sense. But it does not, in my opinion, govern the present case.

Brady v. *Giles*, 1 Moo. & Rob. 494, is the next case to which I refer. It was decided by a judge of remarkable good sense—Lord Abinger. To our eyes that case is the clearest in the world. There seems to be no reason for any liability in Mr. M'Kinlay at all. That gentleman hired from the defendant, who was a carriage jobber, a fully-equipped carriage and four horses for a trip to Windsor and back. On the way back, the carriage, owing, as it was alleged, to the negligence of the postillions, collided with the plaintiff's gig. In the action brought against the carriage jobber it was contended that the postillions were at the time the servants of Mr. M'Kinlay. Lord Abinger refused to nonsuit the plaintiff, saying that "It had always appeared to him that it was quite impossible to lay down any rule of law on such a point. No satisfactory line could be drawn at which, as a matter of law, the general owner of a carriage, or rather, the general employer of the driver, ceased to be responsible and the temporary hirer became so. Each case of this class must depend upon its own circumstances." There appears to me to be great good sense in those observations, and it was in view of them that I asked for power to draw inferences.

Now comes a case which presents to my mind great difficulty, *Quarman* v. *Burnett*. The defendants,

two old ladies, kept a comfortable carriage of their own and had, for a period of three years, been in the habit of hiring horses and a coachman from a jobmaster. The same coachman came every day to drive them, and they paid him a small gratuity for each drive. The ladies wished him to present a respectable appearance, so they supplied him with a coat and a hat. Desiring to guard against his using these garments elsewhere, they instructed him to change, on the occasion of each drive, in the hall of their house. On one of these occasions while the man was in the hall changing his coat and hat, the horses bolted and came into collision with the plaintiff's chaise. One would have thought that on that particular occasion the ladies might have been held to be responsible, but a verdict having been found for the plaintiff, the Court of Exchequer set it aside on the ground that there was not even evidence to go to the jury that the coachman was acting as the servant of the defendants. That is a strong authority in favour of the defendant. Yet it differs from the present case in two respects. Firstly, the horse that was being driven in the present case was the horse of the defendant; and, secondly, the horse was one which had only recently been acquired by him and with which, consequently, the driver supplied by the livery stable keeper had but a slight acquaintance. Neither of these matters are, in my opinion, immaterial. Why do I say that the fact of the horse belonging to the defendant is material? For this reason, so long as the hirer contracts for the supply to him of a complete equipage for an hour, a day, or a week, as the case may be, and the livery stable keeper, in pursuance of that contract, supplies him with a fully-equipped carriage, including horses and a man to drive them, the hirer has no kind of control over the driver, except in one particular, he can indicate to him to what point he wishes to go. He could not order him to increase his speed, for the driver could say, "I am not your servant. I know my master's wishes with regard to the horses, and I will drive them accordingly." But the case is different where the horses belong to the hirer of the driver. The hirer could then say, "I am late; drive fast, up hill and down hill," and if the driver refused to obey, he could say to the livery stable keeper, "I will not have that man again."

Again, it must be taken into consideration that this horse was only recently brought from Yorkshire, and had not been driven by Loveday a sufficient number of times to enable him to know the peculiarities of its temper and the proper manner of harnessing it and of adjusting the reins and bit.

All these are elements to be considered in determining the relation of the driver to the defendant.

Two cases remain to be considered, and I confess that I cannot altogether reconcile them with some of those already cited. The first is *Rourke* v. *The White Moss Colliery Co.* That case makes it clear that a man may be the general servant of one person and yet at the same time be the servant of another person for some particular purpose. The defendants having begun sinking a shaft in a colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labour, the defendants to provide and place at the disposal of W. the necessary engine-power with an engineer to work the engine (who was employed and paid by the defendants), the engine to be under the control of W. The plaintiff, a man employed and paid by W., while working at the bottom of the shaft, was injured by the negligence of the engineer. It was held that, though the engineer remained the general servant of the defendants, yet, being under the control and orders of W. at the time of the accident, he was acting as the servant of W. and not of the defendants, who were therefore not liable for his negligence. The case is unquestionably at variance with *Quarman* v. *Burnett*. It also brings out this, that the important element in determining whether a man is the servant of the one person or of the other in relation to a particular employment, is not whether he is paid by the person whose servant he is said to be, but whether he was under his control in the conduct of the business. If my coachman falls ill and I borrow a coachman from somebody else, and he drives my brougham so negligently that someone is injured, who is responsible? The coachman is not my servant. He has only been lent to me for the one or two occasions. The question rests on the principle of representation, *qui facit per alium facit per se*. It cannot be said that my friend who lends me the coachman is responsible. No. The man is responsible who borrows the coachman, under whose control he is for the time being, and who gets the advantage of his services.

In *Donovan* v. *Laing* the defendants contracted to lend to a firm, who were engaged in loading a ship at their wharf, a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was the servant of the wharfingers and was employed by them to direct the working of the crane, sustained an injury through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant. It was held that though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. That case is on all-fours with *Rourke* v. *The White Moss Colliery Co.* Apply the principle of those two cases to the facts of the present case. What control had the livery stable keeper over Loveday while driving the defendant's horse. None. The whole control was in the defendant, who could have ordered him to go fast or slow as he pleased, or to keep the horse without food or otherwise manage the horse as he indicated.

It is time that a comprehensive principle should be laid down in these cases. I think the principle to be derived from the cases is that if the hirer simply applies to the livery stable keeper to drive him between two points or for a fixed period, and the latter supplies all other necessaries for the purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But where the brougham, the horse, the harness, and the livery are the property of the person who hires the driver, especially where the peculiarities of the horse are not known to the driver, who has not driven him previously, and where, as occurs in this case, the driver has driven the hirer for a considerable time in such a manner as to lead one to infer an approval by the former—looking at the congregation of all these circumstances, it seems to me that if the question were put to a jury whose servant was this man, they would say that this man was not the servant of the livery stable keeper but of the person who hired him. In my judgment, therefore, the defendant is liable.

Judgment for the plaintiff.

Solicitors for the plaintiff, *John H. Mote & Son.*

Solitciors for the defendant, *P. J. Gordon & Son.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith and Collins, L.JJ.) } Feb. 13.

Ex parte MERSEY DOCKS AND HARBOUR BOARD. (*a.*)

Practice — Interpleader — Stakeholder—Bailee estopped from setting up jus tertii—*R. S. C., order* 57.

A bailee who is estopped from setting up the jus tertii *may nevertheless be entitled to relief by way of interpleader.*

Appeal from an order of Ridley, J., directing the trial of an interpleader issue.

Certain tobacco, which had been imported into Liverpool, was warehoused with the Mersey Docks and Harbour Board. The importer executed a transfer of the tobacco to the Union Credit Bank to secure the repayment of an advance, and subsequently, as the Union Credit Bank alleged, in fraud of them, he executed a transfer of the same tobacco to the North and South Wales Bank to secure repayment of an advance.

The Mersey Docks and Harbour Board having received notice from the North and South Wales Bank of the transfer to them, wrote to them a letter, called in the case the letter of attornment, in which it was stated that the tobacco in question, stored in the dock warehouses, was now held to the order of the North and South Wales Bank. On the faith of this letter the North and South Wales Bank made an advance to the importer.

An action for the wrongful detention of the tobacco having been brought by the North and South Wales Bank against the harbour board, and a claim to the tobacco having also been made by the Union Credit Bank, the harbour board interpleaded, and Ridley, J., made an order directing the trial of an interpleader issue between the two banks. The order further ordered that the Union Credit Bank and the North and South Wales Bank should be restrained from commencing or prosecuting any proceedings against the Mersey Docks and Harbour Board in respect of the subject-matter of the interpleader application, except in respect of special damage, if any, which the North and South Wales Bank might have sustained and be entitled to recover against the harbour board through having acted on the letter of attornment.

From this order the North and South Wales Bank appealed.

Pickford, Q.C., and *Maurice Hill*, for the North and South Wales Bank. — The harbour board have estopped themselves by the letter of attornment from denying the title of the North and South Wales Bank, and in refusing to deliver up the goods they are guilty of an act of conversion: *Henderson & Co.* v. *Williams*, 43 W. R. 274, [1895] 1 Q. B. 521. The action, therefore, ought to be allowed to proceed. Relief by way of interpleader ought not to be granted to a person who is estopped from setting up the *jus tertii*. The question of estoppel cannot be tried in an issue between the two banks, and on that ground also the interpleader order ought to be set aside: *Baker* v. *The Bank of Australasia*, 5 W. R. 253, 1 C. B. N. S. 515.

Carver, Q.C., and *Leslie Scott*, for the Mersey Docks and Harbour Board.—The harbour board are mere stakeholders, and are entitled to the protection of interpleader. Even if they are estopped from setting up the *jus tertii*, they are not thereby debarred from the remedy of interpleader: *Attenborough* v. *St. Katharine's Dock Co.*, 26 W. R. 583, 3 C. P. D. 450; *Robinson* v. *Jenkins*, 38 W. R. 360, 24 Q. B. D. 275.

Pickford, Q.C., in reply.—The mere existence of a contract of bailment is not sufficient to exclude interpleader. The principle on which a bailee may be allowed to set up the *jus tertii* is explained in *Biddle* v. *Bond*, 13 W. R. 561, 6 B. & S. 225. But where there is a real estoppel, as in this case, the bailee cannot interplead. In *Attenborough* v. *St. Katharine's Dock Co.* and in *Robinson* v. *Jenkins* there was no real estoppel.

A. L. SMITH, L.J.—I agree with Ridley, J., in thinking this is a proper case for interpleader. The practice with regard to interpleader is now governed by order 57 of the Rules of the Supreme Court. Rule 1 of that order says that "relief by way of interpleader may be granted where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto." This case clearly comes within those words. The only fetters on the jurisdiction to make an interpleader order in such a case are those mentioned in rule 2; the applicant must satisfy the court that he claims no interest in the subject-matter in dispute, that he is not colluding with either of the claimants, and that he is willing to dispose of the subject-matter as the court may direct. Beyond this there is no limitation on the power to make an order, if the court thinks fit. It is said that the harbour board are estopped by their letter of attornment to the North and South Wales Bank from setting up the *jus tertii*. That does not touch the jurisdiction. But it is said that, even if there is jurisdiction to make an interpleader order, the court ought not to make it by reason of this estoppel point. Assuming that there is an estoppel in this case, which it is not necessary to decide, I think that the *dicta* of the judges in *Attenborough* v. *St. Katharine's Dock Co.*, though there was in fact no estoppel in that case, show that the mere existence of an estoppel is no reason why an interpleader order should not be granted.

In my opinion the question as to the title to the goods in dispute should be fought out between the two banks. But the North and South Wales Bank ought not to be shut out from the chance of fighting the question of estoppel between themselves and the harbour board. And I think we ought to enlarge the order so as to leave it open to them, if necessary, to bring an action against the harbour board to recover the value of the goods and damages. The exception will, therefore, be varied so as to run thus—except any claim which the North and South Wales Bank may have by reason of the letter of attornment.

COLLINS, L.J.—I am of the same opinion. I think that order 57 gives an unfettered jurisdiction, and that it is competent to the court to grant the relief of interpleader in such a case as this. Is there, then, any reason why we should not exercise our jurisdiction in this particular case? If it were not for recent authorities I should be disposed to yield to the argument of the appellants that, where a person is debarred from setting up the *jus tertii*, he is not entitled to interplead. That would seem to me to be a reasonable ground on which the court might decline to allow an interpleader order. But, looking at the history of the practice in interpleader, I think that the Legislature has shown an intention to remove certain fetters

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

which formerly existed, and it seems to me that in *Attenborough* v. *St. Katharine's Dock Co.* the judges faced the contention which is now put forward, and expressed the opinion that, even where a person is estopped from setting up the *jus tertii*, relief by way of interpleader may nevertheless be granted.

Order varied.

Solicitors for the appellants, *T. Cooper & Co.*, for *Hill, Dickinson, Dickinson, & Hill*, Liverpool.

Solicitors for the respondents, *Rowcliffes, Rawle, & Co.*, for *A. T. Squarey*, Liverpool.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Jan. 28.

In re HARRISON AND BOTTOMLEY. (*a*.)

Receiver—Equitable execution—Charge on land—Reversion, sale of—"Actual delivery in execution"—Judgments Act, 1864 (27 & 28 *Vict. c.* 112), *s.* 1.

The defendants in a probate action having been condemned in costs, the plaintiff obtained an order from the Probate Division for the appointment of a receiver of the rents and profits of real estate vested in remainder in the defendants. On an application in the Chancery Division by the plaintiff for a charge on and sale of such remainder,

Held, that no such charge or sale could be enforced, as the appointment of a receiver did not constitute an "actual delivery in execution" of the remainder within the meaning of section 1 *of the Judgments Act*, 1864.

Appeal from North, J.

Henry Gresham, by his will dated the 1st of July, 1895, devised and bequeathed all the residue of his estate to his wife for life and after her death to Sarah Harrison and Barbara Bottomley in equal shares, and appointed John Woods his executor. The testator died on the 2nd of July, 1895.

The executor brought an action against the legatees to have the will established, and on the 10th of July, 1896, a declaration was made that the will had been duly proved in solemn form. Judgment was entered for the plaintiff with costs.

On the 14th of January, 1897, an order was made on the defendants to pay to the plaintiff within seven days the taxed costs of the action, amounting to £122 3s. 7d. Mrs. Harrison was a widow with no property whatever. Mrs. Bottomley was a married woman having no separate estate, her husband being a gardener in the receipt of £1 a week as wages. The only property available for the payment of the costs was the reversionary interest of the two ladies in the real estate devised by the testator (worth about £640) subject to the life interest of Mrs. Gresham.

On the application of Woods on the 12th of April, 1897, an order was made by the Probate Division appointing a receiver to receive the rents and profits of the testator's real estate without prejudice to the rights of any prior incumbrancers. Then Woods presented a petition in the Chancery Division, intituled in the matter of the Act 1 & 2 Vict. c. 110, the Act 27 & 28 Vict. c. 112, the Act 44 & 45 Vict. c. 41, and in the matter of Sarah Harrison and Barbara Bottomley, asking that the reversionary interests of Mrs. Harrison and Mrs. Bottomley, which had been delivered in equitable execution, might be sold, and the proceeds paid to the petitioner on account of what was due to him under his judgment of the 10th of July, 1896.

North, J., dismissed the petition, with costs, to be set off against those due to the petitioner by the respondents under the order of the 14th of January, 1897.

John Woods appealed.

W. H. Stevenson, for the appellant.

F. J. Lampard, for the respondents.

LINDLEY, M.R.—It is obvious to us all that, however desirous we may be to do what the appellant asks us to do, we have no power to help him. I am rather sorry that that should be the case, for if we could do this, we would. The difficulty arises in this way: The defendants are married women who are entitled to legal remainders in real estate devised to them by the testator, and Mr. Woods, the appellant, has obtained a judgment against them, and he cannot get his money. The question is whether he can, whilst the defendants' interests are reversionary, obtain a sale of their estates. He has obtained from the Probate Court an order appointing a receiver, and I am not now going to question that order. I assume for the moment that it is unobjectionable. I take it that if these ladies were to sell or attempt to sell their reversions, and Mr. Woods were to know of that, he could stop it, for that order would operate surely as an injunction against them obtaining the money; so that it appears that the order is by no means worthless, but it is not a charge. What we are asked to say is, first, that under the order for payment of costs there is a charge; and, secondly, that in consequence of the appointment of a receiver the land of these ladies has been actually delivered in execution.

The question whether it is a charge depends on 1 & 2 Vict. c. 110, and from that I should have said, if it had not been qualified by a subsequent statute, that Mr. Woods clearly had a charge; but then there comes the Judgments Act, 1864, s. 1, which very materially modifies the operation of the former Act and says this: "No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance." This is inconsistent with the judgment being a charge, for a judgment is "not to affect any land . . . until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority." I agree that the words "writ of *elegit* or other lawful authority" would include an order such as this one, appointing a receiver; but the question is whether we can say that this land, which these ladies have no present right to possess, can be regarded as having been actually delivered in execution. My answer is, No; we cannot stretch the words in order to do what we think is justice. That is the difficulty—and North, J., has felt it, and we have also felt it before now, in both of the cases that have been cited here to-day, viz., *In re Hamilton*, 34 W. R. 203, 31 Ch. D. 291, and *Cadman* v. *Cadman*, 35 W. R. 1, 33 Ch. D. 397—which prevents us from doing what we are now asked to do. Having regard to these cases, it appears to me we are asked to make an order which we have no jurisdiction to make.

There is nothing in any of the cases cited by counsel for the appellant which conflicts with this view. In none of them was this point before the court, and though perhaps there are two cases to which he has referred (*In re Cooper*, 37 W. R. 330, and *In re Jones*, [1895] W. N. 123) which might be favourable to his

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

contention, I doubt whether they were decisions upon reversionary interests at all. They are so reported that I cannot tell whether at the time the application was made the interests in question were reversionary or not. But passing this over, there is no authority to justify us in upsetting the order of North, J., and this appeal must therefore be dismissed with costs.

RIGBY, L.J.—I am of the same opinion, and for the same reasons. I have looked at the order in *In re Cooper* which has been mentioned, and it appears to me that there is nothing in the order to justify the suggestion that a reversionary interest was being dealt with; on the contrary, the order is absolutely inconsistent with that view, and therefore it must only be considered as a suggestion. Another suggestion was made—viz.: that in *In re South*, 22 W. R. 460, James, L.J., had departed from what had been said in earlier cases and laid down a rule which is absolutely unintelligible, and held that for this purpose there was a difference between a reversion and a remainder. What he did say was perfectly sound and intelligible, as we should expect from that great judge. What he said is this, that if a man is seised of land there is a difference; that if he is owner of the reversion he may also have seisin of the property and that that can only be the case when the reversion is expectant on a tenancy for a term, *i.e.*, a chattel interest. If there were a remainder on a lease it would not be a remainder in the strict sense in the eye of the old law; the possession of the estate subject to the lease would be seisin; the owner would be seised of the estate subject to the lease and that would be a present seisin. That is all that James, L.J., said. A man may have a remainder on a freehold, but in that case he is not seised of the property.

VAUGHAN WILLIAMS, L.J.—I agree entirely. The explanation of the cases to which counsel for the appellant called our attention as to the effect of an order appointing a receiver for the purpose of execution amounting to delivery of possession within the meaning of the statute of 1864 is that these cases, so far as they were cited to us, one and all were cases in which the judgment debtor had a present seisin or present interest in the land. I quite agree that the cases do show that the mere intervention of some slight legal impediment which does not affect ownership, but which certainly does affect the right to present possession, like a lien or incumbrance of some sort, will not prevent there being, by means of an order appointing a receiver, a delivery of possession within the meaning of the statute of 1864.

The only other thing that I should like to add is that there is one case which was not cited—*Macnicoll* v. *Parnell*, 35 W. R. 773—in which a judgment debt being unsatisfied for want of goods of defendant, but the defendant having, expectant on the death of the tenant for life, a legacy for a larger amount than the judgment debt, it was held that a receiver should be appointed to receive a sufficient portion of the said legacy when it should become receivable. I have not looked at that case very carefully and our attention was not called to it, but whatever may be the effect of it, it was not a case which was dealing with interests in land at all, or which would constitute a sufficient present interest in land so as to justify an order appointing a receiver for the purpose of taking reversions in execution.

Appeal dismissed.

Solicitors, *Clinton & Co.*, for *F. G. Tweed*, Gainsborough; *F. Hatton*, for *C. T. Rhodes*, Halifax.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 25, 26, 28; Dec. 9.

WEST v. WILLIAMS. (a.)

Mortgage — Personalty — Covenant to make further advances—Further advances made by first mortgagee after notice of second mortgage—Priorities.

In 1895 *W. W. mortgaged his interest in personal estate under a will to the plaintiff, but the plaintiff gave no notice of the mortgage to the trustees of the will until* 1897. *In* 1896 *W. W. mortgaged his interest to X. and Y. to secure a sum then advanced, and also further advances which X. and Y. covenanted to make. X. and Y. duly gave notice to the trustees of the will of this mortgage, but had no notice of the plaintiff's mortgage until the* 15*th of February*, 1897. *They made further advances pursuant to the covenant both before and after the* 15*th of February*, 1897.

Held (*reversing* Kekewich, J., 46 W. R. 362), *that the principle of* Hopkinson *v.* Rolt, 9 *W. R.* 900, 9 *H. L. Cas.* 514, *applied, notwithstanding that the further advances were made pursuant to a covenant, and that X. and Y. were entitled to priority over the plaintiff only in respect of such of the further advances as were made prior to the date when they received notice of the plaintiff's mortgage.*

This was an appeal from the decision of Kekewich, J. The case is reported in 46 W. R., p. 362, where the facts are fully stated. The following is an epitome of the material facts:

Under the will of Walter Williams the elder, who died on the 5th of March, 1892, his trustees held the residue of his estate upon trust for conversion and to pay the income thereof to the defendant Walter Williams during his life. By an indenture of mortgage dated the 24th of December, 1895, the defendant Walter Williams assigned to the plaintiff F. W. West all his interest under the said will by way of mortgage to secure £600 and interest as therein mentioned, and it was thereby agreed that until the 24th of December, 1896, or until breach of the covenants on the part of the defendant Walter Williams, the plaintiff F. W. West should not give notice of that mortgage to the trustees of the said will.

By a memorandum of charge also dated the 24th of December, 1895, the defendant Walter Williams charged his interest under the said will with the payment to the defendant F. Temple of the sum of £150 and interest, but subject to the said mortgage.

By an indenture of mortgage dated the 2nd of April, 1896, made between the defendant Walter Williams of the one part, and the defendants P. A. Williams and J. W. Williams (thereinafter called the mortgagees) of the other part, reciting (amongst other things) that the defendant Walter Williams had applied to the mortgagees to advance to him the sum of £2,297 and also an annual sum of £200 during a period of five years from the 15th of February, 1896, which the mortgagees had (subject to the conditions or limitations expressed in the indenture of settlement thereinafter recited) agreed to do upon having repayment thereof with interest secured in manner therein appearing, and on condition of the defendant Walter Williams executing the said indenture of settlement, and also reciting the said indenture of settlement, and that it was already prepared and was intended to bear even date with but to be executed immediately after the indenture now in statement, the defendant Walter Williams thereby assigned to the mortgagees all his interest under the

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

said will, subject to redemption on payment to the mortgagees of the sum of £2,297 and interest and such further sum or (if any) as might be advanced by the mortgagees under their covenant in the said indenture of settlement or the indenture now in statement, with interest.

By the said indenture of settlement of even date with the mortgage of the 2nd of April, 1896, which was made between the defendant Walter Williams of the first part, the said defendants P. A. Williams and J. W. Williams of the second part, and the defendants Taylor and Miére of the third part, after reciting the said mortgage of the 2nd of April, 1896, in consideration of the covenant on the part of the defendants P. A. Williams and G. W. Williams thereinafter contained, the defendant Walter Williams as settlor thereby assigned his interest under the said will to the defendants Taylor and Miére in trust for the defendant Walter Williams during his life, or until he should assign, charge, or incumber the same or affect so to do, and after the determination of that trust during his life upon the trusts therein mentioned. And the defendants P. A. Williams and J. W. Williams thereby covenanted with the defendant Walter Williams subject to the conditions therein mentioned to pay to him for the said period of five years the annual sum of £200 in manner therein mentioned. Notice of the said indentures of mortgage and settlement was on the 2nd of April, 1896, duly given to the trustees of the said will.

On the 8th of January, 1897, the plaintiff F. W. West first gave notice to the trustees of the said will of his said mortgage of the 24th of December, 1895. The defendant Temple gave no notice of his charge to the trustees of the said will.

On the 15th of February, 1897, the plaintiff F. W. West offered to redeem the mortgage of the 2nd of April, 1896, but that offer was refused. This was the first notice that the defendants P. A. Williams and J. W. Williams had of the plaintiff's mortgage. The plaintiff claimed by this action (1) to enforce his mortgage; (3) a declaration of the priorities as between the plaintiff and defendants; (4) a declaration that the interest of the defendant Walter Williams under the said indenture of settlement was subject to the plaintiff's mortgage; (5) redemption of the defendants' mortgages, so far as they had priority over the plaintiff's mortgage.

The plaintiff admitted at the trial that the defendants P. A. Williams and J. W. Williams were entitled to priority as regarded the sum of £2,297, and also as to all such other sums as were advanced by them to the defendant Walter Williams, under their covenant prior to the 15th of February, 1897, but claimed priority over all sums advanced by them after that date.

Kekewich, J., in effect, held that the further advances having been made in pursuance of the covenant, the defendants P. A. Williams and J. W. Williams were entitled to priority in respect of all such advances, notwithstanding notice of the mortgage of the plaintiff, and also that the indenture of settlement itself had priority over the plaintiff's mortgage, and his lordship dismissed the action with costs as against the defendants P. A. Williams and J. W. Williams and the defendants Taylor and Miére.

The plaintiff J. W. West and the defendant Temple appealed.

Bramwell Davis, Q.C., and *Wright Taylor*, for the plaintiff.—We submit that notwithstanding the covenant to make further advances, *Hopkinson* v. *Rolt*, 9 W. R. 900, 9 H. L. Cas. 514, applies, and therefore the defendants P. A. Williams and J. W. Williams are not entitled to priority over the plaintiff in respect of advances made after notice of his mortgage. Moreover, the mortgage to the plaintiff cannot be held to be a breach of the condition in the settlement. "Until he shall assign" has never been held to refer to a past assignment. The cases of *Manning* v. *Chambers*, 1 De G. & Sm. 282, and *Seymour* v. *Lucas*, 8 W. R. 599, 1 Dr. & Sm. 177, depend on the intention which the court held to be expressed. There is no such expressed intention here. [LINDLEY, M.R., referred to *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, 40 W. R. Dig. 280.] Further, the settlement was voluntary, and cannot defeat the plaintiff's mortgage.

Warrington, Q.C., and *Sargant*, for the defendants P. A. Williams and J. W. Williams.—*Hopkinson* v. *Rolt* does not apply; the further advances here were not voluntary, the uncles were bound to make them. As to the priority of the settlement we submit that *Dearle* v. *Hall*, 3 Russ. 1, and *Loveridge* v. *Cooper*, 3 Russ. 30, show that the principle is that a mortgagee having neglected to give notice cannot complain if the mortgagor deals with his equity in favour of *bonâ fide* purchasers.

Butcher, Q.C., and *A. R. G. Jennings*, for the trustees of the settlement.

Bramwell Davis, Q.C., was only asked to reply as to the effect of *Hopkinson* v. *Rolt*, as explained in *Bradford Banking Co.* v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29.

Union Bank of Scotland v. *National Bank of Scotland*, 12 App. Cas. 53, was also referred to.

LINDLEY, M.R.—I agree in the judgment which Chitty, L.J., is about to read, but I wish to add a few words with regard to *Hopkinson* v. *Rolt*. A first mortgagee whose mortgage is taken to cover what is then due to him and also further advances cannot claim the benefit of his security for further advances in priority to a second mortgagee of whose mortgage he had notice before the further advances were made. This rule was ultimately established in the well-known case of *Hopkinson* v. *Rolt*. In that case the first mortgagee had not agreed to make further advances. We have to consider whether the same rule applies when he has agreed to do so. Kekewich, J., has held it does not. This point is of great general importance, and I have carefully considered it and have come to a conclusion different from that of the learned judge. *Hopkinson* v. *Rolt* was commented upon and explained by the House of Lords in *Bradford Banking Co.* v. *Briggs* and in *Union Bank of Scotland* v. *National Bank of Scotland*. The three cases show very clearly that the principle which underlies the rule established in *Hopkinson* v. *Rolt* is simply this, that an owner of property dealing honestly with it cannot confer upon another a greater interest in that property than he himself has. The rule rests on no technicality of English law, it is based on the plainest good sense, and it is as much the law of Scotland as the law of England. When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it and create another mortgage subject only to the first. Nor can anyone who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has. On the other hand, the first mortgagee has no right to restrain the mortgagor from borrowing money from someone else and from giving him a second mortgage subject to the first. Even if the first mortgagee has agreed to make further advances on the property mortgaged to him the mortgagor

is under no obligation to take further advances from him and from no one else, and if the mortgagor chooses to borrow money from someone else and to give him a second mortgage the mortgagor thereby releases the first mortgagee from his obligation to make further advances. Whatever prevents the mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagor from his obligation to make them. A plea of exoneration and discharge before breach would be a good defence at law to an action by the mortgagor against the first mortgagee for not making further advances. If, notwithstanding his release, the first mortgagee makes further advances with notice of a second mortgage he is in no better position than anyone else who does the like.

For these reasons I have come to the conclusion that the rule laid down in *Hopkinson* v. *Rolt* does apply to the advances made by the uncles to their nephew after they had notice of the plaintiff's mortgage.

As regards the rest of the case I cannot usefully add anything to the judgment of my brother Chitty, L.J., which I have read and in which I concur.

CHITTY, L.J.—This appeal is by the plaintiff and the defendant Temple against parts of the judgment of Kekewich, J. It raises two principal points—first, whether the defendants P. A. Williams and J. W. Williams (whom I will call the uncles) are entitled to tack to their security the advances made by them to the defendant Walter Williams, their nephew, after the 15th of February, 1897, the date when the uncles first had notice of the plaintiff's security. The plaintiff by his pleading claimed priority over the mortgage to the uncles. But at the trial it was admitted that the uncles must have priority for all advances made by them up to the 15th of February, 1897, and this is also admitted by the notice of appeal. The second point relates to the question whether the plaintiff is entitled to redeem the uncles' mortgage, and, if he redeems, to a judgment over for foreclosure against the trustees of the settlement made contemporaneously with the mortgage to the uncles.

There is no dispute between the parties on the facts. [His lordship gave a short summary of the facts, and continued:] The judgment under appeal is to the following effect: First, it declares that the uncles' mortgage, including all sums advanced and to be advanced under the covenant in the settlement, and also the settlement itself, have priority over the plaintiff's mortgage, and dismissed the action with costs as against the uncles and the trustees of the settlement. It includes, therefore, in the uncles' priority, not merely (*a*) the sums which the uncles had advanced up to the 15th of February, 1897, but (*b*) also sums advanced subsequently to that date down to the judgment, and (*c*) all sums which they might thereafter advance under the covenant. Further, it excludes the plaintiff from any right of redemption. Secondly, it goes on to declare that by virtue of the plaintiff's mortgage made before the date of the settlement the life interest of the nephew under the settlement had determined and the discretionary trust had come into operation. And thirdly, it makes a foreclosure decree against the remaining defendants only—namely, the nephew and the defendant Temple, intended apparently to be confined to the policy of assurance although not so confined in express terms.

Now, on the first point there arises a question of considerable general importance. It is this. When a mortgagee is seeking to tack advances made by him after notice of a subsequent incumbrance, is the principle of *Hopkinson* v. *Rolt* excluded by the circumstance that the mortgagee has entered into a covenant to make the advances. In *Hopkinson* v. *Rolt* there was no such covenant, and the subsequent advances which the mortgagee was not allowed to tack were merely voluntary. In this respect the case before us differs. *Hopkinson* v. *Rolt* was considered by the House of Lords in *Bradford Banking Co.* v. *Briggs* and in *Union Bank of Scotland* v. *National Bank of Scotland*. In *Bradford, &c., Co.* v. *Briggs*, a limited company had stipulated for a "first and permanent lien" on its shares for any money which might become due to it from a shareholder. The banking company, with notice of this agreement for a lien, made advances on shares. The shareholder subsequently became indebted to the company, and the company claimed priority for these subsequent debts incurred after notice given by the bank of their security, and they contended that the bank, knowing the terms on which the shares were issued, and taking with notice, could not set up their charge as against the company. This contention was negatived by the House of Lords. The principle on which these decisions are founded appears to me to be that a mortgagee cannot obtain a charge on property which is no longer the mortgagor's to charge, and which the mortgagee knows at the time when he makes his further advance is no longer the property of the mortgagor. No charge arises for a further advance until it is actually made. This principle is plain and simple, and is based on natural justice and fair dealing. If this be the principle (which I think it is), the covenant to make further advances creates no difficulty, and for this reason: the covenant is to make the further advance on the security of the property, and inasmuch as the mortgagor has by his own act deprived himself of the power to give the stipulated security, no action for damages would lie on the covenant. It is hardly necessary to add that no action lies for specific performance of any agreement to make a loan. The result, then, thus far is that the uncles are not entitled as against the plaintiff to tack any advance which they made to the nephew after the 15th of February, 1897.

On the second point the question is whether the plaintiff is entitled to redeem the uncles' security. I cannot entertain any doubt on this question. I think he is, not merely because he is a person deriving title from the nephew under the express words of the proviso for redemption in the uncles' mortgage deed, but because he is plainly the second incumbrancer on the nephew's interest under the will. Then there arises the question whether, if he redeems the uncles' mortgage, he is entitled to a foreclosure decree against the trustees of the settlement, who represent in this action all the persons claiming beneficially under the trusts of the settlement other than the nephew himself, who, although he was properly served and put in a defence, did not appear at the trial. The uncles are not beneficiaries under the settlement. The trustees contend that the true effect of the settlement and the mortgage to the uncles is that the uncles purchased the nephew's life interest under the will for value without notice of the plaintiff's security and then settled the interest thus purchased. But the answer to this contention is to be found in the deeds themselves. The contention is inconsistent with the form and substance of the deeds. They contain no trace or suggestion of any such purchase; the settlement is not made by the uncles, nor by their discretion as beneficial owners; the settlor is the nephew and the nephew alone. This is clearly expressed on the face of the settlement. The consideration for the settlement is another matter. The consideration was the then present advance and the conditional covenant by the uncles to make further

advances for the nephew's maintenance. It was for this consideration that the nephew agreed that he should make the settlement. All that he could effectually settle, as against the plaintiff and the defendant Temple, was his own interest, which was, as he knew, subject to the securities which he had created in their favour. It is noticeable that, although in the mortgage to the uncles he assigns "as beneficial owner," which, under the Conveyancing Act, imports all the usual mortgagor's covenants, including that against incumbrances, he assigns in the settlement "as settlor," which imports merely a covenant for further assurance. He therefore does not covenant in the settlement that his interest which he settles is free from incumbrances. This fortifies the conclusion (which I think is otherwise plain) that he settled merely his interest, whatever it was. The settlement, therefore, is of no validity against the plaintiff. The plaintiff, if he redeems the uncles' mortgage, is consequently entitled to the usual decree for foreclosure against the trustees and the defendant Temple and the nephew for what the plaintiff pays to the uncles on redeeming and for what is due to the plaintiff under and by virtue of his own security.

In these circumstances the question whether the nephew has forfeited his life interest under the settlement becomes comparatively immaterial. It was a question of importance according to the view which the learned judge took. Now, it is material only on the question whether the nephew should be let in to redeem under that part of the judgment which relates to foreclosure by the plaintiff. It is an important question between the nephew and the other beneficiaries under the settlement. The language of the trusts and of the covenant for future advances which is contained in the settlement itself is identical. It points to the future only, it is "until he shall assign or incumber" and so forth. These words must have the same meaning in the trusts and in the covenant. This was admitted at the bar, and was rightly admitted. If the covenant had stood alone there could be no question that the words of futurity could not be construed as relating to the past. Words which grammatically refer only to the future have been construed in a settlement of this kind made by will or otherwise as including the past in order to give effect to the intention manifested. It is sufficient to refer to *Metcalfe* v. *Metcalfe*. There is no authority applying any such doctrine to the case of a condition in a covenant. In the present case there is a recital in the settlement that the nephew had created "certain charges" (without specifying what they were) on his interest under his father's will. In the face of this recital it seems to me that it cannot be held that there was an intention to make past charges a ground of forfeiture. Any such supposed intention is directly negatived. There is no obligation laid upon the nephew to apply the money which he obtained from his uncles in paying off the prior charges. If those charges formed a ground of forfeiture then the life interest of the nephew ceased the moment it arose and the covenant never became operative.

With regard to the costs I think that the incumbrancers should add their costs of the action, including the costs of appeal, to their securities. This is the general rule when a case of disputed priorities arises out of the acts or conduct of the mortgagor. The plaintiff offered to redeem before suit, but he confined his offer to the original advance by the uncles. He withdrew his offer by claiming priority in his statement of claim. Still he asked to have the priorities ascertained and offered to redeem if he had not the first security.

As to the claim of the defendant Temple who joins in the appeal, the facts are not sufficiently before us to enable us to decide anything specifically as to his rights. By his defence he submitted to act as the court should direct. The question (if it arises) between him and the uncles as to their right to tack as against him their subsequent advances will depend on the time when he first gave notice of his security. But any such question is one between co-defendants, and therefore one which the court does not decide at the trial unless it involves any right of the plaintiff, which is not the case here, or unless the defendants concur in asking for a decision. Any question between the uncles and the trustees of the settlement as to the uncles' right to tack their advances made after the 15th of February, 1897, as against the trustees is also a question between co-defendants, but it may not be improper to state my opinion that those advances clearly have priority over the settlement.

The order will be to the following effect: The judgment of Kekewich, J., should be discharged. There must be a declaration of the priority of the uncles' security in accordance with what I have above stated. Then there must be the usual redemption decree ascertaining what is due to the uncles under and by virtue of their security for their original advance and their subsequent advances down to the 15th of February, 1897, including their costs as mortgagees and their costs of the action and the appeal. If the plaintiff does not redeem he will stand foreclosed, and his action will be dismissed in the usual manner. In the event of the plaintiff redeeming, he will have a foreclosure decree over against the trustees of the settlement, the defendant Temple, and the defendant the nephew for what the plaintiff pays to the uncles, and for what is due to him on his own security. Only one time should be limited for redemption, unless there is special reason. If there is any special reason it should be mentioned now. It does not seem necessary to work out the rights of the parties beyond what I have stated. Liberty to apply must be reserved, under which a further order can be made should it become necessary. There will, I apprehend, be no difficulty in drawing the order substantially in conformity with the above sketch. If any difficulty should arise it may be mentioned to the court before the order is passed.

VAUGHAN WILLIAMS, L.J., concurred.

Solicitors, *Weekes & Co.; Mackrell & Co.*, for *Wragge & Co.*, Birmingham; *Mann & Taylor.*

High Court of Justice.

Chan. Div. Kekewich, J. — Feb. 22.

In re LAING.
LAING *v.* RADCLIFFE. (*a.*)

Trustee — Investment — Loan to tenant for life upon personal credit without security—Liability of trustees.

Where the tenant for life under a voluntary settlement made by herself requested the trustees to exercise the power which by the settlement was given them of investing the fund upon personal credit without security, by advancing the moneys to herself upon such conditions,

Held, that the trustees were at liberty, in their dis-

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

cretion, to make the advance, being satisfied of the reasonable prospect of the moneys being recouped.

Keays *v.* Lane, 3 *Ir. Rep. Eq.* 1, 17 *W. R. Ch. Dig.* 168, *discussed and distinguished.*

Proposition in Lewin on Trusts (10*th ed.*), *p.* 335, *controverted.*

This was a summons taken out by Mrs. Charlotte Elizabeth Laing, widow, asking that the defendants A. N. Radcliffe and H. F. A. Hood, as trustees of an indenture of settlement dated the 25th of March, 1898, might be at liberty to advance upon loan to the plaintiff, upon her personal credit and without security, the whole or any part or parts from time to time of the funds subject to the trusts of the settlement.

The summons was heard in chambers.

The facts appear in the judgment below.

F. G. Champernowne, for the plaintiff.

W. S. Eastwood, for infant defendants.

Cur. adv. vult.

KEKEWICH, J.—For a reason which will presently appear, I have thought it right to give judgment in court in this case which came before me in chambers. It is a summons by the plaintiff Mrs. Laing, and asks for an order that the defendants, the trustees of a settlement of the 25th of March, 1898, may be at liberty to pay her, upon loan and upon her personal credit without security, the whole or any part or parts of the funds subject to the trusts of the settlements, and the question is whether the trusts of the settlement justify such an order. The settlement was made by Mrs. Laing when she was, as she still is, a widow. It was a voluntary settlement, and appears to have been made for the purpose of protecting the settlor against the importunities of her son. The subject-matter of the settlement was £750, which the trustees are directed to invest in their names in one of the modes there mentioned or upon such personal credit without security as the trustees or trustee shall in their or his absolute and uncontrolled discretion think fit. Then follows a power to vary the investments from time to time with the consent of the settlor during her life, and after her death at the discretion of the trustees who are directed to hold the trust fund upon trust for the settlor for life, then upon such trusts as she shall by will appoint, and in default of appointment upon trust for all or any of the children or child of Aaron William Laing, the only son of the settlor, who being sons attain the age of twenty-one years, or being daughters attain that age or marry. There is a power to purchase freehold, copyhold, or leasehold hereditaments, and to manage the same, and also a power to purchase furniture or other household effects for the use of the settlor, or to pay to her for the purposes aforesaid the trust fund or any part thereof, but so that the purchased furniture and effects shall be held upon the trusts declared of the trust fund. These powers are expressed to be exercisable only during the life of the settlor, and upon her request in writing. It is provided that the settlor may revoke the settlement at any time after the death of Aaron William Laing. I understood it to be stated to me in chambers that the £750 had been invested in one of the modes authorized by the settlement, but I cannot find this in the papers before me, and my judgment proceeds on the footing that this is immaterial, which I think it is. Mrs. Laing asks the trustees to advance her the whole £750 without security, and the question is whether such an advance is authorized by the settlement or not. A distinction was endeavoured to be drawn between an original investment and a change of investment, on the ground that the latter required the consent of the settlor, and that she could not properly consent to a change resulting in an advance to herself, and reference was made to *Harrison* v. *Thexton*, 4 Jur. N. S. 550, 6 W. R. Ch. Dig. 77. I fail to see what bearing that case has on the present, or to find any reason why the trustees should not realize an existing investment and advance the money to the settlor with her consent, if in truth they could have advanced it before investment. The distinction, as already stated, is to my mind immaterial. The question whether an advance to the lady is within the powers of the settlement or not, is one of a different character. If no authority had been referred to, I should have had no hesitation in saying that it was authorized, but reference was made to a passage in Lewin on Trusts (10th ed.) p. 335, which is adverse to this view, and it was for this reason that I determined to give judgment in open court. The statement in Lewin is this: "And trustees having a power with the consent of the tenant for life to lend on personal security, cannot lend on personal security to the tenant for life himself." In support of this proposition a note refers to *Keays* v. *Lane*, 3 Ir. Rep. Eq., 17 W. R. Ch. Dig. 168, p. 1. The note also mentions that a tenant for life whose consent is necessary to the exercise of a power for sale by trustees may purchase from the trustees. This, no doubt, is correct, as will be seen from the case of *Dicconson* v. *Talbot*, 19 W. R. 138, L. R. 6 Ch. App. 32, but the suggestion is that the advance on personal security is not governed by the same considerations. My opinion apart from authority being what I have already mentioned, I must examine the authority cited to see whether it supports the proposition in the text. *Keays* v. *Lane* was a suit against a trustee charging him with breach of trust by lending part of the trust funds to the tenant for life. The breach of trust and the liability of the trustee for it was admitted, and the question of substance was whether the trustee was entitled to impound for his benefit the interest of the tenant for life at whose instance and for whose benefit the breach of trust had been committed. The Lord Chancellor held that the trustee was so entitled, and in truth for the present purpose there is nothing more in the case. It was argued by the counsel for the petitioners that the trustees committed a breach of trust in lending part of the trust fund to the tenant for life, and that such a loan was not authorized under the power to invest on personal security. The Lord Chancellor does not expressly notice this argument. I do not think he can be taken to be referring to it when he says, on p. 6, that the breach of trust consisted in the calling in of the trust fund of £5,000 in the year 1845, and putting it out not on proper security, but as a loan to Samuel Keays, who had the life interest in it, and on whose insolvency in 1849 it became lost and irrecoverable; nor can I see that the authorities cited by counsel in support of that argument (to which I have referred) do really support it. The truth is that the real breach of trust was, and was admitted to be, the advance to a man—namely, Samuel Keays, the tenant for life, who, if not in embarrassed circumstances at the time of the advance, was at any rate a man of no means, or one to whom such an advance could not prudently be made. The advance on personal security there authorized was, like the advance on personal security here, treated by the settlement as a mode of investment, and it was not intended that the trustees should pay the trust money away to the tenant for life or anyone else without a reasonable expectation of recovering it when wanted, and in that

case the trustees took a bond from Samuel Keays with a policy of assurance on his life as collateral security. It would be going too far to say that Samuel Keays' tenancy for life or its determinable character had nothing to do with the decision in that case, for it certainly had; but on the other hand I do not think that it is a sufficient or indeed any authority for the proposition in Lewin on Trusts.

Being uncontrolled by authority, and seeing no objection on principle, I hold that the trustees are at liberty to advance the whole or any part of the trust propetry, whether in their hands invested or with the consent of the settlor obtained by realizing investments, to her on her personal security. This answers the question asked by the summons in one sense; that is, expresses the opinion by the court that the trustees are at liberty to advance the trust fund, realizing investments, if necessary, for that purpose, to the tenant for life on her personal security, that is, a bond or note of hand, if they think fit. This, however, I understand, will not content the trustees, who wish to know not only whether they may, if they think fit, but whether they ought under the circumstances of the case to make the advance. In this case I am not prepared on the present materials to answer the question. There is evidence directed to show that it is to the advantage of the family, including in that term all that can in any event derive benefit from the settlement, that the advance should be made, but I am by no means sure that such evidence can properly be regarded, and, at any rate, I am not disposed to give much weight to it. An advance on personal security differs, of course, materially from an investment in any other of the modes authorized by the settlement and strictly it is not an advance on security at all. Nevertheless, I think that what is contemplated is an advance by way of loan with the prospect of the money being repaid and being hereafter available for the beneficiaries under the settlement. It was neglect in this respect which constituted a breach of trust in *Keays* v. *Lane*, and the trustees of this settlement would, I think, be guilty of a breach of trust if they advanced the money to the tenant for life without being satisfied that sooner or later it would be recouped to the settlement, or at least there was a reasonable prospect of this being done. For this purpose it would, of course, be necessary to consider, not merely the present position of the tenant for life, but also whether, by means of the proposed advance, she would probably improve that position and make it more likely that she would be responsible for such a sum. The evidence does not go to this. If the trustees are willing to make the investigations themselves, and forming their own conclusion to act on their own responsibility, there is no occasion for me to do more than say that they are at liberty to make the advance out of the trust fund if they think fit, but if they desire my sanction they must produce further evidence on the lines above indicated, and the summons must be adjourned for further hearing in chambers on that point. The costs of the tenant for life and the trustees, to be taxed between solicitor and client, must in any event come out of the trust fund.

Solicitors, *Radcliffe, Cator, & Hood.*

Chan. Div. } Romer, J. } Dec. 15; Jan. 24.

In re AN ARBITRATION BETWEEN DAVID AND MATTHEWS. (*a.*)

Partnership—Sale of business to surviving partner—"Effects and securities"—Goodwill.

Co-partners carried on business under the style of L. & D. until 1876, *when L. died. D. then entered into a partnership with M., under articles which,* inter alia, *provided that the business should be carried on under the old style of L. & D., and that in the event of the decease of either partner the survivor might purchase the whole business, and for such purpose a general account of the firm's property should be made, including all the "effects and securities," and the value thereof should be calculated as at the date of such decease.*

Upon the death of D., the parties interested appointed the same person to be arbitrator and appraiser, and this person stated a special case to the court under section 19 *of the Arbitration Act,* 1889, *for a decision as to whether he ought to include the goodwill of the firm in his valuation, and, if so, what was the proper footing on which to value it.*

Held, that the goodwill ought to be included in the valuation, and that it ought to be valued on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not have the right to solicit customers of the old firm, or carry on business under the style of the old firm.

The law with regard to the disposal of goodwill on the dissolution of a partnership, and as to surviving or continuing partner's right to set up a rival business, discussed and explained.

Special case under section 19 of the Arbitration Act, 1889.

M. Letricheux and Edmond David carried on business in Swansea as coal merchants and commission agents under the style of Letricheux & David up to the death of Letricheux in December, 1876.

Edmond David then took into partnership R. J. Matthews under articles dated the 23rd of March, 1877. The old style of Letricheux & David was continued. Article 8 provided "that in case of the death of one of the partners a general account of the position shall be made, including all effects and securities of whatsoever nature that they possess, and the value of such effects and securities be estimated as at the date of such decease. Two appraisers shall be appointed to fix the value of the effects and securities, one by the surviving partner the other by the lawful heirs of the deceased, and if these two do not agree they must appoint a third person, whose decision shall be final."

The partnership created by the articles of the 23rd of March, 1877, was continued and renewed as provided for in those articles and expired on the death intestate of Edmond David in March, 1896.

Soon after this it was agreed between his widow and administratrix, Louise David, and Richard John Matthews that one R. G. Cauker should act as sole appraiser under article 8, and subsequently it was also agreed that he should also act as sole arbitrator in accordance with article 10.

Before him, on behalf of the deceased partner's administratrix, it was contended that the business had a goodwill and that it ought to be included in the valuation, and evidence was tendered as to whether or not it was the custom of the trade to value goodwill as between the representatives of a deceased

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

partner and a surviving partner; but this, with certain other evidence, the arbitrator refused to receive.

On behalf of the continuing partner, R. J. Matthews, it was contended that there was no goodwill, and, even if there was, it ought not to be valued.

The questions for the opinion of the court were:

(1) Whether under article 8 the arbitrator ought to consider the question of goodwill, and, if any, value it as attached to the business at the date of the death of David.

(2) Whether or not in considering the question of goodwill he should appraise the value, if any, thereof on the footing that if it were sold, R. J. Matthews would be at liberty to carry on a rival business but without any right to solicit any person who was a customer of the old firm prior to the death of Edmond David to continue to deal with the said R. J. Matthews or not to deal with the purchaser; and whether or not he should appraise such value, if any, on the footing that if it were sold, the said R. J. Matthews would not be entitled to carry on business under the name of Letricheux & David or on what other footing he should appraise such value, if any.

(3) Whether the evidence tendered was rightly refused.

Farwell, Q.C., and Napier, for Madame Louise David.

Christopher James, for R. J. Matthews.

Cur. adv. vult.

Jan. 24.—ROMER, J.—With regard to the first question submitted for my opinion I do not think there is any real difficulty. Article 8 of the partnership agreement constituted in substance a contract for sale of the partnership assets to the surviving partner. This being so, then on principle, and on the authorities cited, I am of opinion that as the goodwill formed part of the effects of the partnership at the death of Edmond David it ought to be valued. The authorities were so fully cited and discussed in the recent case of *Jennings* v. *Jennings*, 46 W. R. 344, [1898] 1 Ch. 378, before Stirling, J., that I need not again review them. And, indeed, I do not suppose that the surviving partner in the case before me would admit that the share or interest of the deceased partner in the goodwill had not passed to him, bearing in mind what the effect of such an admission might be. I ought, perhaps, to add, with reference to an argument adduced to me based on the special provisions of article 9 of the partnership agreement, that I cannot gather from that article that the share of profits payable to the representatives of the deceased partner was given in lieu or payment of that partner's share of goodwill. The more natural inference is that the share of profits was given in lieu of interest on the deceased partner's portion allowed to remain in the business.

With regard to the second question I feel more difficulty. I think that the goodwill ought to be valued on the footing of the consideration of what its value would have been to the partnership if there had been no contract between the partners that the surviving partner should purchase the share of the deceased partner in the partnership effects and securities, and, therefore, on the footing that if it were sold the surviving partner would be at liberty to carry on a rival business; but also, I think, on the footing that he could not use the name of the partnership firm of Letricheux & David, and would not have the right to solicit the old customers of the firm. I will take the case of a partnership of the ordinary kind determined by the death of one partner, and will consider what the rights of the deceased partner would be. The goodwill of the business would be an asset, and might well be the most valuable asset of the partnership. The executors, therefore, in the absence of special provisions in the partnership contract, would be entitled to require that the goodwill should be sold together with the other assets for the purposes of division between the executors and the surviving partner; if the surviving partner refused to carry out this implied contract, then the executors could by an action in the Chancery Division obtain an order for the sale of the goodwill under the direction of the court. This is now well settled, though at one time it was considered and had been decided (see *Hammond* v. *Douglas*, 5 Ves. 539) that the goodwill survived for the benefit of the living partner. And in the meantime pending the sale I think the surviving partner would not be allowed to appropriate to himself the goodwill which belonged to the partnership (see for example the case of *Turner* v. *Major*, 10 W. R. 243, 3 Giff. 442). In that case, which was one of dissolution by agreement between living partners, there was a special agreement that the goodwill should be sold. But I can see no difference in principle, as far as concerns the point I am now dealing with, between a special contract that the goodwill should be sold and the contract implied by the court in ordinary cases of partnership: see also *Taylor* v. *Neate*, 37 W. R. 190, 39 Ch. D. 538. In the case of *Lewis* v. *Langdon*, 7 Sim. 421, there are some observations by Shadwell, V.C., which would seem to imply that he regarded a surviving partner as being under an obligation to the legal personal representatives of a deceased partner to preserve the goodwill, but those observations must, I think, be regarded as based on the above-mentioned case of *Hammond* v. *Douglas*, which at that time was probably regarded as representing the law on the subject of goodwill. If, then, it is not permissible for a surviving partner to appropriate to himself the goodwill of the partnership business, it follows that he ought not to do—and in case of necessity would be restrained by the court, pending a sale of the goodwill for the benefit of the partnership, from doing—any act in excess of his rights which, if not stopped, would enable him to obtain the goodwill or any part of it. For example, though a surviving partner is within his rights in carrying on a similar or rival business, he could, in my opinion, be restrained from carrying on that rival business in the name of the partnership firm so as to lead to the belief that he was carrying on the partnership business, or so as otherwise to appropriate to himself the goodwill of that business. In saying this I am not considering special cases of difficulty which might arise if the name of the surviving partner was exactly the same as that of the partnership firm and he was doing nothing else which might injure the goodwill beyond carrying on a similar business in his own name, but I am dealing only with ordinary cases. With reference to certain cases which at first sight might appear to conflict with the view I have expressed, it will be found on examination that those cases, so far as not overruled, do not really conflict. I need not again refer to the cases of *Hammond* v. *Douglas* and *Lewis* v. *Langdon*, or refer in detail to cases or observations in cases (as in *Robertson* v. *Quiddington*, 28 Beav. 529) based on the erroneous supposition that *Hammond* v. *Douglas* was a binding authority. As to the case of *Webster* v. *Webster*, 3 Swans. 490 n., that was not one where the executors of the deceased partner were seeking to protect the goodwill, but was an application by them to restrain the surviving partner from using the name of the firm based merely on the ground (obviously untenable) that thereby the estate of the deceased partner might be made liable. With regard to the case of *Banks* v. *Gibson*, 13 W. R. 1012, 34

Beav. 566, it was one, according to the view of the judge who decided it, where co-partners had agreed on dissolution to divide the assets, including the goodwill, so as to allow either partner to use the name of the partnership firm. I know of no other case bearing on the point which calls for special comment. It is true that I cannot find any case directly establishing the right of the executors of a deceased partner, in order to protect the goodwill, to an injunction to restrain the surviving partner from carrying on business in the name of the partnership firm. But that is not extraordinary when it is considered that up to comparatively recent times it was considered that the right to the goodwill belonged to the surviving partner, and that it is only recently that the importance of goodwill and the necessity of preventing its improper appropriation has been fully recognized, and I may refer, as illustrating this, to the very recent important decision of the House of Lords in the case of *Trego* v. *Hunt*, 44 W. R. 225, [1895] A. C. 7. And bearing in mind that in ordinary cases of dissolution of partnership by death of one partner there is implied a right to have the goodwill sold, which would have to be carried out by an assignment of the goodwill to the purchaser; it is pertinent to refer to what James, L.J., said in *Levy* v. *Walker*, 27 W. R. 370, 10 Ch. D. 436, that without any doubt on his part the assignment of the goodwill of a business conveyed the right to use the name of the business sold, and the exclusive right to use that name as between the vendor and purchaser of that business.

It further appears to me to follow, that in considering the value of the goodwill it should be appraised on the footing that the surviving partner would not be at liberty to solicit the customers of the old firm; for if the goodwill had been sold in the ordinary way on the death, and had been assured to the purchaser, it is clear since the case of *Trego* v. *Hunt* that the surviving partner, who would have been one of the vendors, could not injure the goodwill sold by soliciting the customers of the old firm. And see the case of *Jennings* v. *Jennings*, above referred to, and while referring to that case I desire to add a few observations on the point mentioned by Stirling, J., at pp. 389 and 390 of the report of that case which occasioned him some doubt. In cases of sale of a business by the court for the purpose of winding up a partnership, it has been the practice to provide by the particulars of sale that the sale would not prevent the persons previously interested in the business or their representatives from carrying on a like business. But that provision is inserted whether the dissolution of partnership occurs by the death of a partner or in the lifetime of all the partners. And the reason of its insertion is to prevent a purchaser being misled into supposing that he is buying, or that the vendors are going to sell to him, anything beyond what would be implied by the law by an assignment of the goodwill of the business: see the observations of Turner and Knight-Bruce, L.JJ., in *Johnson* v. *Helleley*, 13 W. R. 38, 2 De G. J. & S. 446. The provision is not intended to give any right to the partners or their representatives to appropriate to themselves the benefit of the goodwill which has to be sold. It merely points out, so as to prevent any mistake or misunderstanding, that the sale of the goodwill of a business does not in itself prevent vendors from carrying on a like business; but the provision does not provide, and is not intended to provide, that the like business may be carried on by the vendors in a manner incompatible with their position as vendors. For example, in case of a sale on dissolution between two living partners, whose names differ from the name under which the partnership business had been carried on, the provision in question would not entitle either partner to carry on a like business in the partnership name so as to lead to the belief that the business was the same as or a continuation of the partnership business. And in the same way, in my opinion, the provision would not entitle one of the partner vendors to injure the goodwill sold by soliciting the customers of the partnership firm.

With regard to the case of *Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145, also referred to by Stirling, J., in *Jennings* v. *Jennings*, if the whole of the agreement in question in that action be looked at, and the circumstances under which it was entered into be considered, I think it is clear that the parties must have intended that the defendant should be authorized to carry on business in the same way as any stranger might do, and certainly that was the view that was taken by the Court of Appeal, and upon which its decision was based.

Before parting with the case which I have now to decide, it appears to me that there is another and a shorter way of dealing with it which leads to the same conclusions as those above pointed out. By the partnership agreement Edmond David and R. J. Matthews contracted that the partnership assets, which would include the goodwill, should on the death of one be sold to the survivor. For the purpose of valuing the goodwill, no difference can properly be drawn between a contract to sell to one of the partners and a contract to sell to a stranger. If the partners had contracted that on the death of one the goodwill should be sold to a stranger, the stranger buying and taking an assignment of the goodwill would have been entitled to prevent the survivor of the partners from carrying on a like business in the name of the firm "Letricheux & David," and from soliciting the customers of the firm.

With regard to the third question submitted for the opinion of the court, it is clear that the arbitrator was right in not receiving the evidence mentioned by him.

Solicitors, *Riddell, Vaizey, & Smith*, for *W. Robinson, Smith, Son, & Lewis*, Swansea; *Paul E. Vanderpump & Eve*, for *Ingledew, Sons, & Vanderpump*, Swansea.

Q. B. Div.
(Lawrance and Channell, JJ.) Feb. 13.

REG *v.* JUSTICES OF BUCKINGHAMSHIRE. (*a.*)

Vaccination—Justices—Certificate of conscientious objection—Evidence—Certificate of the birth of the child—Vaccination Act, 1898 (61 & 62 *Vict. c.* 49), *s.* 2.

Justices have power to make a rule that they will not entertain an application for a certificate of conscientious objection under section 2 of the Vaccination Act, 1898, *unless and until, where it is possible, a certificate of the birth of the child in respect of whom the application is made is produced to them.*

Rule *nisi* calling on the justices for the county of Buckingham to show cause why they should not hear and determine an application for a certificate under section 2 of the Vaccination Act, 1898.

On the 16th of November, 1898, Arthur Bedford applied to the justices for a certificate of conscientious objection under section 2 of the Vaccination Act, 1898, in respect of his two children. He was asked if he produced the certificates of the birth of the children. He did not produce such certificates, but tendered himself and his wife to give evidence as to

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the births of the children. He also produced the children themselves. He was thereupon told that the application would not be granted unless and until the birth certificates were produced.

Two similar applications had been made by the applicant upon two previous occasions in respect of the same children, both of which applications had been refused by the justices, and for the same reason.

Both the children were born before the 12th of August, 1898, the date of the passing of the Vaccination Act, 1898.

The justices in an affidavit filed by them stated that at a meeting of the justices they had made a rule that no application for a certificate under section 2 of the Vaccination Act would be entertained by them unless and until a certificate of the birth of the child in respect of whom the application was made were produced to them.

Section 2 of the Vaccination Act, 1898, provides as follows: "(1) No parent or other person shall be liable to any penalty under section 29 or section 31 of the Vaccination Act, 1867, if within four months from the birth of the child he satisfies two justices, or a stipendiary police magistrate, in petty sessions, that he conscientiously believes that vaccination would be prejudicial to the health of the child, and within seven days thereafter delivers to the vaccination officer for the district a certificate by such justices or magistrates of such conscientious objection. (2) This section shall come into operation on the passing of this Act, but in its application to a child born before the passing of this Act there shall be substituted for the period of four months from the birth of the child the period of four months from the passing of this Act."

Schultess Young, in support of the rule.—The evidence tendered by the applicant was the best evidence of the facts of the births of the children. The justices had no power, under the Act of 1898 or otherwise, to make a rule requiring the production of a birth certificate. The children having been born before the 10th of October, 1898, and the application having been made within four months from that date, it became immaterial to prove the precise date of the birth of the children. The effect of the rule made by the justices is to impose upon all applicants for a certificate the cost of obtaining a birth certificate.

LAWRANCE, J.—This rule must be discharged. The justices have adopted by far the most convenient manner of dealing with these applications in requiring the production of a certificate of the birth of the child. The birth certificate so produced would refer to the birth of the child in respect of whom the application was made, and then there could be no doubt in respect of what child the application was made and the certificate under section 2 of the Act granted. It is of great importance that the child should be identified both for the purpose of preparing the certificate and for the purposes of any future proceedings taken in respect of the child to whom it refers.

CHANNELL, J.—I am of the same opinion. The justices are entitled to require a certificate of the birth of the child, and to make a rule to that effect, unless some reason is shown why such certificate should not or could not be given. They require such certificate for the purpose of drawing up a proper order. If an application were made in respect of a child which was never registered or in respect of a child born out of the country, it is not suggested that the production of a birth certificate would be required.

Rule discharged.

Solicitor in support of the rule, *Alibone*, Cheverton.

Q. B. Div. (Lawrance and Channell, JJ.) — Feb. 3, 10.

REG. v. JUSTICES OF LONDON. (a.)

Poor rate—Non-payment—Issue of distress warrant—Right of appeal.

No appeal lies from the order of a magistrate directing a distress warrant to issue for non-payment of poor rates.

Rule *nisi* to the justices of London in quarter sessions to hear an appeal by the Palmerston Publishing Co. (Limited) against an order of the justices of the Strand Division issuing a warrant to levy by distress and sale of the goods of the company for non-payment of certain parochial rates.

The justices had refused to hear the appeal on the ground that there was no right of appeal from an order of justices issuing a distress warrant for non-payment of rates.

43 Eliz. c. 2, s. 6: "Provided always that if any person or persons shall find themselves grieved with any sess or tax, or other act done by the said churchwardens, and other persons, or by the said justices of the peace, that then it shall be lawful for the justices of peace, at their general quarter sessions, or the greater number of them, to make such order therein as to them should be thought convenient; and the same to conclude and bind all parties."

17 Geo. 2, c. 38, s. 4: "In case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor . . . or . . . by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor, or by any of his Majesty's justices of the peace; it shall and may be lawful for such person or persons . . . to appeal to the next general or quarter sessions of the peace."

Section 7: "And for the more effectual levying money assessed for the relief of the poor, be it enacted by the authority aforesaid, that the goods of any person assessed, and refusing to pay, may be levied by warrant of distress, not only in the place for which such assessment was made, but in any other place within the same county or precinct; and if sufficient distress cannot be found within the said county or precinct . . . such goods may be levied in such other county or precinct by virtue of such warrant and certificate; and if any person shall find him or herself aggrieved by such distress as aforesaid, it shall and may be lawful for such person to appeal to the next general or quarter sessions of the peace for the county or precinct where such assessment was made, and the justices there are hereby required to hear and finally determine the same."

J. P. Grain showed cause against the rule.

J. B. Matthews in support of the rule.

The following cases were referred to in the course of the arguments: *Reg.* v. *Justices of Kent*, 16 L. T. Rep. 672, 15 W. R. C. L. Dig. 67; *Reg.* v. *Forrest*, 3 T. R. 38; *Reg.* v. *Justices of Yorkshire*, 3 T. R. 776; *Reg.* v. *Justices of Devon*, 1 M. & S. 411; *Ricardo* v. *Maidenhead Local Board of Health*, 5 W. R. 691, 27 L. J. M. C. 73.

Cur. adv. vult.

Feb. 10.—The judgment of the court was read by

CHANNELL, J.—In this case Mr. J. B. Matthews obtained a rule *nisi* for a *mandamus* to the justices of the County of London sitting at the North London Quarter Sessions to hear and determine an appeal

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

which they had refused to hear on the ground that in their opinion there was no right of appeal in the case. Cause was shown against the rule being made absolute before us, and we have now to say whether the rule should be discharged or made absolute. The appeal was against an order of justices directing a distress warrant to issue for recovery of poor rates and other rates. The appellants alleged that they had not been rated, and that their name, so far as it appeared on the rate books at all, had been placed there subsequently to the allowance of the rates. No distress had actually been levied, and that being so section 7 of 17 Geo. 2, c. 38, could not be relied on as giving a right to bring the present appeal, as that gave a right of appeal only to persons aggrieved by a distress. Mr. Matthews, in his argument in support of his rule, admitted that he could not rely on that 7th section (which, he contended, only gave a right of appeal where the distress was levied outside the county), and he admitted that the only statute he could rely on was the 43 Eliz. c. 6, s. 6. He further admitted that he was unable to find any reported case in which there had been an appeal, successful or unsuccessful, under 43 Eliz. against the issuing of a distress warrant. In none of the books of practice of quarter sessions (most of which contain lists, purporting to be exhaustive, of all appeals which do lie to quarter sessions) is there any mention of an appeal against a warrant of distress. It seems to us that it would be a very strange thing, if there really is under the statute 43 Eliz. such a right of appeal, that there should be no trace of such a right in the books during the period of nearly 300 years which has elapsed since the statute passed. Mr. Matthews' answer to this was that until the Act of 17 Geo. 2 there was no limit of time for the appeal against a rate, and that in all probability appeals were not presented until an effort was made to levy the money, and then the appeal would be against the warrant, the rule, and all the proceedings together. Further, as to the period since 17 Geo. 2 he pointed out that an action could generally be maintained in the cases in which according to his contention an appeal lay against the warrant, and that most people would prefer an action in which they got damages to a mere appeal. There is a good deal of force in this, but we think it hardly accounts for the complete absence of any trace of such an appeal. We think that the explanation is this. The statute of Elizabeth in general terms gives an appeal against any act done by justices. It does not, however, provide any machinery for the making of a rate, or for the time or manner of any appeal. Many years seem to have elapsed before any definite course of procedure was made obligatory by the Legislature. Ultimately, when no doubt great diversity in practice had arisen, the statutes of 17 Geo. 2, c. 3, and c. 38 were passed, which do provide some machinery both for the making of rates and for the appeals. From that time other Acts of Parliament have from time to time been passed as to the mode of making rates and other similar matters. The result is that, although the statute of Elizabeth remains unrepealed, and is the foundation of the law of rating, its general provisions have been superseded by the particular provisions of subsequent legislation. Just as the manner of making a rate, which was left entirely undefined in the statute of Elizabeth, has been defined by subsequent legislation, so the mode, time, and manner of making the appeals, which in general terms were authorized by the statute of Elizabeth, have been defined, and at the present time the right of appeal given by the statute of Elizabeth exists only in the way defined by subsequent legislation. The mode of appealing against a rate is well defined, and need not now be considered. The mode of appealing against the act of justices in authorizing the money to be levied by distress is by appealing under section 7 of 17 Geo. 2, c. 38, against the distress. It has been suggested that that section does not cover the whole ground, as it only gives a right of appeal where the distress is outside the place of assessment, and that it presupposes the existence of a right of appeal when the distress is within the place of assessment, and that that appeal must be under 43 Eliz. We do not think that is so. Section 7 refers to distress first in the place of assessment; secondly, outside that place but within the same county or precinct; thirdly, outside the county. It goes on to say that any person aggrieved by "such distress as aforesaid" may appeal. We think that means aggrieved "by any such distress as aforesaid," and is not confined to "such distress as last aforesaid." There is, therefore, an appeal under this section whenever a distress is levied, either in the place of assessment or elsewhere, but of course there is no appeal under it against the mere act of issuing the warrant unless it is followed up by distress. This enactment appears to us to define the mode of appealing against the distress warrant and to prevent an appeal unless there had been a distress. We were referred to a case, *Reg.* v. *Justices of Devon*, 1 M. & S. 411, as showing that when an appeal was given against the act of justices (as in the Highway Act, 13 Geo. 3, c. 78, which was the matter to be considered in that case) the appeal might lie against the warrant for the distress. The case itself does not even show that. Lord Ellenborough's judgment seems to treat it as possible, but what he held was that there was no real grievance until the distress, consequently that an appeal within four days after the distress though more than four days after the warrant was within four days of the cause of complaint, and Lord Ellenborough pointed out that although a warrant issues there may never be a levy, and therefore no real grievance. That case does not really help the appellant in this case.

The case of *Reg.* v. *Justices of Kent*, 16 L. T. Rep. 672, 15 W. R. C. L. Dig. 67, was also quoted. That was an appeal under 17 Geo. 2, c. 38, s. 7, and it only decided that there could be no appeal under that section on grounds applicable to an appeal against the rate. The decision is not that no appeal lay under that section when the distress was in the place of assessment, and it does not seem to us that either judge thought that was so. We think that we cannot hold there is now an appeal under 43 Eliz., from a justice issuing his warrant to levy a rate, except under the conditions and in the manner provided for by subsequent statutes, that is, after his distress has been levied. This seems entirely in accordance with all recorded practice. In the present case the warrant was issued to levy general district rate and sewers rate as well as poor rate, but no argument was addressed to us showing any special right of appeal as to these rates, and it seems that they are rates leviable by statute under one warrant, which if necessary is to be treated as if there were separate warrants, and which also are subject by statutes 18 & 19 Vict. c. 120, s. 161, amongst other things, to the same right of appeal as in the case of poor rate. The inclusion of these rates, therefore, does not alter the matter. Mr. Matthews, in arguing in support of the rule, suggested that the facts of the present case showed how desirable it was that there should be an appeal. That may be so, but as an appeal to quarter sessions is entirely statutory, it has little if any bearing on the question we have to decide. What we hold simply is that the appeal is premature before levy, and having

regard to the facts stated in the affidavits in this case, it is unlikely that if those facts cannot be altered there ever will be any levy on this warrant. If those facts are true there was no jurisdiction whatever to issue the warrant, and all concerned in the levy (except perhaps the subordinate officers) would be liable to an action if they act on it. In the result we come to the conclusion that the quarter sessions were right in refusing to hear this appeal, and the rule for a *mandamus* must be discharged.

Solicitors, *H. C. Barker & Son; I. C. & W. Isaacson.*

Q. B. Div.
(Day and Lawrance, JJ.) Jan. 13.

YABBICOM (*Appellant*) *v.* KING (*Respondent*). (*a.*)

Local government—Bye-laws—No power to set aside—Buildings.

A local authority empowered to make bye-laws is bound by those bye-laws, and has no power to sanction building plans not in accordance with them. They have no dispensing power, and any purported approval of plans contravening such bye-laws is inoperative and invalid. The approval must be a lawful, and not a mere actual, approval.

Case stated.

At a petty sessions at Bristol, an information was preferred on the 30th of March, 1898, by Thomas Henry Yabbicom, the appellant, against Edward King, the respondent, under section 35 of the Bristol Improvement Act, 1847, charging that the respondent unlawfully did erect a certain house contrary to the provisions of the said Act inasmuch as he omitted to build a parapet to the said house.

The facts proved at the hearing were as follows:

The house mentioned in the said information was erected by the respondent at Bell-hill, in the parish of St. George in the city and county of Bristol, at a date subsequent to the 31st of October, 1897, being the date of the commencement of the Bristol Corporation Act, 1897.

Prior to the commencement of the Bristol Corporation Act, 1897, the parish of St. George was situate in the urban district of St. George in the county of Gloucester, but by the provisions of that Act the said parish became part of the city and county of Bristol.

The said house was one of a continuous row of houses, and the walls separating the said houses from the adjoining houses on either side were party walls.

The respondent had not erected parapet walls on the said party walls, and had not carried up the said party walls above the roofs of the said adjoining houses.

The said house was erected in accordance with a plan deposited by the respondent with the Urban District Council of St. George before the 12th of June, 1896. The said plan did not comply with the 26th of the bye-laws made under section 157 of the Public Health Act, 1875, and then in force in the urban district of St. George, in that it showed that the party walls of the said house were not intended to be carried up above the roofs of the said adjoining houses as required by the said bye-law; but notwithstanding such non-compliance the said urban district council purported to approve the said plan on the 12th of June, 1896, which approval was endorsed on the said plan as follows:

"Saint George Urban District Council,
"Plan approved June 12th, 1896.
"(Signed) A. G. VERRIER,
"Presiding Chairman."

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The Bristol Improvement Act, 1847, enacts as follows:

Section 35.—And be it enacted that all separate side walls or party walls shall be well and closely lined up to the under side of the slates upon the roof of the building, and the parapets of the height and thickness as specified for party walls shall be built on such side walls or party walls.

Section 37.—And be it enacted that every parapet wall and every party wall hereafter to be erected within the city and county shall be carried up at least two feet above the slates or other covering of the roofs of the premises adjoining.

The aforesaid bye-laws of the urban district of St. George, dated the 4th of November, 1885, which were admitted in evidence, although objected to by the respondent, provide:

Section 26.—Every person who shall erect a new building shall cause every party wall of such building to be carried up nine inches at the least in thickness: (1) Above the roof flat or gutter of the highest building adjoining thereto to such height as will give in the case of a building of the warehouse class or of a public building a distance of at least three feet, and in the case of any other building a distance of at least fifteen inches measured at right angles to the slope of the roof or above the highest part of any flat or gutter, as the case may be.

The Bristol Corporation Act, 1897, enacts as follows:

Section 15.—All bye-laws, rules, and regulations and all orders (other than precepts) made by the urban district councils or the local authorities respectively (so far as they relate to the added area) under any Act of Parliament and in force at the commencement of this Act are hereby annulled, but all penalties incurred thereunder, and all forfeitures which have ensued by reason thereof, may be enforced and recovered by the corporation in like manner and in all respects as the same respectively might have been enforced and recovered by the respective councils and local authorities as the case may be, in case this Act had not been passed, and shall be carried by the corporation to the credit of the district fund. Provided that all plans of new streets and of new buildings within the added area approved by the urban district councils or the local authorities respectively before the commencement of this Act shall be valid for the period of two years after that date, but at the expiration of that period fresh plans of such new streets and new buildings as shall not at that date have been commenced shall be deposited for the approval of the corporation, which plans shall be in conformity with the bye-laws, rules, and regulations in force within the city.

Section 30.—(1) Except as by this Act otherwise expressly provided all the jurisdiction, powers, rights, privileges, authorities, immunities, and duties of the corporation as a municipal body, and of the council of the existing city, and any committee thereof acting in the execution of such enactments as are at the commencement of this Act in force within the existing city, and of the corporation as the urban sanitary authority for the district or any committee thereof, shall extend to and throughout the city, and all charters and enactments and all bye-laws, orders and regulations, lists of tolls, tables of fees and payments, and scales of charges at the commencement of this Act in force within and applicable to the existing city, or to the burgesses or inhabitants thereof, shall, subject to the provisions of this Act, extend and apply to the city and the inhabitants and burgesses thereof, until or except in so far as any of such bye-laws, orders, regulations, tolls, fees, payments, or charges may be repealed or altered.

The appellant contended that on the authority of *McIntosh* v. *The Pontypridd Improvement Committee*, 8 Times L. R. 128, 203, 40 W. R. Dig. 128, the approval by the Urban District Council of St. George of a plan contravening the bye-laws of the urban district of St. George was a nullity; that the proviso to section 15 of the Bristol Corporation Act, 1897, applied to cases where the bye-laws of the urban district of St. George differed from the bye-laws, rules, and regulations in force within the city and preserved for two years the right to build in accordance with approved plans complying with the bye-laws of St. George, but that it did not make valid a plan which had been illegally approved; that the case must be regarded as though no plan had been approved by the district council; that the respondent's house must therefore comply with the Bristol Improvement Act, 1847; and that by sections 35 and 37 of that Act the respondent was obliged to erect parapets on the party walls of his house and to carry up the said party walls at least two feet above the slates or other covering of the roofs of the adjoining premises.

The respondent contended that as the district council of St. George had in fact approved of the plan of his house, he was entitled under the proviso to section 15 of the Bristol Corporation Act, 1897, to build the house in accordance with the plan, and that the justices had no authority to inquire whether the plan did or did not comply with the bye-laws of the urban district of St. George, nor whether the approval of the plan was or was not valid.

The justices dismissed the information, as they were of opinion that the respondent's construction of section 15 of the Bristol Corporation Act, 1897, was correct.

They were also of opinion that sections 35 and 37 of the Bristol Improvement Act, 1847, did not make it obligatory to build parapets on party walls of buildings erected in the city, but merely required that, if any parapets were built, they should be of the height and thickness therein specified.

The question of law arising on the above statement of facts was whether the above construction of section 15 of the Bristol Corporation Act, 1897, and sections 35 and 37 of the Bristol Improvement Act, 1847, was correct.

Clavell Salter appeared for the appellant.

Eldon Bankes, for the respondent.

DAY, J.—I am clearly of opinion that the case of *McIntosh* v. *The Pontypridd Improvement Committee*, which is referred to in the special case, is not affected and controlled by these Acts. That case is quite rightly decided upon every point, both on principle and upon the authorities which are referred to in the judgment of Wright, J. It is clearly a binding authority upon us, and should have controlled the magistrates. I quite agree with Mr. Bankes that the Bristol Corporation are in no better and no different position from that in which the St. George's people were as to exercising the authority. They are in no better and no different position whatever. I am clearly of opinion that the St. George's Urban District Council would have been entitled at any time to take advantage of the law. As decided in *McIntosh's case*, the bye-laws have the effect of law, which it is not within the competence of any private body or any body which exercises *quasi*-public authority for the time being to dispense with. They are no more entitled to dispense with the law of England than private people have power to dispense with it. There is no dispensing power whatever. They are bound by the law like everybody else, and they are bound by their own bye-laws, and they have no power at all to dispense with these bye-laws. The Corporation of Bristol are not seeking to enforce any power other than the St. George's authority had power to enforce. I am clearly of opinion that the dispensation from the bye-laws was not operative, and that the Bristol Corporation were entitled to take up the position they did and to examine the question and say whether the building was in accordance with the bye-laws or not. They have gone into the question, and have come to the conclusion that it is not within the bye-laws, which had in effect been dispensed with by the local authority. The question of their dispensation being brought up for investigation by the court, the court ought to have come to the conclusion that the dispensation was invalid and not operative in any sense at all. It is said that by reason of section 15 of the Bristol Corporation Act, 1897, the plans having been approved they are effective. That is begging the whole question. It says: "Provided that all plans of new streets and of new buildings within the added area approved by the urban district councils or the local authorities respectively before the commencement of this Act shall be valid for the period of two years after that date." That means not actually approved, but legally and lawfully approved. It does not mean to give effect to invalid dispensations, to invalid plans, or to plans which violate the bye-laws. All the acts done under the bye-laws are maintained by that section, but no acts disapproved of by the bye-laws are rendered effective against the bye-laws or against the statute. To my mind the magistrates came to a wrong conclusion in holding that section 15 had any other and different effect. Therefore the question raised in this case for our opinion must be answered in the negative.

LAWRANCE, J.—I am entirely of the same opinion. I think that the approval mentioned in section 15 of the Bristol Corporation Act means a legal approval by the St. George's Urban District Council. The corporation had a perfect right to see whether the urban district council were acting under the legal powers conferred upon them by their bye-laws when they gave their approval to these plans. I think the case is entirely decided by the authority of *McIntosh* v. *The Pontypridd Improvements Committee*. It is absolutely in point, and the judgment of Wright, J., is clear upon the point. He mentions two cases to which I have already called attention, one, *Kerr* v. *Corporation of Preston*, 25 W. R. 265, 6 Ch. D. 463, which is strong to show that a public body which had a right to interfere could not acquiesce even if they stood by and knew that what was being done was being done illegally; but it is very much stronger in regard to acquiescence, especially when that acquiescence is sought to be used as an estoppel against them. The other case is the case of *Baxter* v. *The Bedford Corporation*, 1 Times L. R. 424, in which the learned judge, Cave, J., several times during the course of the case says in effect "I do not care what the corporation did, I do not care what their officers did, they had no power to do it, therefore if they did waive their powers they had no right to do so." If so, it seems to me the first duty of the Bristol Corporation was to see that the approval by the urban district council was a legal one. There can be no doubt under the circumstances it was illegal, that is to say, it was contrary to their bye-laws, and therefore the Bristol Corporation was right in the view they took, and the appeal will be allowed.

Appeal allowed.

Solicitors for the appellant, *Robins, Hay, Waters, & Hay*, for *D. Travers Burges*, Bristol.

Solicitors for the respondent, *Meredith, Roberts, & Mills*, for *T. D. Sibley*, Bristol.

Q. B. Div.
(Wills and Bruce, JJ.) Dec. 16.

CHESTERFIELD BREWERY CO. (*Appellants*) *v.* COMMISSIONERS OF INLAND REVENUE (*Respondents*). (*a.*)

Inland revenue — Stamp duty—Conveyance on sale—Contract for sale of equitable interest—Reconstruction of company in course of winding up—Agreement for transfer to new company of shares in old company—Declaration of trust of shares in old company—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 59 (1).

By an agreement under seal, made between all the shareholders in an unlimited company (which was in course of being voluntarily wound up) and a new limited company, it was agreed that the shareholders in the old company should "exchange" their shares in that company for certain numbers and amounts of stock and shares in the new company, and that the new company should also pay certain sums of cash to the shareholders. The agreement also provided that, upon the allotment to the shareholders of the old company of the shares and stock in the new company, the shareholders should "hold their respective shares in the old company in trust for the new company."

Held, that the agreement was a "conveyance on sale" of the shares in the old company within the meaning of section 54 *of the Stamp Act,* 1891, *or a "contract for the sale of an equitable interest" in those shares within section* 59 (1) *of that Act, and was chargeable with* ad valorem *duty on the cash paid and the shares and stock allotted.*

Dictum *of* Channell, J., *in* West London Syndicate *v.* Commissioners of Inland Revenue, [1898] 1 *Q. B.* 226, *at p.* 240, 46 *W. R. Dig.* 74, *approved.*

Case stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891.

An instrument was presented to the commissioners under section 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which it was chargeable.

The instrument was dated the 4th of December, 1897, and was expressed to be an agreement made between seven persons (of whom two were parties in their individual capacity and also as executors under a will) described as "of the Chesterfield Brewery Co., registered in 1884 as an unlimited company (thereinafter called the 'old company'), of the one or first part," and the appellant company, incorporated in 1897 and thereinafter called the 'new company,' of the other part, and was under the hands of the parties of the first part and under the seal of the appellant company. It proceeded as follows:

"Whereas the old company was constituted by a deed of settlement dated the 25th day of March, 1884, and afterwards in the same year registered as an unlimited company under the Companies Acts, 1862 to 1883, with a nominal capital of £100,000 divided into 1,000 shares of £100 each. And, whereas 800 only of the said shares have been issued and the same are all fully-paid up and are held by the parties hereto of the first part. And, whereas the old company is in course of being voluntarily wound up and the said Robert Fenwick Mills" (one of the parties of the first part) "is the liquidator for such purpose. And, whereas the new company has been incorporated under the Companies Acts, 1862 to 1893, with a nominal capital of £200,000 divided into 1,000 preference shares of £100 each and 1,000 ordinary shares of £100 each. And, whereas, it is desirable that the shareholders in the old company shall acquire shares in the new company in manner hereinafter provided. Now it is hereby agreed as follows:

"1. The parties hereto of the first part shall respectively exchange their shares in the old company for such number or amount of fully-paid up ordinary shares and fully-paid up preference shares in and debenture stock of the new company as are respectively set opposite their respective names in the schedule hereto. The new company shall also pay to each of the seven persons parties hereto (but as to the said Richard Fenwick Mills and William Forster Mills in their own right only and not in the capacity of executors under the before-mentioned will) the sum of £100 each in cash.

"2. The said debenture stock shall be part of a total issue of £100,000 debenture stock carrying interest at the rate of 4 per cent. per annum and be constituted and secured in accordance with the draft of a trust deed already prepared and approved of by the parties hereto.

"3. When this agreement has been filed, as below mentioned, the new company shall allot to each of the parties hereto of the first part the shares and debenture stock to which they respectively are to be entitled as aforesaid and thenceforth such respective holders shall hold their respective shares in the old company in trust for the new company.

"4. Before issuing any of the paid-up shares aforesaid the new company shall cause this agreement to be duly filed pursuant to section 25 of the Companies Act, 1867."

The instrument had been filed with the Registrar of Joint-Stock Companies as therein provided and the shares in the appellant company had been allotted as fully paid to the members of the old company. There had not been any transfer of the shares in the old company by the members of that company to the appellant company. The commissioners were of opinion that the transaction effected by the instrument was a sale of the equitable interest in the shares of the old company, the consideration being a sum of £700 in cash and the shares and stock of the appellant company to be allotted as fully paid to the members of the old company, and that it was accordingly chargeable with *ad valorem* conveyance duty by reference to section 59 of the Stamp Act, 1891, upon the cash paid and the shares and stock allotted. They accordingly assessed the stamp duty at £1,200 on the instrument, being the *ad valorem* duty payable under the head "Conveyance or transfer on sale" in the First Schedule to the said Act at the rate of 5s. for every £50 of the sum of £240,000, being the aggregate of the sum of £700 paid in cash and of the value of the shares and stock to be allotted as fully paid.

The question for the court was whether the instrument was chargeable with the duty of £1,200, in accordance with the assessment.

The following sections of the Stamp Act, 1891, were referred to during the argument:

Section 54. "For the purposes of this Act the expression 'conveyance on sale' includes every instrument and every decree or order of any court or of any commissioners whereby any property or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction."

Section 59 (1). "Any contract or agreement made in England or Ireland under seal, or under hand only . . . for the sale of any equitable estate or interest in any property whatsoever . . . shall be charged with the same *ad valorem* duty, to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

Theobald (*Upjohn, Q.C.*, with him), for the appellants.—The instrument is not chargeable with

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

ad valorem duty. It is an agreement for the sale or exchange of the shares in the old company for shares and stock in the new company; it is not an agreement for the sale of an equitable estate in the shares, and therefore does not fall within section 59 of the Act. The new company as purchasers, on payment of the cash and allotment of the shares and stock according to the terms of the agreement, would be entitled to have a legal transfer to them of the shares of the old company. The provision in clause 3 that after such allotment the parties of the first part will hold their shares in the old company in trust for the new company does not affect the right of the new company to have a transfer; it is a superfluous provision, and merely expresses the legal position—viz., that on payment of the purchase-money the vendor becomes a trustee of the property sold for the purchaser. In *West London Syndicate* v. *The Commissioners*, [1898] 1 Q. B. 226, 46 W. R. Dig. 74; the instrument bound the vendors in a certain event to execute a declaration of trust of leasehold property, but the Divisional Court held that this did not constitute an agreement for the sale of an equitable interest, and on this point their judgment was upheld by the Court of Appeal, *ante*, p. 125, [1898], 2 Q. B. 507. Nor is the instrument a conveyance on sale within the meaning of section 54. It does not itself transfer the shares in the old company to or vest them in the new company; this is left to be done subsequently by a legal transfer: *The Commissioners* v. *Angus & Co.*, 38 W. R. 3, 23 Q. B. D. 579. Every agreement for sale gives to the purchaser an equitable interest in the property, but it is not on that account a conveyance on sale.

Sir R. B. Finlay, S.G. (*Danckwerts* with him), for the respondents.—The instrument falls within either section 54 or section 59. The old company was in voluntary liquidation and therefore (by section 161 of the Companies Act, 1862) the shares could not be transferred without the consent of the liquidator, which was not given; R. F. Mills, the liquidator, was a party to the instrument not as liquidator but in his capacity of shareholder. By clause 3 the shareholders make themselves trustees of their shares for the new company; this dispenses with any necessity for a subsequent transfer, and from the circumstances disclosed by the instrument it is obvious that no such transfer could have been intended; and the case states that no such transfer has in fact been executed. The instrument operates as a declaration of trust which took effect upon the allotment of the shares in the new company, and it ought therefore to be stamped as a conveyance on sale: *West London Syndicate* v. *The Commissioners*, [1898] 1 Q. B. 226, per Channell, J., at p. 240. The decision of the Court of Appeal in that case also supports the view that this either effected a sale and transfer of the legal interest in the shares or was an agreement for the sale of an equitable interest in them.

Theobald, in reply.—The statement in the case that there has been no transfer in fact is irrelevant and unjustifiable. [WILLS, J.—No doubt what has happened afterwards is immaterial: the instrument was chargeable or not upon its execution. But how could it have been intended to transfer shares in a company which was being extinguished?] The instrument must be interpreted according to its terms; the fact (if it was so) that the consent of the liquidator was necessary and was not given does not alter the legal position; it cannot be assumed that his consent would not be given.

WILLS, J.—I am of opinion that the contention of the Crown in this case is right. I think that clause 3 of the instrument in question undoubtedly contains a declaration of trust creating an equitable interest in the shares in the old company. I entirely agree with the view expressed by my brother Channell in *West London Syndicate* v. *The Commissioners* (although his remarks on this point were not necessary for the decision of that case), that where an instrument contains a declaration of trust which effects a transfer of property to the person in whose favour it is made the instrument must be treated as a conveyance on sale within section 54 of the Stamp Act, 1891. It was argued that that view of the effect of the third clause conflicts with the proper construction of the rest of the instrument; but even if that were so I cannot agree that clause 3 is any the less a declaration of trust. But I go a great deal further and base my judgment on a broader ground: the whole instrument—nothing outside it—must be considered to see what the intention really is. Now, it appears from the instrument that the old company was in voluntary liquidation, and the clear intention seems to me to have been that this should be the one instrument by which the shares in the old company should become vested in the new company; the declaration of trust in the third clause is in favour of the new company, not in favour of the shareholders of the new company; it vests in the new company an equitable interest which apart from that clause they would not, *qua* company, have had, for the agreement in clause 1 is that the shareholders in the old company should exchange their shares for shares and stock of the new company. If that exchange were carried out the whole body of shareholders in the new company would become the owners of the shares in the old company; that, of course, could not have been intended, because the shareholders in the two companies were the same persons. It is clear, therefore, that the agreement for an exchange contained in clause 1 was never intended to be acted upon; it is there merely to give an appearance of an exchange to a totally different transaction. The court cannot be tied down by the mere words and refuse to draw the obvious inferences from the facts disclosed by the instrument. The old company was being wound up, and as soon as the winding up was complete it and all its shares would be extinguished. It is impossible to think that it could have been intended to effect a transfer to the new company—that is, to the same persons as those who held the shares in the old company—of the shares in the old company which existed merely for the purpose of being extinguished. By the transaction effected by this instrument the new company acquired the equitable interest in all the shares held by the members of the old company in consideration of certain cash payments and the allotment of certain shares and stock of the new company; if that is not a transfer upon a sale of an equitable interest I do not know what such a transfer is. I entertain no doubt that this instrument is not only a "conveyance on sale" within the meaning of section 54, but is also a contract for the sale of an equitable interest within section 59.

BRUCE, J.—I agree. I entertain no doubt that clause 3 of this instrument operated as a declaration of trust by the shareholders in the old company in favour of the new company of all the shares in the old company, and that it was, therefore, a conveyance on sale within the meaning of section 54.

Judgment for the Crown.

Solicitors for the appellants, *Pilgrim & Phillips*, for *Watson, Esam, & Barber*, Sheffield.

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Court of Appeal.

(A. L. Smith, Collins, and Romer, L.JJ.) March 6.

HALL v. SNOWDON, HUBBARD, & CO. (a.)

Practice—Appeal—Security for costs—Appeal under Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37)—*Ord.* 58, *r.* 15.

The ordinary rule of the court that the poverty of the appellant is a reason for ordering security to be given for the costs of the appeal, extends to appeals under the Workmen's Compensation Act, 1897.

Original motion.

Application by the respondents that the appellant should be ordered to give security for the costs of an appeal from the decision of the judge of the Bloomsbury County Court under the Workmen's Compensation Act, 1897.

The appellant was the infant son of a workman who was killed by an accident while in the employment of the respondents, and took proceedings by his next friend to recover compensation under the Act of 1897. The county court judge gave judgment for the respondents. The application for security for costs was founded upon poverty.

C. Herbert Smith, for the respondents.—Poverty being admitted, the court will order the appellant to give security for the costs of the appeal. The ordinary rule of the court applies to cases under the Workmen's Compensation Act, 1897.

Bailhache, for the appellants.—If poverty is a ground for ordering security for the costs of an appeal in cases under the Workmen's Compensation Act, 1897, then nearly every appeal by a claimant under the Act will be stopped, except where the claimant is backed by a trade union. If these appeals went to the Divisional Court, like appeals under the Employers' Liability Act, 1880, security for the costs of the appeal would not be ordered. The fact that these appeals come to the Court of Appeal ought to make no difference, and if the rule as to security for costs applies, a claimant will be deprived of the benefit of having the decision of the court upon what may be a very important point of law. The court in its discretion will not hold that mere poverty is a "special circumstance" within ord. 58, r. 15, in appeals under the Act of 1897. [A. L. SMITH, L.J.—Why cannot the appellant proceed *in formâ pauperis?*] That would not be any protection to the respondents, and an appellant may be disinclined to proceed *in formâ pauperis.*

A. L. SMITH, L.J.—In my opinion security for the costs of the appeal must be given. The reasons for that conclusion are these: The Legislature has specified the county court judge, failing the appointment of an arbitrator, as the person to decide questions of compensation under the Act of 1897, and has given an appeal from the county court judge direct to this court. While doing that the Legislature has not enacted that the ordinary rule of practice by this court as to ordering security for the costs of an appeal is to be abrogated. The ordinary rule is that, except in applications for the new trial of an action, when the respondent shows that the appellant will be unable through poverty to pay the costs of the appeal, if unsuccessful, the court will order the appellant to give security for the costs of the appeal. I am therefore of opinion that security for costs should be ordered. If the appellant is in a position to get leave to proceed *in formâ pauperis,* he need not give security for costs; but before he can get such leave he must submit a case to counsel and obtain his opinion that there are reasonable grounds for an appeal, and this is some protection to the respondents. The appellant must give security for costs to the amount of £15.

COLLINS and ROMER, L.JJ., concurred.

Application granted.

Solicitors for the appellant, *Riddell, Vaizey, & Smith.*

Solicitors for the respondents, *Marshall & Pridham.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div.
(Lord Russell of Killowen, C.J., and A. L. Smith and Collins, L.JJ.) Feb. 20.

In re AN ARBITRATION BETWEEN THE GUARDIANS OF THE ROCHDALE UNION AND THE GUARDIANS OF THE HASLINGDEN UNION. (a).

Local government—Boundaries—Alteration of union boundaries—Transfer of part of a parish—Adjustment of property, debts, and liabilities—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 36, 68.

Where an alteration is made in the boundaries of two poor law unions by the transfer, by an order of the county council, under section 36, *sub-section* 6, *of the Local Government Act,* 1894, *of part of a parish from one union to another, an adjustment of the property, debts, and liabilities can be claimed under section* 68, *as between the two unions, and not as between the union from which the transfer is made and the part of the parish so transferred.*

Appeal from the judgment of the Divisional Court (Ridley and Channell, JJ.), on a case stated by an arbitrator, reported [1898] 2 Q. B. 206, 46 W. R. Dig. 108.

Prior to 1894 the township of Spotland was one of the townships comprised in the Rochdale Union, and the township of Newchurch was one of the townships comprised in the Haslingden Union. By an order of the county council of the county of Lancaster, dated the 28th of June, 1894, a certain portion of the township of Spotland, being the portion included in the borough of Bacup, was, in pursuance of the Local Government Acts, 1888 and 1894, as from the 28th of December, 1894, amalgamated with a certain portion of the township of Newchurch, which formed the remainder of the borough of Bacup, so as to form one township or parish for Poor Law purposes coincident in area with such borough by the name of the township of Bacup. By an order of the same date made by the joint committee duly appointed by the said county council and the councils of the county boroughs of Bury, Manchester, Oldham, and Rochdale, the portion of the new township of Bacup which formerly formed part of the township of Spotland, was in pursuance of the said Acts, as from the 28th of December, 1894, detached from the Rochdale Union, and the whole of the township of Bacup was included in and became part of the Haslingden Union, and it was provided that section 68 of the Local Government Act, 1894, should apply for the purposes of any adjustment which might be required in consequence of the provisions of such order, subject to the proviso that the arbitrator is

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

any adjustment between the Haslingden and Rochdale Unions should have regard to the large amount of workhouse accommodation then provided by the Rochdale Union and to all other special circumstances of such last-mentioned union. These two orders were duly confirmed by the Local Government Board and came into operation on the 28th of December, 1894. The guardians of the Rochdale Union gave notice to the guardians of the Haslingden Union that, by reason of the detachment of the above-mentioned part of the township of Spotland from the Rochdale Union, the property, debts, and liabilities of their union had been affected, and a serious loss had been occasioned to the union, and that they were prepared to treat with the guardians of the Haslingden Union for the adjustment of the said property, debts, and liabilities, and as to the payment to be made by the last-mentioned guardians in respect thereof, and that, unless the last-mentioned guardians were prepared to treat in respect of the said adjustment, the guardians of the Rochdale Union desired that the adjustment should be referred to arbitration. The question of adjustment was accordingly referred to arbitration.

At the hearing before the arbitrator the Rochdale guardians contended that the following matters ought to be taken into consideration in making the adjustment: (*a*) The amount of the outstanding loans charged upon the common fund of the Rochdale Union; (*b*) the exceptional number of paupers requiring relief in the Rochdale Union by reason of the density of population and the situation of the town of Rochdale; (*c*) the comparative absence of pauperism from the transferred portion of the township of Spotland; (*d*) the large amount of workhouse accommodation provided by the Rochdale Union; (*e*) the unsuitability and unfitness of a great part of the Rochdale workhouse for the purposes for which it was provided; (*f*) the loss of all contribution from the transferred portion of the township of Spotland towards the expenses of the guardians of the Rochdale Union; (*g*) the increase in the rates leviable in the remainder of the Rochdale Union by reason of such transfer.

On behalf of the Rochdale Union evidence was tendered that the guardians had raised loans for erecting and furnishing the workhouse in their union, and that large sums were, on the 28th of December, 1894, outstanding in respect of these loans, and were charged upon the common fund of the whole union; that the town of Rochdale was comprised in the Rochdale Union, and had a dense population; and that the rateable value of the Rochdale Union was, on the 28th of December, 1894, £512,399, and of the portion of the township of Spotland transferred to the Haslingden Union £33,040. On behalf of the guardians of the Haslingden Union it was contended that none of the said matters were matters in respect of which the arbitrator had power to award an adjustment as between the Haslingden Union and the Rochdale Union.

The arbitrator was of opinion that none of the said matters relied upon on behalf of the Rochdale guardians were matters for adjustment between the said parties under the said Acts and orders, and he accordingly declined to receive the evidence tendered, and awarded that no adjustment was required, subject to this case for the opinion of the court.

The Divisional Court held that an adjustment was required under section 68 of the Local Government Act, 1894, and referred the matter back to the arbitrator.

The Haslingden Union appealed.

Macmorran, Q.C., and *C. A. Russell, Q.C.*, for the Haslingden Union.

Brynmor Jones, Q.C., and *A. Glen*, for the Rochdale Union, were not called upon.

Lord RUSSELL OF KILLOWEN, C.J.—In my opinion the judgment of the Divisional Court is right and must be affirmed. I agree substantially with the judgment of Channell, J., and entirely with the principle involved in his judgment. The effect of the orders made in this case is that the respective boundaries of the Rochdale and Haslingden Unions have been altered in such a way that a part of the township of Spotland, which was formerly comprised in the Rochdale Union, has been detached from the Rochdale Union, and has been included in the Haslingden Union. The guardians of the Rochdale Union thereupon alleged that the change had worked to their pecuniary disadvantage, and they claimed to have an adjustment made between their union and the Haslingden Union. Two objections are taken to this claim. First, it is said that if any ground for adjustment exists at all, the adjustment cannot be between the two unions, but between the Rochdale Union on the one hand and the separated portion of the township of Spotland on the other. Secondly, that this is not a case for adjustment at all within the Act. As regards the first objection, it seems to me to be impossible to give effect to it, because there has been no addition to the Haslingden Union or separation from the Rochdale Union of any unit of government, or any body of persons representing any sort of legal entity—even if that would have made any difference, as to which I express no opinion—but there has been merely a portion of a township cut off from the Rochdale Union and added to the Haslingden Union. It seems to me that section 68 of the Local Government Act, 1894, contemplates that there may be an agreement for an adjustment between the parties—that is, an agreement between two parties capable of entering into an agreement, between two legal entities—and it seems to me impossible to suppose that in such a case as this it was intended that the adjustment should be made between a separated portion of a township on the one hand, and the union from which it was detached on the other hand. It seems to me, therefore, that if there is to be an adjustment at all, it must be between the two unions.

Coming now to the second objection, this depends upon the proper construction of sections 36 and 68 of the Act of 1894. It is important to see what is the scope of section 36. That section deals with areas and boundaries, and by sub-section 6, "where the alteration of a poor law union seems expedient by reason of any of the provisions of this Act, the county council may, by their order, provide for such alteration in accordance with section 58 of the Local Government Act, 1888, or otherwise, but this provision shall not affect the powers of the Local Government Board with respect to the alteration of unions." It was under that provision that the order in the present case was made, the effect of which is to transfer part of the township of Spotland from the Rochdale Union to the Haslingden Union. I must next consider what provision the Legislature has made for the consequences ensuing from the carrying out of the orders contemplated by section 36. It is conceded that there are in section 36 a number of cases which require an adjustment, and that section 68 is intended to apply to such cases. In section 36, however, there is a provision for the delimitation of union boundaries, and section 68, which is a general section applicable to all cases in which an adjustment is required, applies just as strongly to the delimitation of union boundaries, where an adjustment may be in equity required, as to the other cases in section 36 to

which it admittedly applies. In other words section 68 may apply to all the cases which come within section 36. It is not necessary to say whether the whole of the language of section 68 applies in its entirety to each of the cases contemplated by section 36. Probably the whole of that language may not fit in with each of the cases contemplated by section 36. But the question we have to determine is whether it does not apply to the present case. The complaint of the guardians of the Rochdale Union is that a portion of a rateable area has been taken from their union and transferred to the Haslingden Union, the rateable value of the portion so transferred being £33,040, and that the inclusion of that area in their union was a distinct advantage to them because the area was of such a kind that, though the rates were considerable, the maintenance of the paupers coming therefrom entailed a very slight burden upon the rates. They said that their position would be pecuniarily prejudiced by the transfer, and that the Haslingden Union would be the gainers thereby, and that therefore there ought to be an adjustment. I think that view is right. I do not go in detail into the particular heads of adjustment claimed. I may say generally that the arbitrator will be entitled to take into consideration on the one hand the loss sustained by the Rochdale Union in consequence of a valuable rateable area being taken from them, and the relief caused to that union by their being freed from the obligation to maintain the paupers coming from the transferred area, and on the other hand the benefit to the Haslingden Union arising from the transfer. The arbitrator will then say how far the Rochdale Union has been pecuniarly damnified by the transfer. For these reasons, I think that the appeal should be dismissed.

A. L. SMITH and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Robbins, Billings, & Co.*, for *T. H. Townsend*, Rawtenstall.

Solicitors for the respondents, *Bower, Cotton, & Bower.*

From Chan. Div.
(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) Feb. 8.

In re MORRIS.

JAMES *v.* LONDON AND COUNTY BANKING CO. (*a.*)

Bankruptcy—Proof—Bill of exchange—Secured creditor—Consolidation of debts and securities.

The holder of four dishonoured bills of exchange sent in a proof, in the liquidation of the estate of a firm which had endorsed each bill, for the aggregate amount of the four bills with noting expenses. The trustee in the liquidation had different rights of indemnity in respect of the four bills. In respect of two of the bills the holder had received more than 20s. in the £ upon his proofs against the various parties to the said bills, but the total amount received by him was considerably less than the aggregate amount claimed in respect of the four bills.

Held (*affirming* Romer, J., 46 *W. R.* 627, [1898] 2 *Ch.* 413), *that the holder could not be allowed to retain the surplus beyond the amount due on either of the two overpaid bills, and attribute it to payment of the amounts due on the other bills.*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Defendants' appeal from Romer, J. (reported 46 W. R. 627, [1898] 2 Ch. 413).

The question raised by summons was whether a creditor holding four separate bills of exchange could lump them together and put in one proof for the whole debt, or whether the bills must be considered as four distinct debts, dividends (after proof) being receivable only for the amounts secured by each bill respectively. The facts were as follows:

The defendants were at the date of the creditor's deed hereinafter mentioned, holders of four bills of exchange hereinafter referred to as A, B, C, and D. A, B, and C were for £2,000 each, and D for £1,000. A and C were drawn by Job & Co., in Newfoundland, upon Job Bros., in England, payable to order of the Commercial Bank of Newfoundland, and were accepted by Job Bros. B and D were drawn by Goodridge in Newfoundland upon Bennett in England, payable in like manner as A and C, and were accepted by Bennett. A, B, C, and D were severally endorsed by the bank to Prowse, Hall, & Morris, and by them to Ridley, and by Ridley to the defendants, all in the ordinary course and for value.

The bank, Job Bros., Bennett, and Goodridge became bankrupt or entered into liquidation, and the defendants proved against their respective estates for the amounts due upon the bills to which they were respectively parties. In September, 1896, Ridley paid the defendants in respect of the four bills £615 odd, forming part of the estate of Prowse, Hall, & Morris, which came into the hands of Ridley, and the propriety of such payment was not disputed.

The plaintiff was the trustee of a creditors' deed entered into in April, 1895, by Morris, the debtor, who was the surviving partner of the firm of Prowse, Hall, & Morris. The deed in effect provided for the distribution of that firm's assets as in bankruptcy among the assenting creditors who would have been entitled to prove if the debtor had been adjudicated bankrupt as therein mentioned. The defendants claimed under the deed against the estate of the firm for the amount of the four bills of exchange with noting expenses, making, after deducting the sum of £615 odd, a total of about £6,430.

Upon their proofs against the various parties to the bills, the defendants received amounts in respect of the bills B and D exceeding the amounts due on such bills, with noting expenses and interest, by £373 odd and £192 odd respectively. The defendants had not received payment in full of either of the bills A and C, and the whole amount received by them was less than the whole amount due in respect of the four bills.

In these circumstances the plaintiff claimed that the defendants were not entitled to any further dividends from the estate of Prowse, Hall, & Morris in respect of bills B and D, and that the sums of £373 and £192 should be repaid by the defendants to the plaintiff, and that the defendants should be ordered to deliver up the bills to the plaintiff. The plaintiff had paid the defendants by way of dividend from the estate of Prowse, Hall, & Morris the sums of £365 and £182 10s., in respect of the bills B and D, but did not know at the time of such payment how much had been received by them in respect of the bills.

Romer, J., held that the defendants were not entitled to retain the surplus beyond the amount due on either of the two overpaid bills and attribute it to payment of the amounts due on the other bills.

The defendants appealed.

Neville, Q.C., and *Muir Mackenzie*, for the appellants, used the same arguments as in the court below, and in addition cited the following cases: *Ex parte*

Gifford, 6 Ves. 805; *In re Joint Stock Discount Co.*, 18 W. R. 102, L. R. 5 Ch. App. 86; *Ex parte Sammon*, 1 Deac. & Ch. 564; *In re Higginson and Dean, ante*, p. 285, [1899] 1 Q. B. 325. [VAUGHAN WILLIAMS, L.J., referred to Robson's Law of Bankruptcy (7th ed.), p. 159, and *Ex parte Reed and Bowen*, 34 W. R. 493, 17 Q. B. D. 244.]

Levett, Q.C., and *F. Thompson*, for the respondent, referred to *Ex parte Barratt*, 1 Gl. & J. 327, and *Paley* v. *Field*, 12 Ves. 435.

Mackenzie, in reply, distinguished *Ex parte Barratt* on the facts, as being a bill paid in full by one of the prior parties who was entitled to the bill.

LINDLEY, M.R.—In this case I think the view taken by Romer, J., is right. One cannot doubt that although this is one proof for £6,000 it is substantially a proof on four bills. It is a mere matter of convenience that they are lumped together. Under ordinary circumstances, of course, it does not matter and simplifies accounts, but it cannot alter the rights of the parties.

Now, when we look at these four bills it appears to me that it becomes of some importance to trace out the persons from whom dividends have been obtained in respect of them. There are two sets of bills, two accepted by Job Bros., of Liverpool, and two accepted by Bennett. The drawers of Job's bills were Job Bros., of Newfoundland, the drawers of Bennett's were Alan Goodridge & Co. All four bills were drawn in favour of the Commercial Bank of Newfoundland, and were endorsed by that bank; all four were endorsed by Prowse, Hall, & Morris, who are the persons claiming them now under the creditors' deed, to Ridley and by Ridley to the London and County Bank. The London and County Bank had no claim at all against the estate of Prowse, Hall, & Morris except as the holders of these bills. The bank were not creditors on any separate account, holding these bills as collateral security. Now, what was their right of proof as against Prowse, Hall, & Morris? Their right was to prove on the four bills, and they had no other right. Of course it might have happened that there was no necessity for keeping them separate, but when you consider that the moneys have been paid in respect of those bills by different people it becomes necessary to consider who they are; and on looking at the details you do not find a single payment there by anybody except by persons who were under liability to Prowse, Hall, & Morris to pay. Take the first, Job Bros.; they were either acceptors or drawers, I do not know which, and I do not know whether they were two firms or one, but they were liable either as acceptors or drawers. As to Bennett's dividends they were acceptors. Goodridges were drawers for Bennetts. Then Ridleys—they paid out of Prowse, Hall, & Morris's funds; that counts for nothing, and so you go on. There is not a single payment made by anybody except in discharge of his own obligation to the bankrupt. Now, that being the case, it does appear to me to be very extraordinary that, because the proof was admitted for one sum of £6,000 odd instead of four sums aggregating that amount, the rights of the parties should be in any way altered.

I think Romer, J., was right. We must not be mislead or misguided by the mere fact that one proof has been admitted and acted upon before anything turned upon it; but when we find that the bank have received more than 20s. in the £ on the bills under a mistake, they must account for the excess.

So far as the authorities go I think *Ex parte Barratt* is much nearer and more in point than any of the other authorities. The appeal will be dismissed with costs.

RIGBY, L.J.—I am of the same opinion. I think it is plain that the proofs were four separate proofs on four separate bills. We know that the only right of proof they had was on these bills. They had no choice. They could not alter that right by merely adding up the figures and lumping them together. Then, following Mr. Muir Mackenzie's argument, with which I was much struck, I do not think they got one right of property in place of one claim. But, of course, if that be a sound analogy they get four rights of property in respect of four bills.

Then as regards the equity of the matter, I do not think it can be doubted that it was only because they added them up and lumped them together that they made one proof; and finally the moneys paid were, as to all but those paid by Messrs. Ridley, in respect of claims which the bankers would have on the acceptors, drawers, and the prior indorsees, all liable in priority to the bankrupt's estate. Messrs. Ridley & Co.'s payments were paid out of the bankrupt's money, and so with regard to all the payments. It appears to me all the payments have been paid in respect of obligations existing towards the bankrupt's estate, and as if paid out of that estate; and I cannot think any rule of practice compels us to disregard the true facts. I agree that the case of *Ex parte Barratt* when thoroughly worked out is an authority which appears to me to be consistent with the other authorities and to be one that we ought to follow.

VAUGHAN WILLIAMS, L.J.—I entirely agree. I want to say, however, with regard to proof on the bankrupt's estate that according to bankruptcy practice no one is entitled or allowed to take advantage of the form of the proofs. Here, supposing persons outside the estate altogether had paid the amount of these bills, the trustee in bankruptcy would not have been entitled to make a profit for the estate out of that fact and say to his creditors, "You have been fully paid and therefore nothing more can be paid in respect of this debt"; because the answer to that would be "Yes, but I have been fully paid by a person who has a right to stand in my shoes"; and in those circumstances although the practice in bankruptcy may not allow the person with a legal proof to receive more than 20s. in the £, and put an obligation thereupon on the outsider, the person who has not proved, to come in and prove in his own right and make the claim in his own right, yet, if the dividends had actually been paid over (as is the case here), you never make the creditor repay to the trustee dividends which ultimately would have to go into the pocket of somebody else. But in this case the persons who have paid what has been paid in respect of these bills were persons who were under an obligation towards the bankrupt and the bankrupt's estate to pay those amounts; and in those circumstances the moment the creditor has got 20s. in the £ and interest—it does not much matter from what source—any surplus that there is is a surplus which will not go to any persons other than the trustee of the estate of the bankrupt, but ought to go beneficially into the bankrupt's estate. In those circumstances it seems to me clear that this order is perfectly right, and that the creditor, who cannot be entitled to hold the dividends, and who is not accountable for them to anybody else, should hand back these dividends to the estate which is beneficially entitled to them.

Appeal dismissed.

Solicitors, *Harries, Wilkinson, & Raikes; Simpson, Cullingford, Partington, & Holland.*

High Court of Justice.

Chan. Div. } North, J. } Dec. 9, 16.

ASTLEY v. NEW TIVOLI (LIMITED). (a.)

Company—Director—Place of profit.

Articles of association provided that the office of director should be vacated by a director "if he accepts or holds any other office or place of profit under the company except that of managing director."

Held, that a director who accepted the trusteeship of a debenture deed given by the company at a salary ceased to be a director.

Motion.

This was an action against the New Tivoli and three directors to restrain the defendants from preventing the plaintiff from acting as director.

By article 104 it was provided "The office of a director shall be vacated (a) if he accepts or holds any other office or place of profit under the company except that of managing director."

The company was registered in 1891, and the first directors were the plaintiff and two other persons. In 1895 the existing debentures were paid off, and the plaintiff and H. S. Smith were appointed trustees of the deed to secure new debentures. The deed provided for the payment of £105 to each of the trustees.

In 1896 the plaintiff retired by rotation and was re-elected. In November, 1898, the question of his disqualification arose, and being excluded, he commenced this action. The motion was treated as the trial of the action.

Swinfen Eady, Q.C., and *Rowden*.—A trustee of a debenture deed is not an officer of the company. And even if he was disqualified, his subsequent re-election while still a trustee was good: *Dawson* v. *African Consolidated Land and Trading Co.*, 46 W. R. 132, [1898] 1 Ch. 6.

Buckley, Q.C., and *M. Romer*.—The company fixed the remuneration, and the object of the clause is to prevent directors from creating places for themselves. It is not shown that the disqualification was known when the plaintiff was re-elected.

Swinfen Eady replied.

NORTH, J.—I think it is reasonably clear that the trusteeship is a place of profit under the company. There is more difficulty in saying that the trustees are officers of the company, and I do not think they could be held responsible for misfeasance under section 165 of the Companies Act, 1862, or section 10 of the Act of 1890. The company is represented by its directors, who fix the character and form of the covering deed, and decide, if there are trustees, what is to be their remuneration. Then article 104 provides that the office of director shall be vacated if a director holds any other office or place of profit under the company. The meaning of that is to prevent the directors from doing anything by which they can accumulate in themselves offices of profit. It is not desirable that a director should be master and servant at the same time. In my opinion a trustee of a covering deed on the terms contained in this document is occupying a place of profit. If he was already a director his acceptance of the trusteeship vacated the office; but if he was a trustee when elected the article applies which vacates the office if he holds any place of profit under the company. The action fails, and must be dismissed with costs.

Solicitors, *Lewis & Lewis; Nicholson, Graham, & Graham.*

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. } Stirling, J. } Jan. 11; Feb. 16.

In re ADAMS & PERRY'S CONTRACT. (a.)

Will—Real estate—Charge of debts—Trustees—Devise of all testator's interest—Power to sell—Lord St. Leonards' Act (22 & 23 *Vict.* c. 35) s. 14.

Testator appointed his wife sole executrix, and after a direction to pay debts and legacies, devised and bequeathed the residue of his real and personal estate to trustees upon trust to permit his wife to receive the rents and profits during her life; then for his niece for life for her separate use; then upon trust to pay two legacies, and subject thereto for the children of the niece.

Held, that the real estate was charged with payment of debts and legacies, but that as the trustees took no legal estate therein during the life of the wife, there was a devise of all the testator's interest in the realty, and consequently the trustees could not sell the real estate by virtue of section 14 *of Lord St. Leonards' Act.*

This was a summons taken out under the Vendor and Purchaser Act by the vendors, asking for a declaration that they, as trustees of the will of Alexander Penprase, had power to sell, and could make a good title to the real estate devised by the said will, and could give good receipts for the purchase-money thereof to the purchaser. The testator by his will, dated the 21st of March, 1868, appointed his wife Teresa Penprase sole executrix, and directed his just debts, funeral and testamentary expenses to be paid as soon as conveniently might be after his death, and after certain specific and pecuniary bequests, gave, devised, and bequeathed all the residue of his real and personal estate to trustees upon trust, as to his freehold estate, to pay to or permit his said wife to receive the rents and profits thereof during her life, and after her decease upon trust to pay or permit his niece Eliza Adams to receive the same for her separate use during her life. And after the death of the survivor of his said wife and niece he directed his trustees to pay to William Adams and Ellen Clara Kingcome, and each or such one of them as should be then living, the legacy of £150, and the testator declared that his trustees should, after payment of the said sums of £150 and £150, stand possessed of his said real estate and the residue of his personal estate in trust for all and every the child and children of his niece Eliza Adams, with a gift over in default of such issue.

The testator died on the 22nd of August, 1869, and his will was duly proved by the widow, the sole executrix. The widow died on the 18th of June, 1881, and Eliza Adams, the second tenant for life, died on the 2nd of March, 1898. On the 17th of May, 1898, the trustees put the testator's real estate up for sale by public auction, subject to conditions, of which the last ran as follows: "The vendors are the trustees of the will of the said Alexander Penprase, and sell under powers conferred on them by virtue thereof, and the concurrence of persons beneficially interested in the purchase-money or property shall not be required."

The trustees claimed to be able to sell under section 14 of Lord St. Leonards' Act (22 & 23 Vict. c. 35

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

as devisees in trust of real estate charged with payment of debts and legacies.

The purchaser having raised an objection to the title of the trustees the present summons was taken out.

Upjohn, Q.C., and *Manby*, for the plaintiffs.—We have here a charge to pay debts, and the legal estate is in the trustees. Consequently they can make a good title under Lord St. Leonards' Act.

They referred to *Doe* v. *Biggs*, 2 Taunt. 109; *Harton* v. *Harton*, 7 T. R. 652; *Creaton* v. *Creaton*, 5 W. R. 123, 3 Sm. & Gif. 386; *Spence* v. *Spence*, 10 W. R. 605, 12 C. B. N. S. 199; *Marshall* v. *Gingell*, 31 W. R. 63, 21 Ch. D. 790; *In re Brooke, Brooke* v. *Brooke*, 42 W. R. 186, [1894] 1 Ch. 43; *Fenwick* v. *Potts*, 8 De G. M. & G. 506; *In re Tanqueray Willaume and Landau*, 30 W. R. 801, 20 Ch. D. 465; *Baker* v. *White*, 23 W. R. 670, L. R. 20 Eq. 166; *Houston* v. *Hughes*, 6 B. & C. 403; *Withers* v. *Kennedy*, 2 Myl. & K. 607; *Greville* v. *Browne*, 7 W. R. 673, 7 H. L. Cas. 689; *Wybrants* v. *Maffett*, 17 L. R. Ir. 229, 34 W. R. Dig. 3. [STIRLING, J., referred to *Doe* v. *Bolton*, 11 A. & E. 188, and *Collier* v. *Walters*, 22 W. R. 209, L. R. 17 Eq. 252.]

Jenkins, Q.C., and *Badcock*, for the purchaser.—There is no intention here to charge the real estate with payment of debts: *Elliott* v. *Dearsley*, 29 W. R. 494, 16 Ch. D. 322.

Upjohn, Q.C., replied.

Cur. adv. vult.

Feb. 16.—STIRLING, J. (after stating the facts).—Now for the existence of the power so conferred by Lord St. Leonards' Act two things are essential. First of all there should be a charge of the real estate with debts or payments of legacies or other specific sums of money; and secondly, the real estate so charged should be devised to the trustee or trustees for the whole of the testator's estate or interest therein. I have therefore to inquire whether both of these requirements are satisfied. Firstly, therefore, I ask, is there a charge of debts or legacies? Now undoubtedly, on the principle of *Greville* v. *Browne*, there is a charge of debts and legacies which are given by the testator immediately on his own death. There is a direction that his just debts and funeral and testamentary expenses shall be paid. Then follows a gift of specific chattels, and also of pecuniary legacies, and then the testator proceeds, "all the rest and residue of my real and personal estate I give, devise, and bequeath to James Mayne and to Samuel Wise Adams, their heirs, executors, administrators, and assigns" as trustees upon trust. [His lordship read the provisions of the will above cited.] That, on the principle of *Greville* v. *Browne*, amounts to a charge of debts and legacies. But further than that I think that although the language of the will creates some difficulty, there is a charge of the reversionary legacies (as I will call them), that is, of the two sums of £150 which are directed to be paid after the death of the two tenants for life. As to this, the testator directs the trustees, who it is to be observed were not executors, to pay them. Then follows a declaration that after payment of these two sums last payable the trustees are to stand possessed of his other real estate and the residue of his personal estate in trust for all and every the child and children of his niece Eliza Adams. Now, the contention on the part of the respondents with reference to this was that although the words "after payment" might create a charge, the language in the subsequent part of the clause, to stand possessed of the real estate and the residue of the personal estate, showed an intention that there should be no charge because the will only spoke of "the residue" as regarded the personal estate, and it was to be inferred that the testator meant that the debts should be paid out of the personal estate in the hands or under the control of the trustees, and that one could not infer any intention therefrom to charge the real estate. No doubt that creates a certain difficulty, but the force of the words "after payment" is so strong as to lead to the belief that the true meaning was that whatever remained of the real and personal estate in the hands of the trustees at the death of the surviving tenant for life should be available for payment of these two reversionary legacies. Therefore I come to the conclusion that there does exist one of the two elements—namely, a charge of the two reversionary legacies, as well as of the debts and legacies—in this instance.

Now I come to consider the question whether the testator has, in the language of the Act, devised the estate so charged to his trustees for the whole of his estate and interest therein. The effect of that is that the power does not come into operation unless the testator has devised to his trustees on the true construction of the will all his estate and interest in the real estate charged with debts. Now, although the testator here purports to devise all the residue and remainder of his estate to his trustees, their heirs, executors, and administrators, it does not necessarily follow that the trustees took all the legal estate. It has been long established by a series of decisions to which it is unnecessary to refer that they only take such an estate as is sufficient to enable them to carry out the trusts imposed on them. It is to be observed that there is no specific direction to them as to payment of debts and funeral and testamentary expenses; there is only a general direction, without stating by whom it is to be carried into effect, and it does not necessarily follow that, notwithstanding the existence of these words, the trustees took an estate in fee simple. It is admitted that the law is correctly stated in Jarman (5th ed.), vol. 2, p. 1146. [His lordship read the passage, and continued:] Now these trustees are not named as executors, and are not expressly directed to pay debts or legacies which become payable on the testator's death. It seems to me in these circumstances that it cannot be inferred that the mere existence of a charge operates to give them the legal estate. It is, however, to be observed that as regards the reversionary legacies the charge, which I hold exists, is accompanied by an express direction for payment of legacies, and, in my judgment, that direction carries the legal estate to the trustees after the death of the two tenants for life. Furthermore, the second tenant for life took her life interest for her separate use, and it has long been established in these circumstances that the legal estate during the life of the second tenant for life would vest in the trustees. The real question to be considered is whether upon this will the trustees took the legal estate during the life of the testator's widow, the first tenant for life. Here there is no direction that the estate of the beneficiary was to be for her separate use. The language is upon trust to pay or permit his said wife to receive the rents and profits thereof during her life, and according to the decision in *Doe* v. *Bolton* that would, *primâ facie*, unless there is some context to alter the effect of the words, give her the legal estate during her life. It was, however, contended that the doctrine laid down in *Harton* v. *Harton*, and recently recognized by the House of Lords in *Foxwell* v. *Van Grutten*, 46 W. R. 426, [1897] A. C. 658, applies so as to vest the estate in the trustees from the death of the testator. Now, the rule established by that case, if I may be permitted to say so, is most briefly and accurately

stated by Lord Davey in *Foxwell* v. *Van Grutten*, [1897] A. C. 658, at p. 683: "It is a convenient rule that where there are recurring occasions for the exercise of active duties by the trustees, and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries." The important words here were "if once in the trustees"; and it is obvious from the consideration of the form of devise which was being considered by the House of Lords there, as well as of the previous portion of the speech of Lord Davey, that those were important words. In that case, as pointed out by Lord Davey, during the minorities of the testator's children the trustees were required to take the legal estate. After their death also it was clear that the trustees must take the legal estate in order to convey. The question arose as to the intermediate legal estate. There the House of Lords held that the legal estate was in the trustees as above mentioned. That does not apply here, because the question is whether during the life of the first tenant for life the legal estate is in the trustees. As to that it seems to me I must follow the law, which I think well established. I will refer for an example to *Doe* v. *Bolton*. In that case a testator devised a manor and mansion-house to trustees in trust to permit and suffer his wife, in case she should wish so to do, to occupy the same and receive the rents and profits thereof until his son was of age, provided she remained unmarried; and on the son attaining twenty-one to release, convey, and assure the manor and mansion to the son in fee, with a proviso that if the widow should not wish to occupy, the trustees should let the mansion till the son attained twenty-one. It was there held that, though the trustees must take the legal estate to convey to the son when of age, that alone would not prevent the widow from taking the legal estate in the meantime. [His lordship read the judgment of Denman, C.J., 11 Ad. & Ell., from p. 191: "It is plain that the trustees . . ." to "necessary for them to take the legal estate," on p. 192, and continued:] That is a test which we must apply here. The words of the gift in this will in favour of the wife to pay to or permit her to receive the rents and profits during her life are to be construed as passing the legal estate to the wife unless we can find something directing that a different person should take that estate. I cannot find anything here. For whatever reason it may have been the testator thought fit to appoint his wife sole executrix and did not impose any duty on the trustees during her life. Therefore the rule of *Doe* v. *Biggs* must be allowed to prevail, as he has not devised the estate to his trustees for his whole estate and interest therein. In my judgment, therefore, a good title cannot be made by the trustees as trustees. There will be a declaration that the vendors as trustees have not power to sell the real estate comprised in the contract, and liberty to apply as to damages and return of deposit or generally.

Solicitors, *Wedlake, Letts, & Wedlake*, for *Saunders & Sibley*, Plymouth; *J. Jobson*.

Chan. Div. } Stirling, J. } Nov. 10; Dec. 11.

Twickenham Urban District Council v. Munton. (a.)

Local government—Street—Making up private street—Objection to plans, &c.—Amendment by justices—Private Street Works Act, 1892 (55 & 56 *Vict.* c. 57), *ss.* 5, 6, 7, 8 (1), 11.

The plaintiffs, an urban authority, resolved to do, with respect to the whole of M.-road, certain street works within section 6 *of the Private Street Works Act*, 1892, *and the plans, estimates, &c., and a provisional apportionment in respect thereof were duly approved by them, and notice thereof was served on the defendants and the other owners of property affected. The defendants did not, but another owner did, object thereto. Ultimately the justices held that part only of M.-road was a private street within the Act, and they amended the plans, &c., and provisional apportionment accordingly; the justices did not, however, amend the resolution, nor did they require any further notice to be given. No fresh notices were served, and the final apportionment, which apportioned the expenses in the same proportions as the amended provisional apportionment, was served on the owners of the property affected thereby, including the defendants. The defendants did not give any notice of objection to such final apportionment, but they refused to pay their proportion, on the grounds that the original resolution had not been expressly amended nor any fresh notice served.*

Held, (1) *that the justices had jurisdiction to amend the plans, &c., without expressly amending the original resolution;* (2) *that, whilst the justices had jurisdiction to direct fresh notices to be served, yet they were not bound to do so, it being a matter as to which they had a discretion; and* (3) *that the defendants were liable to pay the amount charged against them.*

This was a summons claiming a declaration that the plaintiffs were entitled under section 13 of the Private Street Works Act, 1892, to a charge on certain houses and lands vested in the defendants and situate Montpelier-road, Twickenham, for £27 10s. and £28 9s. 6d. the apportioned amounts of expenses incurred by the plaintiffs in executing private street works under section 6 of the above-mentioned Act, together with interest, and for consequential relief.

The Private Street Works Act, 1892, was duly adopted for the district of Twickenham, and came into operation on the 22nd of February, 1893.

On the 27th of June, 1895, the plaintiffs resolved with respect to Montpelier-road to do the various street works mentioned in section 6 of the Act, with the exception of lighting.

On the 25th of July, 1895, the plaintiffs passed the following resolution: "That the specifications, plans, sections, estimate, and provisional apportionment prepared by the council's surveyor with reference to the making up of Montpelier-road, Twickenham, be and they are hereby approved." The specifications, &c., mentioned in that resolution related to the whole of Montpelier-road. The resolution was duly published, and copies thereof served, in accordance with section 6, sub-section 3, of the Act, on the defendants and other owners of premises affected thereby.

The defendants gave no notice of any objection, but another owner did give such notice, and on the 1st of January, 1896, the matter having been brought before a court of summary jurisdiction, the justices held that a part of Montpelier-road was a street repairable by the inhabitants at large, but that the remainder was a private street within the meaning of

(a.) Reported by W. Scott Thompson, Esq., Barrister-at-Law.

the Act, and they amended the plans, estimates, and apportionment so as to limit the operation thereof to the latter portion of Montpelier-road. The justices did not direct any fresh notices to be served, and no further notices were served either on the defendants or any other person showing the alteration in the works proposed to be carried out.

On the 24th of October, 1896, the council's surveyor made his final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the amended provisional apportionment.

On the 19th of December, 1896, notices of such final apportionment were served on the several owners of the premises affected thereby, including the defendants. The defendants gave no notice of objection to the final apportionment.

The defendants were willing to pay the sums mentioned in the summons provided that the whole of Montpelier-road was repaired, but they objected to the repair of the portion to which the scheme of the plaintiffs had been limited by the magistrates as being detrimental to them so long as the rest of the road remained unrepaired.

The material provisions of the Private Street Works Act, 1892, are as follows:

"5. In this Act, if not inconsistent with the context . . . the expression 'street' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large.

"6. (1) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do" the private street works therein enumerated, "and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street. (2) The surveyor shall prepare, as respects each street or part of a street, (*a*) A specification of the private street works referred to in the resolution with plans and sections (if applicable); (*b*) an estimate of the probable expenses of the works; (*c*) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act. Such specification, plans, sections, estimate, and provisional apportionment shall comprise the particulars prescribed in Part I. of the schedule of this Act, and shall be submitted to the urban authority, who may by resolution approve the same respectively, with or without modification or addition, as they think fit. (3) The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments, shall be published in the manner prescribed in Part II. of the schedule in this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment within seven days after the date of the first publication. During one month from the date of the first publication the approved specifications, plans, and sections (if any), estimates, and provisional apportionments (or copies thereof certified by the surveyor), shall be kept at the urban authority offices, and shall be open to inspection at all reasonable times.

"7. During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may by written notice served on the urban authority object to the proposals of the urban authority on any of the following grounds—that is to say: (*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act; (*b*) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large; (*c*) that there has been some material informality, defect, or error in or in respect of the resolution, notice, plans, sections, or estimate; (*d*) that the proposed works are insufficient or unreasonable. . . .

"8. (1) The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors, and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part, or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given. (2) No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever.

"11. The urban authority may from time to time amend the specifications, plans, and sections (if any), estimates, and provisional apportionments for any private street works, but if the total amount of the estimates in respect of any street or part of a street is increased, such estimates and the provisional apportionment shall be published in the manner prescribed in Part II. of the schedule to this Act, and shall be open to inspection at the urban authority's office at all reasonable times, and copies thereof shall be served on the owners of the premises affected thereby; and objections may be made to the increase and apportionment, and if made shall be dealt with and determined in like manner as objections to the original estimate and apportionment."

Section 12 provides for a final apportionment to be made after the completion of the works, and empowers the owners to object on the grounds therein mentioned.

Section 13 gives the urban authority a charge on premises included in the final apportionment of the sums finally apportioned.

Macmorran, Q.C., and *The Hon. Frank Russell*, for the plaintiffs.—The plaintiffs are entitled to the charge which they claim; the resolution was duly passed, and, the defendants not having made any objection within a month are bound thereby.

R. C. Glen, for the defendants.—The council resolved to make up the whole of the road; that resolution stands and there has been no resolution to make up part only of the road. The plaintiffs rely on section 8, but we submit that the magistrates had no jurisdiction to make amendments in the resolution without having the parties before them. The foundation of the jurisdiction to declare a charge is that there should be a valid resolution; here there is none to justify what has been done. The defendants have been deprived of the opportunity to object to the apportionment. Section 8 shows that the justices ought to have directed a further notice to be

given, and upon such notice being given the defendants would have the same power of objection as if that notice had been given originally by the council. There has been no valid final apportionment, and the defendants submit that the proceedings must be commenced *de novo*: *Whitchurch* v. *Fulham Board of Works*, 14 W. R. 277, L. R. 1 Q. B. 233.

Macmorran, Q.C., in reply.—[STIRLING, J.—Has there been any resolution that part only of the road should be made up?] Not in terms, but the council have amended the plans and done the works according to such amended plans; therefore they must have resolved to do them. If the justices found that part of the road was a highway repairable by the inhabitants at large they would be obliged either to amend or else dismiss the application. The justices must therefore have some power of amendment.

Dec. 10.—STIRLING, J., after stating the facts and referring to sections 3, 4, 5 (definition of "street"), 6, 7, 8, 11, 12, 13 of the Private Street Works Act, 1892, continued as follows: The defendants resist the summons on the following grounds: First, it is said that the justices have exceeded their jurisdiction by taking upon themselves the function of the urban authority with whom rests the determination of the question whether the whole or part only of a street should be repaired. Undoubtedly section 6, sub-section 1, gives the urban authority the right to decide whether the whole or part of a street is to be repaired, and, in the present case, the plaintiff council did by resolution determine that the whole of Montpelier-road should be repaired. Sub-section 2, however, provides that "the specification, estimate, and provisional apportionment shall be submitted to the urban authority, who may by resolution approve the same with or without modification or addition as they may think fit." In this case the approval was without modification or addition. Sub-section 3 provides for due notice of the last-mentioned resolution being given to the owners of the premises shown as liable to be charged, any one of whom may, by section 7, take objection to the proposed works on the following amongst other grounds: "(*b*) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large." Section 8 provides that such objections shall be dealt with by a court of summary jurisdiction, and also provides that "the court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority."

Now, here the court did not quash the resolution, or the plan, sections, estimates, or provisional apportionments, but amended the plans, estimates, and apportionments, without, however, saying anything about the resolution. But it is to be observed that the court was acting within its power, because the Act empowers the court to quash or amend the resolution, plans, and so forth, or any of them; and in point of fact the resolution was in terms so framed by reference to the plans and estimates as not to require any verbal modification.

Now, upon the construction of the Act the jurisdiction of the court of summary jurisdiction to amend a resolution and the accompanying plans, sections, and so forth, appears to me to exist in a case where the objection taken is that the street or part of the street is a highway repairable by the inhabitants at large, no less than where the objection is of any other nature specified in section 7; and where the jurisdiction is exercised I can find nothing in the Act which renders it necessary that the urban authority should begin their proceedings *de novo* or pass a resolution limiting the works to that part of the street which is not repairable by the public. So to decide would be, as it seems to me, in fact, to hold that the power of the court of summary jurisdiction is in such a case limited to quashing the resolution and the accompanying plans, and does not extend to amending them. I do not think that that is the true construction of the Act; but I think that the amended resolution, and plans, and so forth, were meant by the Legislature to take effect just as if they had been duly passed, *ab initio*, by the urban authority. In my judgment, therefore, the justices did not exceed their jurisdiction.

Secondly, it was contended that the defendants had been by these proceedings deprived of all opportunity of taking objection to the works now proposed to be executed. That is true; but section 8 provides that the court of summary jurisdiction may, if it thinks fit, adjourn the hearing and direct further notices to be given. It was, therefore, within the power of the court of summary jurisdiction to direct notices to be given to the defendants; but it was not obligatory on such a court so to do. Plainly the court had a discretion in the matter, and that discretion was exercised. It is not for me to say whether or not the discretion was properly exercised. All that I have to determine is whether the justices acted within their jurisdiction. I think that they did, and it appears to me that this objection also fails.

On the whole I come to the conclusion that the plaintiffs are entitled to the order for which they ask, and that order must be made accordingly.

Solicitors, *Ruston & Co.*; *Munton & Morris.*

Chan. Div. } Kekewich, J. } Feb. 10, 11, 18.

In re RAPHAEL.
Ex parte SALOMON. (*a*.)

Solicitor—Costs—Pauper client—Taxation of costs in House of Lords—Liability to costs as between solicitor and pauper client—R. S. C., 1883, *ord.* 16, *rr.* 22-31.

Where a solicitor had been retained by, and acted for, a successful pauper appellant (since deceased) in the House of Lords, but in accordance with the practice in the House of Lords as laid down in Johnson v. Lindsay [1892] *A. C.* 110, *the respondent in the House of Lords was not liable for party and party costs;*

Held—on an application by the solicitor against the estate of his deceased client for taxation of the costs of the appeal to the House of Lords—that the solicitor was entitled to recover from the client's estate the ordinary costs which a solicitor is entitled to charge, viz., costs to be taxed as between solicitor and client.

Summons to review the taxing-master's certificate.

The applicant, Ralph Raphael, had acted as solicitor for the late Aron Salomon in *Broderip* v. *Salomon*, 43 W. R. 612, [1895] 2 Ch. 323, and in the appeal of *Salomon* v. *Salomon & Co.*, 45 W. R. 193, [1897] A. C. 22, in which the House of Lords, reversing the judgment below, held that, the company being regularly constituted under the Companies Acts, the appellant, Aron Salomon, was under no liability to indemnify it, as his agent or trustee, against the claims of creditors in the absence of fraud.

It was under the applicant's advice, that Aron

(*a*.) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

Salomon, who had been reduced to poverty by the decision of the Court of Appeal, had presented a petition to the House of Lords for leave to sue *in formâ pauperis*, with an affidavit in the terms of ord. 16, r. 22, of the Rules of Court, 1883.

Leave having been given, Aron Salomon succeeded in his appeal to the House of Lords, and ceased to be a pauper.

He died in 1897, and the respondent, Emanuel Salomon, took out letters of administration of his estate and effects.

On the successful appeal of a pauper to the House of Lords, party and party costs were disallowed in *Johnson* v. *Lindsay*, [1892] A. C. 110, 48 W. R. Dig. 180.

A bill of costs was delivered by the applicant to the respondent, in which, among other items, he claimed costs for work done by him as solicitor in the prosecution of the appeal to the House of Lords.

The bill having been taxed on the petition of the respondent, the taxing-master submitted these items to Mr. Taylor, of the Taxing Department of the House of Lords.

It was contended on behalf of the respondent that this being a taxation under an order of the Chancery Division, rule 27 of order 16 of the Rules of Court applied, and the applicant was not entitled to "take, or agree to take, or seek to obtain from" the pauper "any fee, profit, or reward for the conduct of his business in the court."

Mr. Taylor refused to tax the bill, on the ground that the Rules of the Supreme Court did not bind the House of Lords, and there did not exist any rules or practice of the House of Lords, in the case of a pauper appellant, regulating the liability to costs as between solicitor and client.

The items, therefore, were disallowed.

Kenyon Parker, for the applicant, said that the question was whether the costs of a successful pauper litigant in the House of Lords can be taxed as between himself and his solicitor. There being no special contract, the ordinary rules as between solicitor and client apply, since the Rules of the Supreme Court, ord. 16, rr. 22-31, do not apply to the House of Lords. The form of *Johnson* v. *Lindsay*, applies to party and party costs only. The pauper can make a bargain if he pleases: *Richardson* v. *Richardson and Plowman*, 44 W. R. 102, [1895] P. 276, 346. The matter should be referred back to the taxing-master to tax the disallowed costs as between solicitor and client.

S. O. Buckmaster, for Emanuel Salomon, the administrator of the estate and effects of Aron Salomon.

The practice is the same in the House of Lords as in the High Court; the rules were much discussed in *Carson* v. *Pickersgill*, 33 W. R. 589, 14 Q. B. D. 859. The result of allowing these costs would be that the solicitor would get the whole costs from the successful pauper, including profit costs, while the pauper would only get costs out of pocket from the unsuccessful respondents. The judgment of the House of Lords only relieved Salomon from paying a sum of £7,700 and did not give him anything. The costs were rightly disallowed, according to the practice of the Chancery Division.

KEKEWICH, J.—A novel and interesting point on the important question of costs arises in this way. The order of Vaughan Williams, J., and the Court of Appeal in *Broderip* v. *Salomon*, known as "the one-man company case," reduced Aron Salomon to poverty. He carried the case to the House of Lords. By the affidavit which he took to the House of Lords in support of his petition, which was considered by the Appeal Committee, he swore he was "not worth £5, his wearing apparel and the subject-matter of the cause or matter only excepted." On that he was allowed to appeal *in formâ pauperis*. The result was that he succeeded on his appeal, and though not thereby made a wealthy man, he was rehabilitated and removed from the list of paupers. He was then entitled as a successful appellant to certain costs from the unsuccessful respondents, and the costs were necessarily paid according to the rules laid down in the case of *Johnson* v. *Lindsay*—namely, "On the taxation of a pauper appellant's costs on a successful appeal to this House, the fees of this House, and the fees of counsel are to be disallowed, and the solicitor is to have his costs out of pocket with a reasonable allowance to cover office expenses, including clerks, &c." That is all he is entitled to recover from the unsuccessful respondents who were ordered to pay the costs. An order of the House of Lords on the respondent there, to pay the pauper appellant's costs would be construed to mean what I have stated. Then Aron Salomon's solicitor says he is entitled to recover from Aron Salomon, or rather to be paid out of his estate, the ordinary costs which a solicitor is entitled to charge, that is to say, costs to be taxed as between solicitor and client, and the question I have to decide is whether he is entitled to that or not.

It is strange that there is no direct authority upon the point at all. The orders of the Supreme Court do not help me, except so far as they may be treated as founded upon justice after much consideration by many learned judges and others. It has, however, been held that they are not binding on the House of Lords, and do not apply to the House of Lords; and I cannot possibly say that because, if this had been an action in the High Court, Mr. Raphael would not have been entitled to ordinary costs, therefore he is not entitled to recover ordinary costs in the House of Lords. On that the case of *Johnson* v. *Lindsay* does not help me in the least. I do not think I can pay any attention to the allegation in the petition set out in the report of *Johnson* v. *Lindsay*. It was urged on behalf of the petitioners at p. 111 of [1892] App. Cas. that "In the case of a pauper appellant in this House, the fees of the House are not required from him, and he obtains the services of counsel and solicitor without remuneration; that if the appeal is dismissed, no costs are given against him; that if when the appeal is successful the appellant's costs are allowed, and are taxed upon the principle hitherto in force in the House, the respondent has to pay when he loses, and not be paid when he wins, and, moreover, has to pay the appellant's costs—not of suing as a pauper, but of winning as a pauper." It is strange that there is there a statement not only that the fees of the House are not charged, but that the pauper obtains the service of solicitor and counsel without remuneration. If that had been true, it disposes of the case. But this allegation in the petition is controverted, and I find no proof of it anywhere. For the same or a like reason I cannot find much to guide me in the otherwise instructive case of *Carson* v. *Pickersgill*, because that case was in the Supreme Court. It was there held that under the Rules of the Supreme Court, 1883, ord. 16, rr. 24, 25, 26, 27, 31, a successful plaintiff in an action *in formâ pauperis*, tried before a judge and jury, is entitled upon taxation as against the defendant to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel. That case went on the rules. The fact there that it was tried by jury, so that the costs were not in the discretion of the court, was much discussed. But in truth that decision went entirely on the Rules

of the Supreme Court. They were very carefully considered and criticized by more than one learned judge, but at the same time the decision did go on the rules, and did not touch the general principle.

But the rules seem to me to be based on this, that when a man sues *in formâ pauperis* in the Supreme Court he has counsel and solicitor assigned to him, and that makes all the difference. They are assigned to him on certain terms which bind them as much as they bind him. So here I am left without authority, and have to consider the general principle. What is the contract? That on reflection seems to me to be the real question. What was the contract between Aron Salomon and his solicitor Raphael when Raphael accepted the client's retainer to conduct the appeal in the House of Lords? Am I to invent a special contract because the client was suing *in formâ pauperis*, a contract which would substantially say this, that whereas but for a special contract the retainer would enable the solicitor to charge the client subject to the ordinary rules—that is to say, to charge costs, including profit costs, subject to taxation, yet because he is suing as a pauper the client is not liable in that or in any other way, but only according to a special contract depending on the fact that he sues as a pauper? Why should I invent that contract for the occasion? When Raphael became the solicitor of Aron Salomon, not by assignment but by Aron Salomon's choice, why should I not say that the retainer is governed by the ordinary rules? I have said that there is no authority on the point, but there is a very useful case before Sir Francis Jeune, in which he expressed an opinion, subject no doubt to revision, if the actual point came before him—the case of *Richardson* v. *Richardson*. There there was an action in the Divorce Court and the petitioner suing *in formâ pauperis* obtained a verdict of £30 damages and a decree *nisi* with costs against the co-respondent, and the question there, as it was in *Johnson* v. *Lindsay*, was not what the solicitor was to obtain from the pauper client but what the co-respondent was to pay on the decree *nisi* to the pauper petitioner. It was not argued at great length, but some authorities were cited, and Sir Francis Jeune reserved judgment, and subsequently delivered a very instructive judgment in which he called attention more than once to the difference between the assignment of a legal adviser to a pauper and the retainer of a solicitor by him, and he says: "It follows, I think, that there is nothing to prevent counsel or a solicitor being retained by a pauper and receiving from him such fees as he, perhaps by the aid of friends, may be able to pay, and this is the effect of the opinion given by the Attorney-General (Sir Richard Webster) in 1891, as stated in the Law Times (vol. 90), p. 79 (2). Whether a solicitor, not assigned by the court, but employed by the pauper, could, if he thought it worth the whole, sue on a retainer, it is not necessary to decide, but my present opinion is that he could." Of course that opinion is not binding upon me, and it is not really a judicial opinion, but it is valuable as being an expression of opinion of the learned judge, not on the particular point before him, but on one connected with a point which involved a long disquisition on costs, where a man is suing *in formâ pauperis*. That view seems to me to be consonant with justice and commonsense. You may trust solicitors in general when they accept a retainer from a pauper not to sue him on the retainer. If a sense of honour would not prevent them from suing and recovering judgment, their own interest would, because, if they have got a pauper to deal with, it is not likely they will be willing to spend money in the recovering judgment against him. But does that prevent a solicitor from making an ordinary contract on the footing that the solicitor may make the client pay if he becomes able to do so? I wish to be perfectly understood. I do not lay down the doctrine that the contract between the solicitor and his client is that the client should not pay unless he succeeds. I do not think that would be a proper contract to infer, or that he will pay the expenses if, fortunately, he ever has the means so to do. I do not think that the contract is of that character, but I think it is the common contract—namely, the client from the moment of the retainer, so long as the retainer holds good, is bound to pay the ordinary costs, though he has not in fact the means to pay. That is in accordance with the ordinary practice. Solicitors often accept retainers from persons who, to their knowledge, may not be able to pay, and they do so partly out of kindness and partly because they are content to take the rough with the smooth in the course of business. It is hard to say because a solicitor happens to know that his client is impecunious, the solicitor cannot sue him if he thinks fit to do so; and I do not see, for this purpose, the distinction between the man who is known to be impecunious, though not described in the procedure as such, and the man who is suing *in formâ pauperis*, because he has been allowed to do so by the House of Lords. Only one other matter I must notice, as it was mentioned by counsel. The "one-man company case" was one of some notoriety, and people seemed to consider Mr. Raphael worthy of reward for his services in enabling tradesmen to turn their businesses into one-man companies and so avoid their liabilities. Therefore they got up a testimonial to Mr. Raphael for the services he had rendered, not to Aron Salomon, but to the public, the testimonial consisting of a piece of plate and an address on vellum. No doubt subscriptions were got under the idea that Mr. Raphael acted gratis. It was said that Mr. Raphael knew it. But it would be going too far to say that, if my view of the contract between the solicitor and client is right, the solicitor is estopped by the acceptance of a piece of plate and an address on vellum from getting his costs; such things would be a poor substitute for costs, and in my opinion the testimonial is not a reason for getting rid of or varying the contract entered into, if my view of that contract is right.

Solicitors, *Ralph Raphael & Co.; Harris & Chetham.*

Q. B. Div. (Bigham, J.) — Jan. 26.

UNITED STATES OF AMERICA v. PELLY. (a.)

Foreign Enlistment Act, 1870 (33 & 34 *Vict. c.* 90), s. 8 (4)—*Contract by English owners to sell ships to American Government—Contract to be void if United States became belligerents—Outbreak of war—Action to recover deposit.*

By section 8 (4) *of the Foreign Enlistment Act*, 1870, *it is an offence for anyone to despatch, or cause or allow to be despatched, any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State.*

The defendants on the 21*st of April*, 1898, *contracted to sell to the plaintiffs, the United States Government, prior to the commencement of hostilities between that*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

country and Spain, two steamships, "to be delivered as soon as possible."

The plaintiffs paid a deposit, which was subject to the following clause of the contract: "If from blockade or any other cause arising from the United States becoming belligerents and preventing delivery of either of the said steamers, this contract is to be null and void, but the vendor is to retain the deposit as and for liquidated damages."

It was impossible for the defendants to have despatched the ships before the day (23rd of April) when the United States commenced hostilities with Spain; but the proclamation of neutrality by the British Government was not published until the 26th of April. In an action to recover the deposit,

Held, that the defendants' contention that they were "prevented" from making delivery by reason of the above-cited section of the Act of 1870, was a good defence to the action.

Commercial cause.

Action to recover £5,300 deposit paid under a contract for the purchase from the defendants of two steam colliers. The defendants pleaded that by reason of the outbreak of war between America and Spain it was impossible for them to deliver the ships, and that by the terms of the contract they were entitled to retain the deposit.

The material facts were as follow:

The contract was entered into on the 21st of April, 1898, in London, and by it the United States Government by their representative agreed to buy from the defendants two ships—*The Rookwood* and *The Lockwood* for the sum of £26,500 each to be delivered in New York "as soon as possible." The deposit paid was 10 per cent. on the purchase price. It was provided by clause 7 of the contract that if from blockade or any other cause arising from the United States becoming belligerents and preventing delivery of either of the said vessels, the contract was to be null and void, but in that case the vendors were to retain the deposit as liquidated damages, and in addition if the steamer or steamers had sailed from the United Kingdom a further payment of £2,500 for each steamer was to be made to the vendors.

At the date of the agreement both vessels were at sea, but *The Lockwood* arrived in the Thames on the morning of the 23rd of April, and *The Rookwood* arrived at Alloa in Scotland on the afternoon of the 22nd of April.

The plaintiffs alleged that there had been delay in despatching the vessels, and that the defendants were not "prevented" within the meaning of clause 7 of the contract from delivering the ships. The latter question turned upon the construction to be placed on section 8 of the Foreign Enlistment Act, 1870, which enacts that, "If any person within her Majesty's dominions, without the licence of her Majesty, does any of the following acts—that is say, (4) despatches, or causes or allows to be despatched, any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State such person shall be deemed to have committed an offence against this Act."

The defendants denied that there had been delay, and relied on evidence they adduced that on the 23rd of April the United States declared war with Spain. On that day they wrote to the Naval Attaché at the American Embassy in London, who had signed the contract on behalf of the United States Government, that as the United States had become belligerents they were prevented from delivering either steamer. The Naval Attaché replied that until the English Government had notified the fact that America was at war with Spain by a proclamation of neutrality the provision of the Foreign Enlistment Act, 1870, did not come into force, and that the ships were to be sent on at once.

This the defendants declined to attempt to do, and the present action was brought.

The argument sufficiently appears from the judgment.

Cohen, Q.C., Joseph Walton, Q.C., and *Newton Crane*, for the plaintiffs.

Sir R. T. Reid, Q.C., and *Scrutton*, for the defendants.

BIGHAM, J.—This was an action brought to recover a deposit made by the United States on signing a contract for the purchase of two ships from the defendants. By the contract the ships were to be despatched as soon as possible, and I have no doubt that the ships were purchased because it was thought that war was almost certain to break out. By clause 7 of the contract, if the United States became belligerents with another power and the vendors were thereby prevented from delivering the ships, the contract was to be void, except that the vendors were to be entitled to retain the deposit, which, in my opinion, was a reasonable and proper stipulation. By the terms of the contract the defendants were to do their best to get the ships despatched "as soon as possible," and one reason for that was, as the United States knew, that it was desirable to get the ships away before the Foreign Enlistment Act operated to interfere with their departure. It was suggested that the defendants from the very first intended to defeat the object of the contract and so make sure of retaining the deposit and in that way to realize a profit without giving any consideration for it. I do not think that there is the least ground for making that suggestion. The evidence satisfies me that the defendants did their best on the 22nd of April, the very day after the contract was signed, to carry out the contract, and I am sure that by the morning of the 23rd of April—that is, before the defendants had had time to start the ships on their way to New York—they had ascertained, as the fact was, that a state of war existed. [His lordship then referred to telegrams published in the *Times* stating that the American fleet sailed on the 21st of April from Key West, and on the 22nd of April a Spanish ship, *The Bona Ventura*, was captured, and to the fact that on the same day the American President issued a proclamation declaring a general blockade of Cuba.] In my judgment the argument of the plaintiffs was wrong when they contended that there was no state of war affecting the defendants unless and until war was formally recognized by our Government, and that the defendants were therefore free so far as contravening the Act of 1870 up to the 26th of April at any rate, when a declaration by her Majesty dated the 23rd of April, and stating that war had unhappily broken out between Spain and the United States, was officially published in the *London Gazette*. I agree that this proclamation is not, strictly speaking, evidence of the date when the fact that the United States had become belligerents became officially recognized by the Government of this country, but I confess that it is not without weight in my mind, because I cannot imagine that those who prepared that proclamation were not fully informed. For the reasons given I am constrained to hold that if the defendants had proceeded with the dispatch of the vessels on or after the 23rd of April, they would have violated section 8, and have brought themselves within the Act. It is sufficient for me to say that if a man found himself doing some act which was contrary

to the law, he was "prevented" from doing that act. Clause 7 of the contract does not merely mean physical prevention. If, therefore, it was improper or wrong for the defendants to deliver the ships after the 23rd of April, which, on the evidence, was the day before they, by any possibility, could have despatched these vessels—then, by the terms of the contract, read as I think it was clearly intended by the parties when they signed it that it should be read—the defendants were not to do so, but were in that event to be compensated for their trouble and expenses by retaining the deposit. For these reasons there must be judgment for the defendants with costs.

Solicitors for the plaintiffs, *Chester & Sons.*

Solicitors for the defendants, *Deacon & Co.*

Q. B. Div.
(Day and Lawrance, JJ.) Jan. 11.

MALLET v. GREAT EASTERN RAILWAY CO. (a.)

Railway — Carriage of goods — "Owner's risk"— Breach of contract—Damages—Liability.

A railway company contracted with M. to carry certain goods to Jersey, viâ the Great Western Railway. Instead of doing so they carried them viâ the London and South-Western Railway, and in consequence there was delay, and M. suffered damage and loss. The contract was for carriage at owner's risk. In the contract was a clause relieving the company from all liability for loss, damage, misdelivery, delay, or detention, except where such arose from the wilful misconduct of the company.

Held, that, as the company had not carried out the terms of the contract, the above clause did not apply, and the company were liable.

This was an appeal by the plaintiff from a nonsuit by the learned judge of the Lowestoft County Court.

The action was for breach of contract. The plaintiff entered into a contract with the defendant company whereby the latter undertook to carry for the plaintiff a quantity of fish to Jersey. The fish was to be carried by the defendants on their own line as far as London, and thence by the Great Western Railway to Weymouth, where it was to be placed on board the steamship for Jersey. Instead of this being done the defendants carried the fish from London by the London and South-Western Railway to Southampton. The consequence of this was that the fish arrived late and the plaintiff lost the market, whereby he suffered damage.

The contract, which was one for carriage at owner's risk, contained the following clause: "To be carried at the reduced rate below the company's ordinary rate, in consideration whereof I agree to relieve the Great Eastern Railway Co., and all other companies or persons over whose lines the merchandize may pass or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the servants of the company or of such other companies or persons as above."

At the trial the plaintiff proved that the defendants carried the fish *viâ* the London and South-Western Railway instead of by the Great Western Railway, and that in consequence he had suffered loss and damage. He did not, however, give any evidence showing the reason why the goods were carried by the former instead of by the latter company. The learned judge nonsuited the plaintiff on the ground that he was bound by the aforesaid clause in the contract and that he had given no evidence showing that anything had been done which would take the case out of that clause.

The plaintiff appealed.

Ernest Wilde, for the appellant.—There was here a clear case of a breach of contract. The contract was to carry by the Great Western Railway. The defendants had failed to do so; they had carried the plaintiff's goods by another line, and in consequence the plaintiff had incurred loss. The case was thus taken out of the above clause in the contract: *Sleat* v. *Fagg*, 5 B. & Ald. 342.

Bodilly, for the respondents.—The nonsuit was right. There was no wilful misconduct on the part of the defendants, and unless such was proved they are not liable for loss or damage: *Stevens* v. *Great Western Railway Co.*, 52 L. T. Rep. 324, 33 W. R. Dig. 173; *Lewis* v. *Great Western Railway Co.*, 26 W. R. 255, 3 Q. B. D. 195.

Wilde, in reply.—Delivery to the wrong person is wilful misconduct.

DAY, J.—I feel no doubt as to the rights of these parties. The plaintiff entered into a contract at Lowestoft with the Great Eastern Railway Co. whereby the latter undertook to carry the fish *viâ* the Great Western Railway and Weymouth. Immediately afterwards the defendants changed their mind upon the subject and sent the fish by the South-Western Railway and Southampton, and by reason of so doing the fish were greatly delayed. The defendants are not protected from liability for such delay by the terms of the above-mentioned clause. The delay there means delay in the performance of rhe contract. Here the defendants deliberately violated the contract, and by reason of not carrying out the contract they delayed the fish. The learned judge in the county court ought to have heard the case out. He did wrong in nonsuiting.

LAWRANCE, J.—I agree.

Appeal allowed.

Solicitors for appellant, *Dubois & Williams*, for *H. Chamberlin*, Yarmouth.

Solicitor for the respondents, *Edward Moore.*

Q. B. Div.
(Wills and Bruce, JJ.) Dec. 12.

ST. LOUIS BREWERIES (LIMITED) (*Appellants*) v. APTHORPE (SURVEYOR OF TAXES) (*Respondent*). (a.)

Inland revenue—Income tax—Annual profits or gains—English company—Business carried on abroad through foreign company—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D., 5th case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

An English company formed under the Companies Acts and registered in London had power by its memorandum of association to acquire the whole or part of the capital stock of an American incorporated association, then carrying on a brewing business in the State of Missouri, in the United States, and to allow the legal estate and interest in any business or property acquired by the company to be vested in and carried on by any American company upon trust

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

for, or as agents or nominees of, the English company. The English company acquired the whole of the share capital of the American association except fourteen shares. The brewing operations were carried on in the State of Missouri exclusively, and under the immediate management of the directors of the American association, and the breweries and other property were vested in that association, and the officers and employees were appointed by the American directors. At the end of each financial year copies of the balance-sheet and profit and loss account of the American association were sent to the English company, and, after considering them, the directors of that company informed the American association as to what dividend they thought ought to be declared, and the American association habitually declared a dividend at the rate mentioned. In the reports and accounts of the English company the breweries business and profits were treated as being the property and under the control of the English company, and the directors of the American association were referred to as "the board of management in St. Louis." The accounts of the breweries were audited annually by an English accountant sent for the purpose by the English company. The amount of the dividend on the shares held by the English company was transmitted to England for distribution amongst the shareholders.

Held, that the brewing business was in substance the business of the English company, and that they were liable to be assessed to income tax under section 2, Schedule D., of the Income Tax Act, 1853, in respect of the annual profits or gains arising from that business.

Case stated by the Commissioners of Inland Revenue.

The appellant company appealed against assessments made upon them under section 2, Schedule D., of the Income Tax Act, 1853—"in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere."

The appellant company contended that the assessment should be made under the 5th case of section 100, Schedule D., of the Income Tax Act, 1842—viz., the duty to be charged in respect (*inter alia*) of foreign possessions "shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain" (now the United Kingdom) ". . . computing the same on an average of the three preceding years," &c.—and they contended that the assessment should be reduced to the amount actually received by them in England.

The appellant company was an English company registered under the Companies Acts, and having its registered office in the City of London. Amongst the objects stated in its memorandum of association were:

"(*a*) To acquire the whole or any part of the capital stock of the St. Louis Brewing Association carrying on business at St. Louis in the State of Missouri in the United States of America, and to acquire and take over any contracts which it may seem expedient that the company as proprietors of the said stock should acquire and take over, and with a view thereto to enter into and carry into effect with such modifications (if any) as may be agreed upon the agreement with Edmund Fitzmaurice Lenon mentioned in clause 3 of the company's articles of association.

"(*b*) To carry on business as brewers, maltsters, &c.

"(*c*) To allow and cause the legal estate and interest in any businesses or property acquired, established, or carried on by the company to remain or be vested or registered in the name of or carried on by any American company formed, or to be formed, and either upon trust for or as agents or nominees of this company, or upon any other terms or conditions which the board of directors may consider for the benefit of this company, and to manage the affairs or take over and carry on the business of any such American company either by acquiring the whole or part of the shares or stock or debentures or other securities thereof or otherwise howsoever, and to exercise all or any of the powers of any such company or of holders of shares or stock or debentures or securities thereof, and to receive and distribute as profits the dividends and interest on such shares, stock, debentures, or securities."

The St. Louis Brewing Association was duly incorporated in May, 1889, under the laws of the State of Missouri, with a capital of 5,250,000 dols., divided into 52,500 shares of 100 dols. each, for the purpose of manufacturing and selling beer. It had (under its articles and bye-laws) a board of thirteen directors, who held office for a year and were elected annually by the shareholders, and other officers appointed by the directors. The board of directors had under the bye-laws the general management and control of the corporation and its officers, and a general supervision and control over the committees of the board, which committees were appointed by the board. The association had purchased a number of breweries at St. Louis, and the share capital of the association was entitled to the whole of the net profits of the breweries less an amount payable for interest on debentures issued by the association and secured by a mortgage upon certain of the breweries.

The St. Louis Brewing Association had issued 50,886 shares, of which 50,872 shares were held by the appellant company, and the remaining fourteen shares were held in America, thirteen being held by the directors of the St. Louis Brewing Association, each holding one share. The brewing, manufacture, and the brewing trade on which the profits wholly depended were carried on exclusively at St. Louis under the immediate management of the directors of the American corporation. These directors in the printed reports of the appellant company were termed the "Board of Management in St. Louis." The banking account of the American corporation and all the trade books and accounts were kept at St. Louis aforesaid. An English accountant was appointed by the appellant company to proceed to America at the end of each financial year and audit the accounts of the eighteen breweries at St. Louis. Although the directors of the American association were not paid salaries, under article 10 of the bye-laws each director received a salary as manager of an individual brewery committed to his charge for management purposes.

At the end of each financial year a balance-sheet of the American corporation and a profit and loss account were prepared showing the result of the brewing business for the past year. A copy of such balance-sheet and profit and loss account was forwarded by the American corporation to the appellant company, and the directors of the appellant company then considered the accounts and agreed upon the rate of dividend which they considered should be declared. They communicated their decision to the American corporation, who then always declared a dividend upon the shares of the American corporation at the rate mentioned. The directors of the American corporation having declared the dividend, the directors of the appellant company then declared a dividend upon the shares of the appellant company.

No dividend warrant was issued by the American corporation. Each stock or share holder, upon production of his certificate, was entitled to be paid the amount of dividend due to him. The amount of dividend on the shares held by the appellant company

was sent over in bulk by telegram so far as required for the English shareholders in the appellant company in England. Such portion of the dividend as was required for American shareholders in the appellant company was retained in America by the American company and distributed there direct. The appellant company did not issue any dividend warrants in respect of such of its shares as were held by American shareholders.

The annual reports and accounts of the appellant company always stated and dealt with the subject of the breweries, their business and profits, as being the property and under the entire control of the appellant company alone.

The commissioners found as follows:

1. That the business carried on at St. Louis in the United States of America was in fact carried on by, and was the business of, the appellant company, and that the profits made were the profits of the appellant company.

2. That the head and seat and directing power of the appellant company were at the appellant company's registered office in the City of London, and that if the business at St. Louis and the profits made thereby were technically the business and profits of the American company, the American company was for such purpose the agent of the appellant company.

The commissioners confirmed the said assessments and stated this case at the request of the appellant company.

Asquith, Q.C. (*Bremner* and *Macaskie* with him), for the appellants.—The commissioners were wrong in holding that the brewing business was carried on by the appellant company; they are interested in it only as shareholders in the American association, whose business it is. The appellant company have no control over the business or the officers of the American company, except so far as by means of the voting power conferred on them as shareholders they can exercise such a control. The case is within *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493, and *Bartholomay Brewing Co.* v. *Wyatt*, 42 W. R. 173, [1893] 2 Q. B. 499, and is distinguishable from *Apthorpe* v. *Peter Schoenhofen Brewing Co.*, 79 L. T. Rep. 98, on the ground that in that case the English company had complete control over the American company.

Sir R. E. Webster, A.G. (*Danckwerts* with him), for the respondent.—The commissioners were right; the case falls within the first branch of Schedule D. of section 2 of the Income Tax Act, 1853 (Dowell's Income Tax Laws (4th ed.), p. 242). The English company was formed, as its memorandum of association shows, to acquire the business and property of the American association; their accounts shows that the breweries and other American property are treated as the property of the English company; the American association is merely a device, contemplated by the English company's memorandum, for enabling the business to be carried on, and the property to be held in the State of Missouri in accordance with the local law. The business is the business of the English company carried on by them in London through the agency of the American association or the American managers, who are in substance the servants or agents of the English company. *Colquhoun* v. *Brooks* does not overrule the decisions in *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson*, 25 W. R. 71, 1 Ex. D. 428. *Bartholomay Brewing Co.* v. *Wyatt* has been overruled by *San Paulo (Brazilian) Railway Co.* v. *Carter*, 44 W. R. 336, [1896] A. C. 31, as Wright, J., pointed out in *Apthorpe* v. *Peter Schoenhofen Brewing Co.* The *Bartholomay case* is inconsistent with a series of previous decisions: *Imperial Continental Gas Association* v. *Nicholson*, 37 L. T. Rep. 717, 1 Tax Cas. 138, 26 W. R. Dig. 102; *London Bank of Mexico and South America* v. *Apthorpe*, 39 W. R. 564, [1891] 2 Q. B. 378; *Denver Hotel Co.* v. *Andrews*, 43 W. R. 339, 3 Tax Cas. 356; *Norwich Union Fire Insurance Co.* v. *Magee*, 44 W. R. 384, 3 Tax Cas. 457; *Grove* v. *Elliots*, 3 Tax Cas. 481.

Bremner, in reply.—The decisions in the series of cases referred to do not go beyond the decision of the House of Lords in the *San Paulo case*. In those cases there was only one company, viz., an English company, and the business abroad was carried on by their agents or managers; here there is an independent American company, and the English company are merely shareholders in it.

WILLS, J.—I have come to a clear conclusion that the Crown is entitled to judgment in this case. I am well aware that if the American law as to companies is the same as our own we must treat this American association as subject to the same principles of law as those which affect our companies here. There is no evidence before us that the American courts take the same view as to the position of companies as was taken by the House of Lords in the case as to a "one-man company": *Salomon* v. *Salomon & Co.*, 45 W. R. 193, [1897] A. C. 22; but I will assume for the purposes of my judgment that this is so, and that in American law as in our own a company is a separate entity, distinct from the shareholders which form it. It is no doubt true, as Mr. Bremner has contended, that in theory the business of this American association is carried on by the American directors and the English company have no legal power, no power which could be enforced in a court of law to order the American directors to do or abstain from doing any particular act. But clause (c) of the memorandum of association of the English company (which it is stated is in a form in common use) shows that there is a recognized way by which one company can in effect obtain power to manage the affairs of another company by acquiring all or practically all the shares in that other company. In that way, although the foreign company may not be theoretically or legally governed by the English company, the English company can and do control the business carried on by the foreign company. The business of the English company in this case is to manage the business of the American association in the interests of the shareholders in the English company. That that is the nature of the business carried on by them here in London it is impossible to doubt. If Mr. Bremner's argument represented the real state of things the English directors would have nothing to do except occasionally to send out someone to see how things were going on with the business in America; and to do this merely for the sake of gratifying their curiosity, for neither they nor the person whom they sent out would have any power to act with respect to the American business; yet these English directors divide between them a large sum annually as remuneration for their services. That fact shows that there is something more to be done by the English directors.

My decision does not merely depend on the description of the business of the appellant company as set out in their memorandum of association. The substance of the matter must be looked at. I do not propose to discuss the question whether the English company can be said to be carrying on the business of the American association. If the substance be looked at, and not mere machinery only, there is a good deal to be said in favour of the larger view that the English company is doing through the American

company the business which is done in America. I do not, however, found my judgment on that larger ground, though there is much in the reports and accounts to support that view.

The previous decisions which have been referred to are not of much assistance to me; the question is really one of fact, and the circumstances of the cases differ. Most of the cases cited differ from this case in that one company only was concerned; but that does not apply to the *Cesena case*, in which there was an Italian company. The case of *Bartholomay Brewing Co.* v. *Wyatt* I do not pause to consider, for my brother Wright (who was a party to that decision) has himself said that the effect of that case has been destroyed by the decision of the House of Lords in *San Paulo (Brazilian) Railway Co.* v. *Carter*. On the question of fact submitted to me here I am of opinion that the appellant company were effectively carrying on business in America, and that they did this by acquiring a preponderating influence in the American association. The possession of the shares in the American association enabled them to do what their memorandum of association states to be one of their objects—they managed the affairs of the American association by acquiring practically all the shares in it. For these reasons I think that the Crown is entitled to judgment.

BRUCE, J.—I agree. I should have felt that some difficulty was occasioned by the *Bartholomay case* if my brother Wright had not said that his decision there was gone. Looking at the matter from a practical business point of view I am satisfied that these American directors are not carrying on their business independently of the English company. The head and seat and power of the business are with appellant company here, and the American company were practically the agents of the English company.

Judgment for the Crown.

Solicitors for the appellants, *Ashurst Morris, Crisp, & Co.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Privy Council.

(*From the Court of Appeal, New Zealand.*)

Nov. 26.

DILWORTH AND OTHERS v. THE COMMISSIONER FOR LAND AND INCOME TAX.

DILWORTH v. THE COMMISSIONER OF STAMPS. (a.)

Charity—Institution for education—Church of England—Beneficiaries to be brought up in a particular religion—Beneficiaries from another country—Deceased Persons Estates Duties Act, 1881 (*New Zealand*), *Exemption Act*, 1883—*Land and Income Assessment Act*, 1891 (*New Zealand*), *Exemption Act*, 1892.

A testator, who died in 1894, *bequeathed the residue of his estate, both real and personal, to trustees for the purpose of founding and endowing an institution for the maintenance and education of boys who were orphans, or the sons of persons in straitened circumstances, resident in the provincial district of Auckland, or in the province of Ulster, Ireland; and the institution was to be managed by persons of a particular religion, and the inmates were to be brought up and instructed in that religion.*

Held to be a charitable devise or bequest, and a "public" institution within the New Zealand Estates Duties Exemption Act, 1883;

Also, as to the land devised, that the institution was "carried on for charitable purposes" within the New Zealand Land and Income Tax Exemption Act, 1892.

These were two appeals from the Court of Appeal, New Zealand, and involved the consideration of several points bearing upon the general law of charitable gifts.

The facts are given at length in the judgment of their lordships. The sections of the various statutes bearing upon the matter are also set out therein.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appellants.

Haldane, Q.C., and *Rowden*, for the respondents.

The judgment of their lordships (Lords WATSON, HOBHOUSE, and DAVEY) was delivered by

Lord WATSON.—The appellants, in both these cases, are the testamentary trustees and executors of the late James Dilworth, of Remuera, near Auckland, in the colony of New Zealand, who died on the 23rd day of December, 1894. Before the commencement of either of the suits in which these appeals are taken, the appellants had obtained probate and had carried out the whole directions of the testator, with the single exception of his instructions with regard to disposal of the residue of his estate, real and personal.

The testator, after making due provision for all persons whom he conceived to have a moral claim upon him, declared his intention of establishing an institution, to be called the Dilworth Ulster Institute, with the object of affording to boys of the classes thereinafter mentioned such maintenance, education, and training as would enable them to become good and useful members of society; and for that purpose he bequeathed to the appellants the whole of the residue of his real and personal estate which he had power to dispose of by will. At the time of the testator's death, the residue of his trust estate, both real and personal, was certified by the Commissioner of Stamps to be of the value of £100,655 2s. 3d.

The testator directed the appellants to reserve not less than twenty-five acres of his land at Remuera, known as Graham's Hill, for the purpose of erecting suitable buildings for the Dilworth Ulster Institute; and also, in the event of their resolving to establish an industrial branch of the institute at Waitakerei, to reserve sufficient land for that purpose. Instructions were given to the appellants, that, in order to prevent the net income derivable from the residue falling below the sum of £5,000 per annum, they should accumulate and invest such sum of money as they might think necessary before proceeding to erect any buildings for the purposes of the institute. And they were directed that, whenever the net income of the residue amounted to not less than £5,000 per annum, and the money in their hands amounted to not less than £10,000 over and above any sums which they had invested for the purpose of securing the net income of £5,000, they should proceed to erect a substantial building upon the testator's lands at Auckland known as Graham's Hill.

The testator further directed that, as soon as the buildings at Auckland were completed, and all liabilities incurred in the erection thereof discharged, the appellants should select so many boys of sound bodily and mental health, being orphans or sons of persons of good character and of any race, as in the opinion of the appellants that portion of the income available

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

for the purpose will be sufficient from time to time to support, train, and educate. All boys selected must be either destitute orphans or the children of persons in straitened circumstances resident in the provincial district of Auckland or in the province of Ulster in Ireland; and, *ceteris paribus*, a preference is to be given to boys resident in or near the town of Dungannon in the province of Ulster. Boys selected from the provincial district of Auckland must not be under three nor above five years of age, and those selected in the province of Ulster must be between five and eight years of age. The Ulster boys are to be selected by the minister for the time being of a church in Dungannon in connection with the General Synod of the Anglican Church called the Church of Ireland, and failing his nomination by the appellants themselves. Provision is made for supplying the Ulster boys with an outfit, and forwarding them to the Dilworth Ulster Institute at Auckland. No pupil is to remain in the institute after he has attained the age of fifteen, but in the case of pupils distinguished by their industry and natural talents, the appellants are empowered to make arrangements for their maintenance and the prosecution of their studies at any university in New Zealand, or in Dublin, or in or near the city of Belfast in Ireland, and to allow such pupils in the meantime to remain resident in the institute.

All boys selected as pupils of the institute are to be maintained in the buildings of the institute, are to be clothed in a suitable uniform dress, are to be brought up and educated in the tenets of the Church of the Province of New Zealand commonly called the Church of England, and are to be instructed in such branches of learning and industry as shall be considered likely to make them good and useful members of society. It is expressly declared that no person shall be appointed chaplain, secretary, master, teacher, or other officer of the institute until he shall have signed a declaration that he is a member of the Church of the Province of New Zealand commonly called the Church of England, and that he accepts and maintains the principles of the Reformation accomplished in the Church of England in the sixteenth century of the Christian era.

The appellants have hitherto been accumulating the income of the residue, in accordance with the directions of the testator; and they have not yet commenced to erect the buildings of the Dilworth Ulster Institute.

So far as hitherto stated, the facts are common to both appeals; but the questions raised by these appeals depend upon the construction of different Acts of the Legislature of New Zealand, and must now be separately considered.

FIRST APPEAL.

Under the provisions of the Deceased Persons Estates Duties Act, 1881, the Commissioner of Stamps for the Colony, who is the respondent in this appeal, assessed the death duty payable by the appellants in respect of the residue of the testator's estate at the sum of £12,735 13s. 6d. The appellants declined to pay, upon the ground that they were exempted from liability by the Charitable Gifts Duties Exemption Act, 1883; but the respondent held that they were not entitled to exemption, inasmuch as the bequest to the Ulster Institute is a gift to a sect or class, and is not a devise or bequest to a public institution, or a charitable bequest within the meaning of the Act. A case was accordingly prepared for the opinion of the Supreme Court of the Colony. The questions submitted to the court were:

1. Is the bequest to the Dilworth Ulster Institute so made as aforesaid exempt from the payment of duty chargeable under the Deceased Persons Estates Duties Act, 1881, and its amendments?

2. What refund of duty (if any) are the said executors entitled to demand in respect of said assessment?

The case was first heard before Connolly, J., who, on the 18th of December, 1895, answered both these questions in the negative. On the 27th of April, 1896, his judgment was affirmed by the Court of Appeal, who unanimously held that the testator's bequest of residue did not come within the exemption provided by the Act of 1883.

The controversy between the parties turns upon the construction of two clauses in "The Charitable Gifts Duties Exemption Act, 1883," which are in these terms:

Section 2.—"In this Act, the term 'charitable purposes' includes devises, bequests, and legacies of real or personal property respectively of whatever description to public institutions such as libraries, museums, institutions for the promotion of science and art, colleges and schools, or to hospitals, orphan, lunatic, or benevolent asylums, dispensaries."

Section 3.—"Notwithstanding anything contained in 'The Deceased Persons Estates Duties Act, 1881,' or any other Act of a like character, no duty whatsoever shall be payable in respect of any charitable devise or bequest."

These two clauses form the substance of the exempting Act of 1883, which contains only four sections. Section 1 relates to the short title of the Act, and section 4 to the date on and after which its provisions were to be operative.

Section 3, which enacts exemption from the duty imposed by the Deceased Persons Estates Act, 1881, or by any Act of a like character, is expressed in very wide and general terms. It provides that no duty whatsoever shall be payable "in respect of any charitable devise or bequest." The only test of immunity required by that enactment, when considered *per se*, is that the devise or bequest shall be of a "charitable" nature. It does not appear to their lordships to admit of reasonable doubt that the gift of residue to the Ulster Institute is charitable, in the popular sense of that word. It provides for the maintenance and education of boys who are orphans, or the sons of parents who are in straitened circumstances; and it does not, in their lordships' opinion, derogate from the charitable nature of the gift, that the institution is to be managed by persons of a particular religious persuasion, or that its inmates are to be instructed in the tenets of the same sect.

But, in the argument addressed to their lordships, a question was raised in regard to the true legal construction of section 2, and to what extent, if any, its provisions qualify the enactments of the succeeding clause. Section 2 is, beyond all question, an interpretation clause, and must have been intended by the Legislature to be taken into account in construing the expression "charitable devise or bequest," as it occurs in section 3. It is not said in terms that "charitable bequest" shall mean one or other of the things which are enumerated, but that it shall "include" them. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely

employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

Their lordships have come to the conclusion that it is not necessary for the decision of this appeal to determine in which of these senses the word "include" is used in section 3. They are willing to assume, and will accordingly assume that the word was meant to introduce an exhaustive definition, and that the provisions of that clause must govern the meaning of the words "any charitable devise or bequest" which are the subjects of direct exemption in section 3. The objects defined in section 2 are charitable in the legal sense of the word; but they do not comprehend all of the objects which would naturally fall under the general definition of "charitable."

Upon the assumption now made, the crucial question in this appeal comes to be—whether the gift of residue to the Ulster Institute is a charitable bequest within the meaning of the second section of the Act of 1883?

The second section enumerates two classes of institutions, a legacy or devise of real or personal property in whose favour will constitute a charitable bequest not chargeable under the Death Duties Act of 1881. The first class of objects must be of a public and not a private character, and consist of "public institutions such as libraries, museums, institutions for the promotion of science and art, colleges and schools." The second class of objects is introduced by the alternative "or," and consists of "hospitals, orphan, lunatic, or benevolent asylums, dispensaries." The word public, which characterizes all the objects of the first class, is not repeated in or connected with the second class; and it appears to their lordships that it was not meant to apply to any of the objects enumerated in that class.

In considering whether the Ulster Institute is within the second class of objects enumerated in section 2, their lordships therefore think it is immaterial whether the institution, when duly completed and administered according to the testators' directions, will be public or private. One thing is tolerably certain, that it will not be a dispensary, the main purpose of which is the distribution of medicine. "Hospital" is a word of wider and more variable meaning, and primarily signifies a place built for the reception of the sick or the support of the aged or infirm poor. It has been used in Great Britain, in some instances, to denote an institution in which poor children are fed and educated. But that is not the ordinary meaning of the word; and, in the present case it is necessary to compare it with the other expressions which occur in section 2. "Schools" are enumerated in the first class; and, if it were plain that the Ulster Institute, when in operation, will be a public school, there would be an end of the present question. On the other hand, if the institute will be a private school, and is so excluded from the first class, there can, in their lordships' opinion, be no presumption that it was meant to be included in the second class under the general description of an hospital. It would, in their opinion, require more definite language in order to produce that result. The word "asylum," which is the only other term of importance occurring in the second enumeration, is qualified by the expressions, which are used as adjectives, "orphan, lunatic, or benevolent." The word "asylum," according to its original derivation, and in its widest meaning, simply signifies a refuge, a place of retreat and security. In its English acceptation the word is most commonly used to denote an establishment for the detention and cure of persons suffering from mental disease, and also a place for the reception and up-bringing of destitute orphans. Although the word might be loosely applied to a night refuge for the homeless, or to any similar institution, there does not seem to be any warrant for describing the Ulster Institute as a "benevolent asylum." Then the institute has no relation to the insane; and the benefits which it confers are not confined to the children of deceased parents. The fact that some of its inmates are to be orphans will not impart to the institution generally the character of an orphan asylum.

It does not appear to their lordships to admit of doubt that the Ulster Institute is in its essential character a school for the education of boys between the ages of 3 and 15, and that it must at all events, be regarded as an institution of a similar nature to a college or school. But the right to exemption from death duty depends, in their view, upon the institute being a "public" institution within the meaning of the first branch of the enumeration in section 2. It was plainly the intention of the Legislature to exclude from the benefit of the exemption bequests to scholastic institutions which are not public, or in other words, which are of a private character; but the context of the Act does not define, and affords no means of determining what, according to the general understanding of the colony, constitutes the essential difference between a public and a private school. As these words are used in England, there would be no difficulty in pointing out some schools which are public, and others which are unmistakably private; but it might be troublesome to explain the reason why some schools are called public, whilst others not very different in their character and circumstances are known as private. It is in regard to the latter class that the difficulty arises of correct description, such as occurs here.

Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals, for their own emolument, are as clearly private. All schools, whether public or private in the strictest sense of the words, which have a reasonably large attendance of scholars, have one feature in common. They give instruction to the public, or in other words to the children of different sections of the public; and the character of the school, as public or private, must depend not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given.

The Ulster Institute is designed to give free maintenance, clothing, and education to the children of a certain section of the public whose parents are resident in the colony of New Zealand. In their lordships' opinion the character of the institution is not materially altered either by the circumstance that the remainder of the beneficiaries are to be selected in another country, and thence conveyed to the institute at Auckland, or by the circumstance that all of the beneficiaries are to be educated according to the religious tenets of a particular church. If the institute be, within the meaning of the Act of 1883, a public institution, such as a school, there is no provision in that Act which can deprive it of the benefit of the exemption in respect of either of these circumstances.

Their lordships have come to the conclusion, not without hesitation, owing to the view taken by the courts below, that the Ulster Institute, as designed by its founder, does answer the description of a public institution, such as a school.

It appears to them that, if the testator had directed his trustees forthwith to hand over the administration and management of the Ulster Institute to a public body in New Zealand, or if he had made his bequest directly to such public body for the same purposes, the institute would necessarily have been regarded as a public and not as a private institution. What he has directed to be done is in substance the same thing. His trustees to whom he has delegated the duty of building the institute and of superintending its administration, are his trustees in this sense only that he appointed them. They have no personal interest in the residue, which they hold only for behoof of those children, members of the public, whom he has directed them from time to time to select as the beneficiaries under the trust. The bequest is an educational endowment in perpetuity, and the beneficial interest in it is not vested in any private person, but belongs inalienably to the public. Such being the character of the charity founded by the testator, their lordships do not think that the inmates of the Dilworth Ulster Institute could with propriety be described as the recipients of private education.

SECOND APPEAL.

In this case the appellants complain of an assessment of £557 9s. 8d., imposed by the respondent, who is Commissioner of the Colony for Land and Income Tax, upon the income and profits of the land and personalty forming the residue of the testator's estate, during the year 1895-96. The assessment was made under "The Land and Income Assessment Act, 1891," which repealed the provisions of "The Property Assessment Act, 1885," and it was objected to by the appellants upon the ground that the income derived by them from the residue was expressly exempted from duty by section 16 of the Act of 1891. The respondent disallowed the objection; and a special case was stated by the parties for the opinion of the Court of Appeal, in which the only question submitted was, in substance: Whether the appellants, as trustees of Mr. Dilworth's will, are liable to pay to the respondent "Land Tax upon the lands vested in them as aforesaid?" The case does not raise any question as to income arising from estate other than lands. It was heard before the Court of Appeal, who, on the 29th of October, 1896, unanimously answered the question submitted to them in the affirmative, and gave the respondent judgment for the amount of duty which he claimed.

In the case lodged by them with a view to this appeal, the appellants rely upon a clause in "The Land and Income Assessment Act Amendment Act, 1892," creating additional exemption, which is in the following terms: "Section 3 (4).—All mortgages held, and all income received or derived by or on behalf of any public charitable institution, whether formed under 'The Hospitals and Charitable Institutions Act, 1885,' or any other Act for the time being in force, or howsoever formed, if carried on for any public charitable purpose, and not for any gain or profit." Their lordships are of opinion that these provisions, whatever be their effect, must be taken into account in construing the principal Act of 1891; because the assessment in question was imposed in virtue of that Act, as amended by the statute of 1892.

The enactments with respect to exemption from duty, in so far as they have any bearing upon the present case, are contained in sub-section 1 of section 16 of the principal Act, which is in these terms:

"16. Land owned and income derived or received, as hereinafter mentioned, shall be exempt from taxation under this Act, subject, however, to the provisions hereof:

"(1) All land owned by any person or body, corporate or unincorporate, and used or occupied by such person or body solely for any of the purposes hereinafter mentioned:

"(*a*) A place of worship or a place of residence for the clergy or ministers of any religious body.

"(*b*) And public school established under 'The Education Act, 1877,' and all lands and buildings used for any school which is not carried on exclusively for pecuniary gain or profit, but so that not more than fifteen acres be used or occupied for the purposes of any one such school.

"(*c*) The site of any university, or college or school, incorporate by any Act or Ordinance, or the site of a public library, athenæum, or mechanics institute, or any public museum, or any school of mines.

"(*d*) A public cemetery or burial-ground.

"(*e*) The ground or place of meeting for any agricultural society being the property of the society.

"(*f*) A place of meeting for the purposes of a friendly society, or of a masonic lodge, or of any building society registered under the Acts in force relating to building societies.

"(*g*) Public charitable institutions constituted under 'The Hospitals and Charitable Institutions Act, 1885,' and charitable institutions not carried on for gain or profit.

"(*h*) Public gardens, domains, or recreation or other public reserves not occupied by a tenant, and all public roads or streets.

"(*i*) Owned and occupied by Maoris only, and not leased to or occupied by any person other than the Maori owner.

"(*j*) Any public railway, including the land occupied and used as permanent way, and for yards, stations, sheds, and all buildings used for the purposes of traffic only, but not further or otherwise.

"No lands vested in Her Majesty or in the New Zealand Railway Commissioner, nor any land vested in any corporate or other body for the purposes of, or in relation to, local self-government, or for any educational or public charitable purpose, shall be liable to taxation under this Act, except when there is a tenant or occupier liable to pay such tax."

The sub-section which has just been quoted creates certain exemptions from the taxability of lands and buildings. Its sub-sub-sections, which are denoted alphabetically, only exempt such lands or buildings as are actually used or occupied for one or other of the purposes therein specified. Thus, in the case of any school which is not carried on exclusively for pecuniary gain or profit (*g*), or of a charitable institution not carried on for gain or profit (*g*), the exemption obviously has no application, except to an institution which has been erected and is in actual operation. It is therefore unnecessary to consider whether, if the Ulster Institute had been completed according to the testator's directions, exemption could have been claimed for it under one or other of these heads. In that case the claim would not have extended beyond the building and its site; and if it were held to be a school within the meaning of sub-sub-section (*b*), not more than 15 acres used and occupied for the purposes of the institute would be entitled to exemption.

The concluding enactments of sub-section (1) have a much wider scope. They expressly exempt lands vested in the Crown, and all lands vested in any corporate or other body for the purposes of, or in relation to, "local self-government, or for any public educational or public charitable purpose." The trustees of the late Mr. Dilworth, although not a public body, are within the alternative of "any other body," and they are vested for certain purposes with the

residue of his real and personal estate. The only question which arises under this part of the sub-section is whether the appellants are vested with the residue, so far as consisting of lands, either for a public educational purpose or for a public charitable purpose. It would be difficult to arrive at the conclusion that an institution like the Ulster Institute, which is unquestionably in the nature of a charity, would not serve any public charitable purpose, seeing that the objects of the charity, who are to be selected from the public, have a vested beneficial interest in perpetuity. And if it were held to be in its character a public charity, the real estate forming part of the residue would be exempted from taxation, although it has not yet been applied to the objects for which it is held by the appellants.

Section 3 of the Amendment Act of 1892, which is incorporated with and must be read as part of the principal Act, appears to their lordships to be sufficient to entitle the appellants to the exemption which they claim in this appeal. They are not incorporated under "The Hospitals and Charitable Institutions Act, 1885," or under any other Act; but the exemption extends to the income derived or received by any and every other body, whether corporate or not, which performs the same charitable function toward the public, "not for any gain or profit."

Their lordships will humbly advise Her Majesty, in both these cases, to reverse the judgment of the Supreme Court of New Zealand; in the first appeal, to declare that the appellants, as trustees of the will of the testator, are not liable to pay to the respondent death duty upon the real and personal estate vested in them as part of the residue of the testator's estate; to remit to the court below to determine what refund of duty (if any) the appellants are entitled to demand and receive from the respondent, the Commissioner of Stamps; and, in the second appeal, to answer the question submitted by the special case in the negative. In each case the respondent must pay to the appellants their costs of the appeal.

Solicitor for appellants, *Charles D. Woolley.*

Solicitors for respondents, *Mackrell, Maton, Godlee, & Quincey.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 8.

FIELD STEAMSHIP CO. (LIMITED) *v.* BURR. (*a.*)

Insurance—Marine—Policy on ship—Cargo rendered worthless by sea peril—Cost of discharging cargo—Liability of underwriters on ship.

A ship, while insured by a time policy on hull and machinery against perils of the sea and all other perils which might come to her hurt, detriment, or damage, was injured by collision. She was carrying a cargo of cotton seed, which was so damaged by sea water and mud in consequence of the collision that it became rotten and worthless, and the consignees refused to accept it.

Held, that the shipowners were not entitled to recover from their underwriters the cost of discharging the worthless cargo at the port of destination.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Judgment of Bigham, J., 46 *W. R.* 490, [1898] 1 *Q. B.* 821, *affirmed.*

Appeal from the judgment of Bigham, J., at the trial of an action without a jury, 46 W. R. 490, [1898] 1 Q. B. 821.

The action was brought by the owners of the steamship *Elmfield* to recover a partial loss under a time policy of marine insurance subscribed by the defendant.

The policy was "on hull and materials, on machinery and boilers" of the steamship *Elmfield*, valued at £10,000; and the perils insured against were, amongst others, "of the seas . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship, &c., or any part thereof."

During the currency of the policy the vessel was carrying a cargo of cotton seed on a voyage from Alexandria to London under a charter-party. On the 20th of December, 1896, she arrived in the Thames, when a vessel called *The Derwent* came into collision with her, and caused such serious damage to her hull below the water-line that it became necessary to run her ashore in order to prevent her from sinking in deep water. During the next ten days part of her cargo was put into lighters, and by this means she was sufficiently lightened to enable her to be towed to the Tilbury Dry Dock, where she was temporarily patched. On the 5th of January, 1897, she was towed to Millwall Dock, where it was intended that the remainder of her cargo should be discharged. It was found, however, that, by the action of the water and mud which had found their way into the ship in consequence of the casualty, the cargo had become rotten and offensive, and was a nuisance; and thereupon the sanitary authorities, acting under the powers of the Public Health (London) Act, 1891, ordered the ship to abate the nuisance and to remove the cotton seed. In the meantime the owners of the cargo had abandoned the cargo to their underwriters, and neither the cargo owners nor their underwriters would pay freight or take delivery, alleging, as the fact was, that the cargo had ceased to be cotton seed and had become worthless.

In these circumstances the plaintiffs made a contract with a firm of Samuel Williams & Sons, who were the owners of a pier at Dagenham, near the mouth of the river, to discharge the cargo and to spread it out on some land at a short distance from the pier at a charge of 5s. per ton, and so to get rid of it. The ship accordingly left the Millwall Dock for Dagenham Pier, and the cargo was there discharged by Samuel Williams & Sons.

The plaintiffs made a claim against the defendant and his co-underwriters under the policy, and the whole of the claim was settled except as to items amounting to £1,046 12s. 10d. These items consisted of (1) £287 2s. 10d., charges incurred in dealing with the cargo betwen the date of the casualty and its arrival at Dagenham; and (2) £759 10s., the charges of Messrs. Williams for discharging and disposing of the cargo at Dagenham.

Bigham, J., held that the expense incurred by the plaintiffs in meeting these charges was not covered by the policy, and gave judgment for the defendant.

The plaintiffs appealed.

Joseph Walton, Q.C., and *Lewis Noad*, for the plaintiffs.

Carver, Q.C, and *Scrutton*, for the defendant.

Cur. adv. vult.

Feb. 8.—A. L. SMITH, L.J., read the following

judgment: The facts of this case will be found in the judgment of my brother Bigham, and the question which arises thereout is whether a shipowner insured under a policy of marine insurance covering hull and machinery against perils of the sea is entitled, in the case of damage to hull and machinery by a sea peril, to recover from his underwriters the cost of discharging the cargo, which has become putrid by reason of a sea peril and is rightly refused by the consignee at the port of discharge, in addition to the damage occasioned to the hull and machinery by the sea peril. I have found from experience in cases of marine insurance that a case which is in itself tolerably clear is often obscured by the putting by the learned counsel of numerous instances said to be analogous, and which upon their face are somewhat similar to, but are not when understood, the case in hand; and, in my opinion, unless the case is concluded by authority, the best and safest way to arrive at a true decision as to what is recoverable under a policy of marine insurance is to ascertain, in the first place what constitutes the subject-matter of the insurance, and next against what perils that subject-matter is insured. When this is arrived at, what is covered—that is, what is recoverable under the policy—will be understood. Now, in this case the subject-matter of the insurance is clear; it is hull and machinery, and nothing else. The peril against which this subject-matter is insured is also clear; it is the deterioration occasioned to the hull and machinery by perils of the sea Having got thus far, it follows that to constitute a claim upon a marine policy covering hull and machinery against sea perils the assured must establish a deterioration to the hull and machinery by a sea peril, and this, when established, the underwriter of hull and machinery is liable to make good to the assured. This is the underwriter's sole liability, and so far I apprehend this cannot be disputed. Now, if the underwriter has paid every farthing's worth of deterioration of the hull and machinery occasioned by the sea peril—for this is the measure of the shipowner's loss—(see *Stewart* v. *Steele*, 5 Scott N. R. 927, and *Pitman* v. *Universal Marine Insurance Co.*, 30 W. R. 906, 9 Q. B. D. 192)—what is to take place? What further claim has the shipowner against the underwriter under a policy upon hull and machinery after all this has been made good to him? This is the question in this case. The answer, which seems to me spontaneously to arise, is that the shipowner has no further claim, and this is the judgment of my brother Bigham now under appeal. The above is how this case appears to me to stand unencumbered by hypothetical cases which were put forward in argument. As to authorities, there certainly are none to the contrary, and what authorities there are are in favour of what I am saying, and will be found in the judgment of Bigham, J.

Notwithstanding this, it is now argued for the shipowner, who has been paid every farthing's worth of deterioration brought about by the sea peril to the hull and machinery of his ship by the underwriter thereof, that, inasmuch as by the sea peril the cargo became putrid and in such a state that the consignee at the port of discharge was not bound to accept it, and the shipowner has thereby lost his freight, he can recover the expenses of discharging this putrid cargo from the underwriters of hull and machinery, and it is said that this is so because the discharge of the putrid cargo was made, not in order to deliver it to the consignee, but to enable the repairs to be done to the injured hull and machinery, and that this expense consequently forms part of the deterioration occasioned to the hull and machinery, by the sea peril. The validity of this argument I have been unable to appreciate, and in my judgment it is wholly unfounded. Whether the cargo be sound, or partially damaged, or putrid, it has to be discharged at the port of destination by the shipowner, if it is to be got out of the ship at all. With this the underwriter of hull and machinery has nothing to do. Whether the cargo be such that the consignee was bound to receive it or not is, in my opinion, as regards the liability of an underwriter upon hull and machinery, wholly immaterial. What has he to do with it? I am not dealing with a case of jettison; that has nothing to do with this case. If loss is occasioned by delay in the discharge of cargo, whether sound, unsound, or putrid, at the port of destination, this is not damage to hull and machinery, and the loss must be covered, if covered at all, by one of those policies which cover losses which are not undertaken by underwriters upon a policy upon hull and machinery, or possibly by a policy upon freight. A delay occasioned by discharging cargo is not, as before stated, a deprivation of the use of the hull and machinery to the owner by reason of an injury to the subject-matter insured, and forms no part of the deterioration to hull and machinery for which an underwriter upon hull and machinery is alone liable, and *a fortiori* the mere extra expense of getting out the cargo is no part of his liability. Take a case where the hull and machinery is not damaged by a sea peril but the cargo is. What liability in these circumstances is the underwriter upon hull and machinery under? What has he to do at the port of destination with the cargo or the discharge of it, or who takes it, or where it is taken to, or the time it takes to discharge it, or what the discharge costs the shipowner, or whether it be the shipowner's cargo or someone else's, or whether it be sound or putrid? Surely nothing. An underwriter upon hull and machinery has nothing to do with the cargo on board, even if that cargo belongs to the shipowner himself: see Arnould on Insurance (2nd ed.), p. 267. So, again, take the case where both the hull and machinery and the cargo are damaged by a peril of the sea. What liability in these circumstances is the underwriter upon hull and machinery under after he has made good to the shipowner the whole deterioration to the hull and machinery of his ship by reason of the sea peril? What has he to do with the cargo or its discharge? Now take the present case, where the hull and machinery is deteriorated by a sea peril, and where the cargo is so deteriorated by a sea peril as to become putrid and in such a state as to justify the consignee in refusing to receive it. How does this affect the underwriter upon hull and machinery, though it was strenuously argued that it did? The underwriter upon hull and machinery cares nothing, and legitimately cares nothing, as to what becomes of the cargo, whether sound, damaged, or putrid. All this is wholly immaterial to him. All he has to do under his contract is to make good to the assured shipowner the deterioration occasioned to the hull and machinery of his ship by a sea peril and nothing more. It was suggested in argument, though no authorities were cited to support the suggestions, nor, as far as I know, do any exist—(1) that the cost of removing sand or gravel or mud washed into a ship by a sea peril did or might fall upon underwriters of hull and machinery; (2) that the cost of removing ballast fell or might fall upon the underwriter upon hull and machinery. I give no opinions as to either of these suggestions, but I will say that I am by no means convinced that they are correct, and when they come up for decision I will endeavour to decide them; it is sufficient to say that neither of these suggested cases is the present case, which relates solely to the cost of removal of a putrid cargo at the port of destination.

It was then said that the cost of removing cargo at a port of refuge in order to repair damage to hull and machinery fell upon the underwriter of hull and machinery. This may be so, but I do say that such a case at a port of refuge is certainly not a case of removing cargo at a port of destination, and different considerations obviously arise thereon. It was further argued that the shipowner might at any rate recover the extra if not the whole of the cost of removal occasioned by the cargo being putrid from the underwriter of hull and machinery. Why so? What I have already said in my opinion covers this point. To accentuate this, I will take for instance the case of a cargo of cement in bags solidified by a sea peril so as to become stone and thus to cost more to discharge than otherwise would be the case. If by the solidification the cement got affixed to the hull or machinery, so that either the hull or machinery became damaged, I can understand the argument that for this damage the underwriter upon hull and machinery might have to pay, but for the mere extra cost of removal of the cargo at the port of destination, with which removal the underwriter upon hull and machinery has nothing to do, in my opinion the underwriter upon hull and machinery is not liable. This cost forms no part of any deterioration to the subject-matter of the insurance—viz., the hull and machinery, any more than damages an assured upon hull and machinery may have to pay the owner of a ship with whose ship the ship of the assured has come into collision. I am of opinion that the judgment of Bigham, J., is correct, and that this appeal must be dismissed with costs.

CHITTY, L.J., read the following judgment: I am of the same opinion. In the decision of this case the subject-matter of the insurance ought to be kept steadily in view. The thing insured was the ship and the machinery. For all damage sustained by the hull and the machinery the underwriters have made full compensation to the plaintiffs. They have thus indemnified the assured against all loss and damage occasioned to the thing assured by the perils of the sea. But the appellants insist that the measure of the indemnity to which they are entitled under the policy is not thereby satisfied. They claim to be recouped the expense they have incurred in getting rid of that which was cargo, but had become a putrid mass by the action of the sea-water on the cotton seed.

I think that the true question is, How much has the thing insured been deteriorated by the peril insured against? Counsel for the appellants, in his excellent argument, suggested the case of a ship damaged by sea perils putting into a port of refuge for repairs, and he argued that in such a case, if the cargo had to be removed in order to get at the damaged parts of the ship and to execute the necessary repairs, the underwriters would be chargeable with the reasonable expense of such removal. But this hypothetical case is clearly distinguishable from the present, and for this reason. The ship had arrived at her port of destination on the voyage she was then prosecuting. This is an important element in considering the plaintiffs' claim. Had the cargo arrived undamaged, the underwriters on the ship would have been clear of all liability in respect of its discharge from the ship. The cargo would have been taken out of the ship, and the ship left free and open for repairing the hull and machinery. Why, then, should the liability of the underwriters be increased by the circumstance that the cargo, which is entirely outside their policy, has ceased to be cargo in specie and become a stinking mass? They are not concerned with the cargo or with the stuff into which it has been transformed by the action of the sea-water. In so far as the ship itself and the machinery have been deteriorated by the action of the rotten cotton seed, the deterioration has been made good by the underwriters. Among the many hypothetical cases suggested during the argument was that of a cargo of cement powder in bags becoming consolidated into a hard mass by the action of sea-water passing through a hole in the ship's bottom. It may well be that in such a case as that the underwriters would be liable for the expense of clearing the inside of the ship from the cement adhering to it, for that could be reasonably regarded as a damage to the structure of the ship. But as regards the expense of clearing away the rest of the cement at the port of destination, that would merely present the question on the appeal in another form. The position taken up by counsel for the respondents seems to me to be sound. They said that the basis of the appellants' claim when examined was the expense sustained by the assured, not as owners of the structure of the ship, but as carriers.

The case has been so fully dealt with by Bigham, J., and A. L. Smith, L.J., and in the judgment of Collins, L.J., which I have had an opportunity of reading, that I think it unnecessary to pursue the matter further. My conclusion is that the appellants' claim, when properly understood, does not fall within the reasonable limits of the policy on which they sue.

COLLINS, L.J., read the following judgment: I am of the same opinion. It is not necessary to restate the facts. The sole point left for decision is whether the assured on hull and machinery can throw upon the underwriters the expense of discharging at the port of destination a cargo which, having become putrid by the action of the perils of the seas, has lost its identity, and in respect of which therefore no freight is payable by the consignee. The mere statement of the point would seem to carry its own answer. It is true that the ship was itself damaged, and likewise the machinery, by the peril which destroyed the cargo, but all this damage has been fully satisfied by the underwriters, and the right of the plaintiffs may, I think, be tested by considering what their position would have been if the sea-water had got access to and spoilt the cargo without physical damage to the hull. How can the presence of a putrid cargo in the ship be said to be a damage to the hull? The fabric of the ship is not injured by it. So far as it affects the ship at all, it is by interfering with its use until it is removed. But this is not damage to hull, which is the interest insured, but damage to the shipowner in his business as carrier. And though in the opinion of some writers it would be more scientific to regard a ship merely as a freight-earning instrument, and not as a fabric having a value of its own, and therefore to treat interference with its freight-earning capacity as a damage to ship instead of looking only to the physical injury to the fabric (see Lowndes on Insurance, par. 189, 18 and 158); yet this view has clearly not been adopted in our law. Damage by delay is clearly not damage to ship: *Ibid.*, par. 126, citing *De Vaux* v. *Salvador*, 4 A. & E. 420, and *Wilson* v. *Bank of Victoria*, 15 W. R. 693, L. R. 2 Q. B. 203. That is the ground on which *Fletcher* v. *Poole*, 1 Park Ins. (8th ed.), 115; *Eden* v. *Poole*, *Ibid.* 117, 2 Marshall Ins. (3rd ed.), 730; and *Robertson* v. *Ewer*, 1 T. R. 127, were decided. "Here," says Buller, J., in the latter case, "the ship itself was safe, and the court only looks to the thing itself which is the subject of insurance; and the wages and pro-

visions" (during the period of detention for repair of damage caused by sea perils) "are no part of the thing insured." Counsel for the appellants contended that the principle of those cases only applied when and because these charges are to be borne by the owner in return for his freight, and therefore cannot defeat the right of the plaintiffs in this case, as no freight is payable, and he cited passages in Arnould which seem to put those cases on that ground: see Arnould on Marine Insurance (5th ed.), pp. 755, 783, 842. But this argument is open to more than one answer. In the first place the right or loss of right to receive freight cannot alter the subject of insurance, which is not freight, but ship and machinery only. Secondly, the passages in Arnould rest only on the authority of the above cases, or of those which decide that ordinary expenses payable by the owner under the contract of affreightment at a port of refuge are not general average expenses, and none of these involve the proposition that such expenses, whether to be borne by the shipowner or not, would be recoverable on a policy on ship. And, lastly, the passages when examined, based as they are on the class of authorities I have mentioned, are, such of them as deal with the claim of owner against underwriter on ship, only explanatory of the fact that the interest affected by such losses is not the ship itself, but something else—viz., the adventure covered by the contract of affreightment. The others deal with average expenses, and to these such considerations are more directly applicable, but have no relation to the point now in discussion. I have pointed out that the subject-matter insured cannot vary with or depend upon the right to receive freight. If the expense—more or less—of discharging the cargo is outside the contract of insurance on hull when the owner retains the right to receive freight, it is equally outside it when he has lost such right. The right or loss of the right is each a possible incident of the contract of affreightment, which is a subject-matter quite outside the ship itself, and is not covered by a policy thereon, though the ship may be a factor in performing it. The inability to recover for loss incident to delay under a policy on ship is, I think, properly put on the ground taken in the cases I have referred to, but it may also be rested on the ground on which it was placed by Lord Denman in *De Vaux* v. *Salvador*—viz., that the sea peril cannot be regarded as the proximate cause of such a loss. "These losses," says Mr. Lowndes, "result not from the damage but from the delay incident to the damage." Here (on the hypothesis by which I am testing the plaintiff's case—viz., that of no physical damage to hull) the real sea damage was to the cargo, the incidental consequence is that the ship cannot be used again till the damaged cargo is removed, and the loss is therefore, on the same reasoning, not due to a sea peril as the *causa proxima*. I agree therefore with Bigham, J., that the claim here is analogous to the claim for expenses during detention, which were held in the cases cited to be irrecoverable under a policy on ship. Counsel for the appellants could cite no authority in support of their proposition that the presence of a putrid mass in the hull was in itself a damage thereto, but they stated that the presence of sand or mud washed in by a sea peril was in practice treated as such by the underwriters, and the cost of removing it paid for under a policy on ship. Of course such an expense might well be, and no doubt often is, properly recoverable under the sue and labour clause, with which we are not concerned in this case, as the ship was in perfect safety when the expense in question was incurred; and it is often the fact also that the practice of underwriters is not in conformity with the strict legal rights under the contract with which alone we are here concerned. If this practice should be drawn in question hereafter, it may become necessary to pronounce upon it, but I am certainly not prepared to hold on the strength of it that the presence in the hull of a cargo turned into manure by sea damage is of itself a damage thereto. Being of opinion that the presence of the rotten cargo was not in itself a damage to ship, it is not necessary to decide whether, being a damage to ship, it was to be referred to a peril of the sea as *causa proxima*. If the case is to be tried by this standard it might well be distinguishable from the illustration of sand washed in by the direct action of the sea, and it does not seem to me that the case is concluded by *Montoya* v. *London Assurance Company*, 6 Exch. 451. The ground of that decision was that the tobacco and the hides were to be treated as one entire cargo, injury to a part of which had spread to the whole. Thus the cargo as a whole was injured by the direct action of a peril of the sea. It is obvious that this reasoning does not necessarily cover the case of damage to hull arising out of damage to cargo by the action of the sea.

I conclude, therefore, that the presence of the rotten cotton seed in the hull being otherwise uninjured was not of itself a damage to hull. But it is said the hull was in fact injured, and the repairs could not be effected without removing the cargo, and the cost of its removal must therefore be part of the expense of the repairs. But all physical damage to hull and machinery has been actually paid for. The cost of repairs is not necessarily the measure of such damage (*Stewart* v. *Steele*, and *Pitman* v. *Universal Marine Insurance Co.*), and I do not think the cost of removing the cargo for the purpose of effecting them can, on the findings in this case, be treated as something payable over and above the sum paid for the physical damage to hull and machinery. But there is a broader ground on which it follows, from what I have already said, that the assured on hull cannot throw upon the underwriter the cost of removing the cargo at the port of destination. The cargo was put on board under the contract of affreightment. All the contingencies which might happen to the cargo were incidents of that contract. If the cargo had arrived in specie, freight could have been claimed for it, and the shipowner would have had to bear the expense of delivering it over the ship's rail. The cargo not having arrived in specie, freight cannot be claimed for it, and whatever the relative rights of the shipowner and the freighter or consignee may be in such case as to the delivery of the cargo, they are just as much incidents of the contract of affreightment as is the right to receive freight when the goods arrive ready to be delivered in specie. The insurer on ship has nothing to do with these matters. They concern the profit or loss on the venture covered by the contract of affreightment, which is quite outside the risk on hull and machinery. I am of opinion that the judgment of Bigham, J., was perfectly right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *W. A. Crump & Son.*

Solicitors for the defendant, *Waltons, Johnson, Bubb, & Whatton.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) Feb. 1.

In re X.
X. *v.* Y. (*a.*)

Infant—Guardianship—Mother sole surviving guardian—Re-marriage of mother—Appointment of additional guardian—Discretion of court—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *s.* 2.

By his will X. appointed his wife (during her widowhood) and his own father guardians of his infant son during his minority, and directed that, on the death of either of them, the survivor should be sole guardian. X. and his wife were both Protestants. X. died in 1886, *and his father in* 1890. *In* 1896 *the widow married again, her second husband being a Roman Catholic, whilst she remained a Protestant, and the infant son was being brought up as a Protestant. In* 1897 *the infant's paternal grandmother, as his next friend, took out a summons asking that an uncle of the infant (the husband of a sister of X.) might be appointed to act jointly with the mother as guardian of the infant.*

Held (dismissing the summons), that the mother of an infant had entirely new rights conferred upon her under the Guardianship of Infants Act, 1886: *she became statutory guardian under the Act, whether she was appointed testamentary guardian by her husband or not.*

The court has power, in its discretion, to remove a guardian or to appoint another guardian to act jointly with the statutory guardian; but the court will not interfere except on good grounds shown to be clearly for the benefit of the infant.

Defendant's appeal from Kekewich, J.

By his will dated the 10th of March, 1886, X. appointed the defendant (his wife) during her widowhood and his father (since deceased) to be the guardians of his infant son, and gave directions as to the education of his son.

The testator bequeathed to his trustees his share and interest in a legacy of £50,000, and in a residue, and directed them to pay to his wife during widowhood a sum of £3,000 per annum, and subject to the annuity he left the legacy and share of residue to his infant son absolutely on attaining the age of twenty-five years. The surplus income to arise from the said sum of £50,000 and share of residue over and above the annunity was to be accumulated until his son attained the age of twenty-five years, or for such lesser period as the law would allow, after the testator's decease. The residue of his property he left to his son absolutely on attaining twenty-one, with full powers of maintenance.

The testator died on the 9th of April, 1886, and his will was proved on the 14th of April, 1887.

On the 2nd of June, 1896, the widow married again, her second husband being a Roman Catholic. The mother continued a Protestant, and the infant son was being brought up as a Protestant.

On the 9th of November, 1897, the grandmother of the infant as his next friend took out a summons asking for the appointment of an uncle of the infant by marriage as guardian during his minority to act jointly with the mother.

The rest of the facts sufficiently appear from the judgments.

Kekewich, J., made the order as prayed.

The defendant appealed.

Sir Edward Clarke, Q.C., Warrington, Q.C., and *Howard Wright*, for the appellant.

Renshaw, Q.C., and *Vaughan Hawkins*, for the respondent.

P. S. Stokes, for the trustees.

LINDLEY, M.R.—I do not think that the order made by Kekewich, J., can stand: it is made on erroneous principles. I think that I can see that he has been guided and convinced by Mr. Vaughan Hawkins' argument on behalf of the respondents and by attaching too much importance to the old practice (which was the practice within my knowledge) long before 1886.

The law as regards the rights of mothers as guardians has been revolutionized by the Act of 1886, and I cannot think that Kekewich, J., has fully appreciated the immense alteration which has been made by that Act of Parliament. In this case the father of the lad whose guardianship is in question made a will by which he appointed two gentlemen trustees; and his wife, during her widowhood, and his own father, guardians of his infant son; and he directed that on the death of either of them, the survivor should become and be the sole guardian. I doubt whether that does amount to an appointment of his wife, though she survived, as sole guardian after her widowhood. We have not had that discussed, but my impression upon the true construction of this will is that in the events which have happened—that is to say, when she married again—there was no guardian appointed by the testator. That is not all. He goes on in his will to state what he wishes as regards the future of his son, and he says: "In reference to the education of my son, I should wish him, at the age of nine, not later, earlier if possible, to go to a first-class private school (Cheam, or any other the guardians may think fit); at twelve, but not later than thirteen years old, to go to Eton College, to Mitchell's House if possible, and considered first-class by guardians, or, if not then in existence, to any other they (the guardians) may think fit; if possible then to go to University (Oxford), but if that is found not to be practical [*sic*] with his going into the foot guards (Grenadier Guards, if it can be arranged), is to be dispensed with"—that is, Oxford is to be dispensed with. "I consider, too, it is most important for him to get into the Brigade of Guards at as early an age as possible—if he cannot get a commission in the Grenadiers, I should choose next the Coldstreams, and if he cannot get a commission in them, then the Scots Guards." Therefore the father had a scheme for the education of his son which he indicates in the manner which I have read. He died in 1886, and everything went on, so far as I know, without any discussion or unpleasantness until June, 1896, when his widow married again; she married a gentleman who is a Roman Catholic, the father having been, and she and the son being, Protestants. Thereupon unpleasantness arose, and the grandmother thought it would be for the benefit of her grandchild that somebody should be associated with the mother in the guardianship of the boy; and and hence the litigation and the proceedings which we have to consider.

Now we must look at the Guardianship of Infants Act, 1886, which by section 2 says this: "On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act the mother if surviving shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father." That revolutionized the law as to the mother and gave her rights which were entirely new. Her legal position before as regards the guardianship of her children was most unfor-

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

tunate and most cruel and unjust. The matter was brought to the attention of the Legislature, hence this statute which says that she is to be the guardian. In the events which have happened she is sole guardian, not by the appointment of her husband, but under the exigency of the statute. Then the section goes on: "When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother." That is to say, the mother is to be guardian; but, to use the language of the Act, the court may if it shall think fit from time to time appoint a a guardian or guardians to act jointly with the mother. Well, why should the court think fit to do anything without some sufficient reason? Why should it interfere at all? It is quite obvious that, although the surviving mother is made guardian by the Act of Parliament, there is nothing in the Act (quite apart from the words I have read) to control the power of the Court of Chancery, or now the Chancery Division, over all guardians and to remove her as well as anybody else who is guardian —even the father—for misconduct which justifies such an interference with the parental rights. But why should the court interfere? That is the strength of Sir Edward Clarke's argument. We have power to do it, but what are the principles upon which we ought to act in thinking fit to add somebody to the mother, whose rights are conferred upon her by the earlier part of the section? I say nothing in this case about personal misconduct because we have not to consider any such thing. Of course personal misconduct, if proved, would be ample ground for interfering. There can be no conceivable ground for our interfering except the benefit of the infant. That is the ground upon which the court always acts in considering these questions of guardianship—whether they arise between fathers or testamentary guardians or anybody else. What is the benefit of the infant? We have to look at that and look at that alone. Now, here it is that I think the learned judge went wrong. He was guided, I cannot help thinking, by the old practice which is summed up in the passage in Simpson on Infants which Mr. Vaughan Hawkins read, and it is repeated in another shape at p. 120, from which I will read it. After saying that in the case of the death of the father and there being no testamentary guardian the mother was guardian by nurture and had the right to the care and custody of her children, he says (this was the old practice): "She will not necessarily be superseded if she marry again, but the practice now is, if the mother marry again, to have a reference to appoint a new guardian." That is to say, that if under such circumstances the mother married again an inquiry was directed, if necessary, to see whether it was desirable that she should continue. But are we to introduce the old practice and pass it on to the new statutory enactment? I say no, not at all. I do not say that her marriage again goes for nothing. It may go for a good deal. If she had married some gentleman who might interfere with the boy and render it desirable that the boy should be removed from her influence, or anything of that kind, it might go for a good deal; but all you can say is that she has married again, and that her husband is of a different religion. When the boy is left alone and brought up properly why should the court interfere? I think that grounds must be shewn that, having regard to the real benefit of the infant, the court ought to interfere; and if no such ground is shewn it would be the duty of the court not to interfere. Those are the principles which appear to me to be sound and upon which we ought to act.

Now, if we look, as we ought, at the benefit of the infant, I take the affidavit of the trustee as showing conclusively that there is absolutely no ground for interfering at all. I am very much struck with the third paragraph of that affidavit which shows that after the mother had married—namely, on the 10th of May, 1897, an order was made by Kekewich, J., granting the trustees liberty to pay a certain sum for the maintenance and education of this child. That was done six months after she married. There is not a word there said about her, or any impropriety or any desirability for removing her. What has happened since? Nothing that I know of. We are sufficiently men of the world to see what is the unfortunate circumstance which has given rise to this litigation. I do not propose to say a word which will give the slightest offence to anybody. There is no imputation against the mother, absolutely none against the gentleman Kekewich, J., has appointed, and absolutely none against the other gentleman whom the mother would prefer to be associated with her, if anybody must be associated with her. But I proceed upon the ground that there are no sufficient reasons to justify the court in thinking fit to appoint anybody to interfere with the mother. There is a period of five years before this boy can possibly go into the army, and in the face of the affidavit to which I have referred, and especially the fifth paragraph, which Sir Edward Clarke read and to which I listened, there is no reason whatever to suppose that it will be in the slightest degree for the benefit of this infant that he should be interfered with at all, or that he should be associated with anybody except his mother as his legal guardian. She will have the benefit of the advice, I hope, of the boy's father's friends, and certainly from the trustees. I see no reason at all for interfering, and I think that on principle Kekewich, J., has made a mistake, and has not given full effect to the great alteration made by the Act of 1886.

I think, therefore, the appeal must be allowed, and that the summons asking for the appointment of a guardian must be dismissed.

RIGBY, L.J.—I am of the same opinion. The case is fundamentally different from all those cases that preceded the Act of 1886, where the court was dealing with, say, a lady—mother or not, under the then unfortunate state of the law. All those cases must—I do not say absolutely—be put aside, but at any rate treated as not authorities for anything to be done under this Act.

Now, as far as I can judge from the different sections of the Act, the Legislature intended to place the husband and wife, with regard to the guardianship, practically in the same position. Whereas, previously, the husband had the exclusive right of appointing a testamentary guardian, the wife gets a co-ordinate right. He may appoint and she may appoint, and, if there is an appointment by each, both are guardians. If the case arises which has here arisen—that the wife—the mother of the infant—is alive, then the second section of the Act says in effect, if there is a guardian appointed by the father, she shall act jointly with that guardian, but if there is no guardian appointed by the father, then she shall act alone as guardian. That is the first point, subject to what follows. There is a statutory right, which is not to be taken away from her without good cause. It says nothing about her being married again; it says nothing, of course, about her having married a husband of a different religious faith; but it lays down as a general rule, applicable to all mothers—

that is, married or not married at the time—that they, if there be no guardian appointed by the father, shall alone be guardian. That is in accordance with the whole course of legislation. We do not attach now so much importance to the fact that a lady is married as in former times we did. The idea that she is under the control of her husband—though of course it is still true and always will be true to a certain extent—has not been looked upon as a guiding idea to anything like the same extent that it was, and that accounts for the fact that it is not an unmarried mother, but a mother whether married or not, who is to have this privilege. Then, reading the section, I protest against the idea that one is to look at what was the state of things before this Act as to appointing a guardian, whether a mother or not, and when the mother had no right at all, and that one can bring in rules and to that extent repeal the Act—for it would be a repeal of the Act—by taking into consideration what the Court of Chancery did in different circumstances, and apply them to the state of things supposed by the Act—I do not think that that is in accordance with the true construction of the Act; and I think that wherever the court is called upon to exercise the judicial discretion which is given by this Act you must go upon the special circumstances of the case and not upon the general rule formerly existing, and exercise that discretion in accordance with what is thought best for the infant.

I think Kekewich, J., has gone too far in treating the prior doctrines of the court as applicable here. I concur with what has been said on both sides, and especially that there is no personal imputation upon any of these parties.

Considering all that, and not seeing anything special here, but rather thinking it would not be for the benefit of the infant to have two guardians with, it may and probably will be, conflicting policies, in my opinion, we ought not to interfere. I think it will be better for everyone that the state of things which is existing under the Act should not be interfered with.

VAUGHAN WILLIAMS, L.J.—I entirely agree, not only in the conclusion, but also in the view that has been taken as to the effect of the Act of Parliament upon the position of the wife in relation to guardianship.

But I wish to add two observations. One is that I do not think that a more responsible or difficult jurisdiction can have to be exercised by any judge than that which a judge has to exercise in respect of the guardianship of infants, and I am quite sure that it is not intended by the decision of this court to-day to depart one iota from the old rule as to not interfering with the discretion of the judge when he has exercised it in respect of this very responsible duty. If such discretion were to be interfered with, the performance of those duties would be almost impossible. But here I do not consider that we are interfering with the discretion of the learned judge. I consider that in this case the learned judge was obviously guided by the consideration that he thought that the old rules laid down in the older cases with regard to the guardianship by mothers of children ought to govern cases under this Act. In that principle of law we think that he was wrong; but I do not understand that there is any intention to depart in any degree from the old rule as to not interfering with the discretion of the learned judge in matters of this sort.

The second observation I want to make is this. Although we have held to-day that there is no ground brought before us which renders it right that the court shall act upon the power that the second section gives it, if it shall think fit, to appoint a guardian or guardians to act jointly with the mother, it is not in any way intended to say by our decision that that was a power which could only be exercised in cases in which some moral reflection was cast upon the mother. I can conceive all sorts of cases in which it might be, under this Act, fit that the court should exercise this power, although there might not be any moral reflection of any sort or kind on the wife; that is to say, in cases in which it was obviously for the interest of the child that the power of appointing a joint guardian should be exercised.

Appeal allowed.

Solicitors, *Freshfields & Williams; Furrer & Co.; Parker & Parker.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Jan. 18, 31.

UNDERWOOD & SONS (LIMITED) v. BARKER. (a.)

Restraint of trade—Covenant—Validity—Reasonableness—Injunction.

B., being in the employ of the plaintiffs, who were wholesale and retail hay and straw merchants carrying on business in the United Kingdom and elsewhere, covenanted that he would not, "for the space of twelve months next after his leaving or being dismissed, carry on the business of hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of hay and straw merchant in the United Kingdom of Great Britain and Ireland, or in France, or in the kingdom of Belgium, or Holland, or in the Dominion of Canada."

B., having voluntarily left the plaintiffs' employ, immediately entered the service of a rival hay and straw merchant in London.

Held, by the Court of Appeal (dissentiente Vaughan Williams, L.J.), *that the restraint being reasonably required for the protection of the plaintiffs, having regard to the nature of their business, was not void, and that, therefore, B. must be restrained by injunction from committing a breach of his covenant.*

Defendant's appeal from Kekewich, J.

The plaintiffs were wholesale and retail hay and straw merchants at Brentford, carrying on a large business in the United Kingdom and other countries.

By an agreement dated the 26th of October, 1897, the plaintiffs agreed to employ the defendant as their clerk and foreman in Calais or elsewhere, at a weekly wage of 35s., and the defendant agreed to do all in his power for the furtherance of the plaintiffs' interests, and, in particular, he covenanted that he would not, "for the space of twelve months next after leaving or being dismissed, carry on the business of hay and straw merchant, or enter into the service of or act as agent for any person or persons carrying on the business of hay and straw merchant in the United Kingdom of Great Britain and Ireland, or in France, or in the kingdom of Belgium, or Holland, or in the Dominion of Canada," and further, that for the space of five years after leaving the plaintiffs' employ he would not, either on his own account or as agent for others, carry on, directly or indirectly, the business of hay and straw merchant or other like business in the Republic of France, and in the event of any breach of such covenant he would

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

pay to the plaintiffs the sum of £500 as and for liquidated damages, and not by way of penalty.

Under the agreement the defendant was employed at Calais for about four months (having been previously employed by the plaintiffs on several separate occasions in 1890); after this he was removed to London at an increased salary. The defendant remained in the plaintiffs' employ until the 12th of November, 1898, when he voluntarily left their employ and entered the service of one Kitts, a hay and straw merchant, of Mark-lane.

The plaintiffs thereupon commenced this action, and moved for an interlocutory injunction in terms of the restrictive covenant contained in the agreement.

Kekewich, J., made the order as prayed.

The defendant appealed.

Dobb, for the appellant.—Until recent years covenants in general restraint of trade were bad. This covenant is far too wide both in point of space and time. If the order of Kekewich, J., stands, it will go far beyond the limits of any case hitherto decided.

Clayton, for the respondents.—The true test of a covenant is this: it must be partial either in space or time (as the covenant here is), and the burden is on the covenantor to prove that it is bad. If there is a limit either in space or time the covenant is good.

He referred to *Badische Anilin und Soda Fabrik* v. *Schott Segner & Co.* [1892] 3 Ch. 447, 41 W. R. Dig. 207; *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 315; *Davies* v. *Davies*, 35 W. R. 697, 36 Ch. D. 359; and *Robinson* v. *Heuer*, 47 W. R. 34, [1898] 2 Ch. 451.

Dobb replied.

Cur. adv. vult.

Jan. 31.—The following written judgments were delivered.

LINDLEY, M.R.—Before referring to the facts I will state the principles of law which are applicable to this case. The law as now settled cannot, in my opinion, be more accurately expressed than it was by Lord Macnaghten in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (*Limited*), [1894] A. C. 535, at p. 565. He there says: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Time was when all agreements in restraint of trade or liberty to work were regarded as against public policy and invalid. But this view of the law was found mischievous and intolerable, and it was gradually disclaimed and modified. The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad: see as to this *Baines* v. *Geary*, 36 W. R. 98, 35 Ch. D. 154, and *Maxim-Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, 41 W. R. 604, [1893] 1 Ch. 630, where the clause was severable; and *Perls* v. *Saalfeld*, 40 W. R. 548, [1892] 2 Ch. 149, where it was not. Further, it is now settled that, unless there are circumstances showing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support, such restriction will be held not binding upon him. According to this doctrine an agreement in restraint of trade which is wider than is reasonably necessary for the protection of the person seeking to enforce it is invalid so far as it is wider than is so necessary, and this may invalidate the whole restraint sought to be imposed if the clause imposing it is so framed as not to be severable: see the last two last-mentioned cases and *Rogers* v. *Maddocks*, [1892] 3 Ch. 346, 41 W. R. Dig. 207. But where an agreement restraining a person from carrying on business is entered into with another person engaged in a similar business for the purpose of protecting him from rivalry in that business, and is no wider than is reasonably necessary for his protection in that business, it is difficult to imagine the circumstances which can render such agreement injurious to the public interests of this country. As pointed out by Lord Macnaghten in *Nordenfelt's case*, [1894] A. C., p. 566-67, what may be reasonable on the sale of a business may be unreasonable on the departure of a man from the service of his employer; but I do not understand him as saying that a restriction that is reasonably necessary for the protection of a man's business can be held invalid on grounds of public policy unless some specific ground can be clearly established. If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *primâ facie* at all events, contrary to the interests of any and every country. Of course, I am not speaking of contracts induced by fraud, duress, or undue influence, or impeachable on any other recognized ground of invalidity. Omitting all such cases, the public policy, which allows a person who obtains employment on certain terms understood and agreed to by him, to repudiate his contract conflicts with and must, to avail the defendant, prevail for some sufficient reason over the manifest public policy which, as a rule, holds him to his bargain. I do not say that no such case can arise even where the terms impose a restriction on his liberty no wider than mentioned above, but at this moment no example of such a case short of some pernicious monopoly occurs to me. In *Dubowski* v. *Goldstein*, 44 W. R. 436, [1896] 1 Q. B. 478, the court, influenced no doubt by these considerations, treated the reasonableness of the restriction for the protection of the employer as the general practical test in cases of this description.

The fact that the person restricted is out of work, and is seeking employment, and is therefore at a disadvantage in making a bargain, cannot be a ground for holding his bargain invalid unless some unfair advantage is taken of his position; and so long as his bargain is reasonable, having regard to the protection of the employer, it cannot be truly said that any unfair advantage is taken. In this particular case oppression is not even suggested; nothing could be more kind and considerate than the treatment of the defendant by the plaintiffs. I can find no circumstance to relieve the defendant from his bargain on the ground of public policy if the restraint

put upon him is no wider than is required for the protection of the plaintiffs in their business. This question turns on the nature of their business and on the true construction of the contract, and to these I will now allude. [His lordship stated the facts and read the contract, and continued:] The defendant's counsel asked us to put a very far-fetched, and I think unreasonable, construction on this contract. He contended that if the defendant in any part of the world acted for any hay merchant carrying on business in any of the enumerated countries the defendant would be guilty of a breach of his contract. But, as pointed out in *Dubowski* v. *Goldstein*, the contract must be construed with reference to the business of the plaintiffs which it was the object of the parties to protect. This is good law and good sense, and, guided by this principle, I am of opinion that the restriction imposed on the defendant is not wider than is reasonably required for the protection of the plaintiffs, regard being had to the nature of their business and the injury which the defendant could inflict upon them by competing with them himself or by entering into the service or acting as the agent of rival hay merchants in the countries where they carried on their business. The restriction is limited to a year and, as I read the agreement, to the places specified in it. It is to be taken as proved that it is important to the plaintiffs that their rivals should not know either to whom the plaintiffs sold their hay or where they got it from. The defendant was engaged as their clerk and foreman, and would, whilst acting as such, obtain information on these matters, and such information would, if imparted to a rival in trade, greatly benefit him and proportionately injure the plaintiffs. These circumstances appear to me to distinguish this case from *Ward* v. *Byrne*, 5 M. & W. 548, which is nearer the present case than any other. There the plaintiffs were coal merchants and the defendant was their town traveller and collecting clerk, and he agreed not to follow or be engaged in the business of a coal merchant for nine months after he should leave the plaintiffs' employ. This agreement was held invalid on the ground that it was unlimited in point of space. This case was much discussed in *Nordenfelt's case*. The restraint was considered unreasonably wide, and I think myself that it was so; but after *Nordenfelt's case* it does not follow that all agreements not to carry on or be employed in a particular business anywhere in this country are necessarily against public policy and therefore invalid. The question in each case is whether such a restriction is reasonable or not in the sense already explained. If it is reasonable in this sense it will be valid unless, on some other ground than its application to the whole of the United Kingdom, it can be held to be against public policy. In the face of the evidence adduced by the plaintiffs and in the absence of all evidence to contradict or modify it, I do not feel compelled by *Ward* v. *Byrne* to hold the restraint in the present case unreasonable so far as this country is concerned, which is the material question, for the defendant has entered the service of a rival of the plaintiffs in this country. If the restraint is unreasonable as to the foreign countries named, which I do not think it is, still the agreement as to them is clearly severable from that part of it which relates to this country.

The parties having agreed that this appeal shall be treated as an appeal from a judgment on the trial, an injunction must be granted in the terms of the contract and the defendant must be ordered to pay the costs of the action and of this appeal.

RIGBY, L.J.—I agree with all that has been said by the Master of the Rolls, and therefore only give a comparatively short judgment.

The law as to contracts in restraint of trade was originally founded on public policy according to the ideas and having regard to the business organization of the time. The whole business organization of society has been revolutionized by the use of railways, the post office, and the telegraph, so that a single firm may have a business extending over a vastly larger portion of the earth's surface than would have been dreamt of in the days when questions similar to that raised in this action were first dealt with. In addition to this it has been clearly recognized in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade. I do not say that there may not be exceptional cases where public policy can be brought in irrespectively of the reasonableness of the actual contract made. I cannot, however, think that in the present case any such exceptional question of public policy is involved. I think that the only question here is whether the restraint to be dealt with is reasonably necessary for the protection of the employer.

In my opinion the true construction of the contract leads to the conclusion that the operative part of the bargain for the present is that the defendant binds himself not to enter within twelve months in the United Kingdom into the service of anyone carrying on the business of hay and straw merchants in the United Kingdom. Everything else appears to me to be severable, and therefore not material for present purposes. Now, it appears on the uncontradicted evidence that the plaintiff company does an extensive wholesale and retail trade buying and selling hay and straw from all parts of the United Kingdom. Not only is this evidence (contained in the only affidavit filed in the court below) uncontradicted, but the defendant when offered an opportunity of answering the affidavit elected not to do so. In the Court of Appeal an affidavit was tendered in which the defendant deposed that he had no dealings in any way with the plaintiffs' customers and neither travelled for nor sold nor bought anything for them, but this affidavit was read by consent only on the express admission by counsel for the defendant that he did learn, during his employment by the plaintiff company, where the hay and straw came from and to a considerable extent where they went to. This was, of course, important information which would be at the disposal of another employer.

I do not think, having regard to the limited time during which the restraint was to last, that it was more extensive than was necessary for the reasonable protection of the plaintiff, which in cases of this kind is the test of the validity of the contract. The injunction will be made to extend to the 28th of November as the parties agreed that the application on the appeal should be treated as an appeal from an order made on the trial of the action.

VAUGHAN WILLIAMS, L.J.—I have arrrived at a different conclusion. I cannot think that the rule of law that all covenants in restraint of trade or binding an individual not to earn his living in the best way he can are *primâ facie* (if there is nothing more) contrary to public policy and therefore void, has been rescinded by recent decisions. Nor can I think that, when it is said that the only test by which to determine the validity or invalidity of such a covenant given for valuable consideration is its reasonableness for the protection of the trade or business of the covenantee, it is intended to leave out of consideration the question whether the particular covenant is such as is calculated to injure the public. The

ruling case as to the validity of such contracts at the present time is *Nordenfelt* v. *Maxim-Nordenfelt, &c., Co.*, which was decided by the House of Lords in 1894, and I think that, if the reasons for that decision given by the noble lords are looked at, it is reasonably clear that no one of them considered that the rule of law, that contracts in restraint of trade or in restriction of the right of every citizen to earn his livelihood by any lawful industry were void, had ceased to exist, and that no one of them considered that the test of the reasonableness of the contract for the protection of the contractee can be applied to the exclusion of the consideration of how far the contract restraining individual liberty has a tendency injuriously to affect the interests of the public. Before calling attention to certain passages appearing in the reasons given by the respective noble lords, I should like to call attention to the fact that in the case then before the House the covenant in respect of which the question arose as to its validity or invalidity as being a covenant in restraint of trade, was a covenant entered into by the vendor of a world-wide business not to carry on anywhere in competition with the buyer the business which he was selling to him; whereas in the case now before the court the contract as to which the question arises as to its validity or invalidity as being a contract contrary to the policy of the law, is a contract given by a servant to his master as a condition of his employment. This difference between the case in the House of Lords and the present case seems to me important, because in the decision of questions of this sort one always has to balance two considerations against each other, the one being the interest of the public in maintaining the rules of fair dealing between man and man, the other being the consideration of the interest of the public in maintaining liberty of individual action, and it seems to me that in the case of the sale of a business, while the public have the deepest interest that the contract by the seller not to compete with the buyer shall be fairly carried out, the restraint imposed by the contract upon liberty of individual action is so slight as to be of no public interest whatever; whereas in the case of master and servant the servant does not enter into the contract with the same freedom of choice as that with which a person buys a business, and the restraint on the servant from earning his livelihood in the manner best suited to his capacity seems to me to be a restriction of individual liberty in which the public have a deep interest. [His lordship then considered the *Nordenfelt case*, and continued:] The observations which I have quoted seem to me to show that, in considering what is a reasonable protection for the covenantee to whom the restrictive covenant is given, one cannot leave out of consideration the interest of the public in freedom of trade and in the liberty of the covenantor to earn a livelihood in any lawful industry. Nor can one limit the consideration of the public interest to the interest of the public in the observance of the contract made for valuable consideration, but must also consider whether the bargain is one which ought to have been made or whether it is contrary to public interest, being too wide or otherwise oppressive. [His lordship then reviewed the history of the present case at length, and concluded:] In the present case I find nothing to the advantage of the public to counterbalance the disadvantage to the public of the restrictive covenant. The maintenance of the rules of fair dealing between man and man is not, in my opinion, sufficient in a case where the covenant is of such a character that the master ought not to have required it of the person seeking employment; and I think that a covenant that the covenantor will not carry on or enter into the service of those carrying on that business in which his life previous to the engagement has been passed, is of such a character.

Appeal dismissed.

Solicitors, *Hatchett-Jones & Co.*; *Ruston, Clark, & Ruston.*

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — June 27, 28, 1898.

BENCE v. SHEARMAN. (a.)

Debt—Assignment—Negotiable instrument—Assignment of consideration—Notice of assignment after negotiation—Duty of debtor.

A debtor who, after giving a negotiable instrument for his debt, receives notice that the debt itself has been assigned, may properly disregard such notice and pay to the assignor who still holds the instrument.

Appeal from Kekewich, J.

The defendant Shearman agreed to pay to one Adams a commission of £175 if he should find a purchaser for a public-house called the "Earl of Essex."

In January, 1897, the plaintiff, who had been introduced by Adams, entered into a contract for the purchase of the public-house.

In February, 1897, Adams gave the plaintiff, to whom he owed about £200, a document stamped as a receipt, and expressed as follows: "Received of Mr. Thomas Bence the sum of £200 in various sums, and I transfer my commission to him on the 'Earl of Essex,' Manor-park, in payment thereof."

The date fixed for the completion of the purchase was the 4th of March, 1897. The plaintiff, the defendant Shearman, and Adams all being present, the plaintiff paid the purchase-money to Shearman, who then gave Adams a cheque for £175, the amount of his agreed commission.

The plaintiff afterwards induced Shearman to stop the cheque at his bank, and to promise not to pay it either until he had communicated again with the plaintiff or until he had seen Adams again (there being a conflict of evidence as to the exact terms of the promise).

Next day the plaintiff, having had another interview with Adams, withdrew the notice stopping payment. Adams accordingly received the money.

The plaintiff then brought an action against Shearman and Adams, claiming £175.

Kekewich, J., gave judgment for the plaintiff against both defendants.

Shearman appealed.

Renshaw, Q.C., and *John Henderson*, for the appeal, cited *Ex parte Richdale, In re Palmer*, 30 W. R. 262, 19 Ch. D. 409; *Lloyd* v. *Banks*, 16 W. R. 988, L. R. 3 Ch. App. 488; and *Saffron Walden Building Society* v. *Rayner*, 28 W. R. 681, 14 Ch. D. 406.

Warrington, Q.C., and *Beddall*, for the plaintiff, referred to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75, sub-section 1.

John Henderson replied.

LINDLEY, M.R., examined the evidence, coming to the conclusion that he could not hold it proved that the assignment was shown to Shearman before he gave the cheque; that it did not appear that on the 4th of March, 1898, it was Shearman's duty to pay the plaintiff rather than Adams; and that Shearman

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

was under no legal obligation either to stop the cheque, or after stopping it, not remove the stop. [His lordship then proceeded:] That brings me to the last point, which is of very great importance to these parties, and to business people in general. Mr. Warrington has contended that after Shearman had given Adams this cheque and Adams had got it, in consequence of the notice then given by the plaintiff to Shearman it was Shearman's duty not to pay the cheque, and Shearman's business to take proceedings against Adams. That is a proposition to which I am not at all disposed to accede. Let us try to work it out. Someone is a creditor of another on a promissory note or cheque. The person who gave the note is informed that the debt which was the consideration for it was assigned before the note was given. Is the debtor on the note under any obligation not to pay it? I think he is under no such obligation at all. See what the contrary involves: if you have a person who is indebted upon any account, and whose creditor holds a negotiable instrument, the consideration for that negotiable instrument can be assigned in such a way that the person who is the debtor upon the instrument is not to pay it. I think the true principle is this: that notice to the debtor who has given a negotiable instrument, that the debt has been assigned, can be disregarded by him. To hold the contrary would be frightfully embarrassing. Just consider the consequences. A man owes another person money, and he pays it, or undertakes to pay, by giving a negotiable instrument. Why is he to be embarrassed by an assignment of the obligation which was the consideration for that instrument? It is a very ingenious contention by Mr. Warrington, which if well founded would settle the matter in his favour; but I think it is not well founded. On all points, therefore, the appellant is right. The appeal must be allowed.

CHITTY, L.J., stated the facts, and continued: I am satisfied, on the evidence, that no notice of the equitable assignment sufficient to bind Shearman was given previously to the handing over of the cheque. The law on the subject is quite clear, and is laid down in Lord Cairns' judgment in *Lloyd* v. *Banks*, 16 W. R. 988, L. R. 3 Ch. App. 488 at p. 490. It must be clearly made out, not only that there has been constructive notice, but that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that an ordinary man of business would act upon the information and regulate his conduct by it. Taking that, which is an excellent statement of the law on the subject—taking that to apply to this case, I am of opinion that there was no such notice given by the plaintiff to Shearman before the handing over of this cheque. Indeed, I think it was not the plaintiff's intention that the matter should be arranged by a payment from Shearman to the plaintiff. Moreover, there was nothing like a distinct notice from the plaintiff to Shearman that he was not to pay the cheque. As I have already explained, the plaintiff intended to get the money from Adams, and I accept Mr. Beddall's argument that, on the cheque being handed over to Adams, Adams became a trustee of the cheque and the money for the plaintiff.

But it is said that notice, after the cheque had thus been delivered, that the consideration for the cheque had been assigned to the plaintiff, was sufficient to impose some obligation upon Shearman. It appears to me, first, that there is no authority for any such proposition; and, secondly, that the principle upon which the law affecting the creditor whose debt has been assigned rests, is inconsistent with any such view. Lord Cranworth in *Jones* v. *Farrell*, 1 De G. & J. 208, 218, 6 W. R. Ch. Dig. 22, commenting upon an observation of Knight Bruce, L.J., that great embarrassment would be caused by carrying the doctrine of equitable assignment too far, said: It "was observed by Knight Bruce, L.J., during the course of the argument, and it has often occurred to me, that the doctrine of this court as to equitable assignments, if we look at it merely as theorists, may lead to very great inconvenience. Nobody can be wholly free from debts. The most solvent person in the world owes debts; he may owe something to a tailor, or a butcher, or a baker, and it would be very inconvenient to him to be told unexpectedly by one of these tradesmen, 'I have assigned over to A. B. the £25 which you owe me as the amount of my bill.'" I read that as showing that the doctrine of equitable assignments is not to be carried to such an extent as to embarrass ordinary men in the course of business.

When Shearman had delivered the cheque to Adams he had no more to do with the business. It is said that he was under some obligation. But in reference to these equitable assignments a man is not made a trustee without his own consent, and I do not see any reason for making that trusteeship, thus imposed by law, more burdensome than it already is.

In this case Shearman did, upon the request of the plaintiff, give notice to the bank stopping the cheque. If the plaintiff had relied upon, or established, a binding promise on Shearman's part to give such a notice, and thereby to delay payment long enough to let the plaintiff take proceedings to recover the money, that would have been quite another case. But it is plain, first, that no such promise is set up, and, secondly, that no such promise was proved; no promise upon which an action could be brought, because no consideration was given in the way of refraining from taking steps. In fact, I think I might throw out of account altogether the suggestion that there was any promise which affected Shearman's legal position; so that he stands in the position of being liable (if at all) only because he was constituted a trustee of this consideration by the notice he received after giving the cheque. The argument against him is a most ingenious one; striking for its ingenuity, and equally, in my opinion, for its unsoundness. I need not consider whether he could have defended an action if he had continued the notice stopping the cheque, because I think he was under no obligation to put himself in this embarrassing position. He is not, after he has once handed over that promissory note in the presence of the plaintiff to be exposed to any such liability. He was then quite free in the matter; and I dissent from the argument that a notice given after the delivery of a negotiable instrument, in such circumstances as these, constitutes the original debtor a trustee, or imposes upon him any obligation which can be properly deduced out of the consideration of the equitable principles which govern the matter. There was no duty. All that Shearman did in the way of stopping the cheque was a voluntary courtesy on his part; and the argument of Mr. Beddall, that what happened afterwards amounted to the giving of a new promissory note, cannot be sustained. The plaintiff's ground of complaint against Adams was such that Shearman might reasonably say, as he did say, I will stop the cheque until I have seen Adams. It is really quite immaterial whether Shearman said he would stop the cheque until he had seen the plaintiff, or until he had seen Adams.

The sum of my opinion, therefore, is that Shearman is under no liability; that he has not been converted into a trustee, because, before he knew of the plaintiff's claim, he had brought himself under an

obligation to Adams, by giving him the cheque. To what I have said I add a passage from the judgment of Jessel, M.R., in *Ex parte Richdale, In re Palmer*, "I never heard of any obligation on the part of the drawer of a cheque given for value to stop the payment of it for the benefit of a third party."

COLLINS, L.J.—I am of the same opinion, and but that we are differing from the learned judge below I should not add anything.

The one point in this case is whether notice of the fact of the assignment by Adams to Bence was brought home to Shearman. Unless it was—that is, unless not merely the document was shown to him and observations made about it, but unless, in the opinion of a jury, knowledge of the fact that the debt had been assigned was really communicated to Shearman—clearly he was justified in paying Adams and not Bence. On that part of the case I should have felt very much embarrassed, inasmuch as the learned judge saw the witnesses, if he had rested his judgment on a finding that Shearman had such notice. But he did not find, though he said he was inclined to think, that notice was given. When one comes to look at the evidence it seems to me that, fairly taken, it does not support that view. Mr. Warrington, indeed, gave up that point, for his contention was that the intention of the parties was fully carried out when Shearman handed the cheque to Adams. Bence appears to have thought that he would be sufficiently safe if he saw that done, and there is evidence that he was desirous the transaction should be carried out in that form, because he did not wish to interfere with the ordinary course of things upon a cheque. That appears to me to be the real point, and therefore I think the learned judge was wrong.

But another point was taken, which, I think, was the basis of the learned judge's judgment: that, the cheque having been properly handed by Shearman to Adams—that is, after Shearman had come under a legal obligation—which in ordinary parlance is payment, Shearman, being asked to stop the cheque that inquiry might be made, and assenting, has come under an obligation not to pay it to the legal owner, but to another person who now apprises him that he is the assignee of the consideration for the cheque. That certainly would not be the common law view of the question; and I am very glad to find, on the great authority of the other members of this court, that equity has never been carried to such lengths as that. Here Shearman was under no obligation to stop the cheque, but he agreed to do so. Even by that he ran a risk. The cheque might have been in the hands of the original donee or of somebody to whom he had transferred it. Then, having as a matter of courtesy stopped the cheque, Shearman is told that the debt has been assigned. But does that constitute him a trustee? In the meantime he has given his cheque and become liable upon it; and it seems to me that this is really an attempt to create a trust by giving notice after payment, and to put the assignee in as good a position as if he had given notice before payment. It is then too late to give notice. The person to whom notice is given has come under a legal obligation, which may result in an action being brought against him. It seems to me, therefore, that, having given a cheque on which he is legally liable, he is bound to deal with the holder, notwithstanding any notice he may subsequently receive. For these reasons I agree that the judgment of Kekewich, J., must be reversed.

Appeal allowed.

Solicitors, *Loxley, Elam, & Gardner; J. B. Pakeham.*

High Court of Justice.

Chan. Div. North, J. — Dec. 20, 21.

In re CARNE'S SETTLED ESTATES. (*a.*)

Settled land—Trust to allow widow to occupy castle and lands so long as she might wish to do so—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 38, 58.

A mansion-house was vested in trustees for a term of 1,000 *years upon trust to allow the plaintiff to occupy the same rent free so long as she might wish to continue to do so.*

Held, that the plaintiff was tenant for life within the meaning of the Settled Land Act, 1882; *but held, that the trustees of the term were not trustees for the purposes of the Settled Land Act.*

Adjourned summons.

By an indenture dated the 14th of March, 1890, certain hereditaments including the castle and manor of St. Donats were (subject to a rent-charge) conveyed to trustees for a term of 1,000 years upon trust to allow the plaintiff to occupy the castle, pleasure ground, stables, and certain fields rent free as long as she should desire to do so, and upon further trust to raise some specified sums of money, and subject to the term to the use of one of the defendants in fee.

The plaintiff took out a summons to have it determined (1) whether she was tenant for life under the settlement; (2) whether the trustees of the term were trustees for the purposes of the Settled Land Acts; and, (3) if necessary, for the appointment of trustees for the purposes of those Acts.

H. Terrell, Q.C., and *W. M. Cann*, for the plaintiff.—The plaintiff is within the definition in section 2 (1), sub-section 5, or at all events has the powers of a tenant for life under section 58 (1) vi. [They cited *In re Paget's Settled Estates*, 33 W. R. 898, 30 Ch. D. 161; *In re Edwardes' Settlement*, [1897] 2 Ch. 412, 45 W. R. Dig. 142; *In re Eastman's Settled Estates*, [1898], W. N., p. 170.] The power to raise money includes a power of sale (*Tasker* v. *Small*, 6 Sim. 625), so that the trustees of the term are trustees for the purposes of the Settled Land Acts.

Vernon Smith, Q.C., and *J. G. Wood*, for the defendant, the reversioner.—In *In re Edwardes* there was more than a mere right of personal occupation, which is all there is here. In *In re Paget's Settled Estates* section 51 applied, and the person who had the powers of tenant for life was entitled to the rents and profits.

Terrell, Q.C., replied.

NORTH, J.—I do not see how to escape from the decision of Romer, J., in *In re Eastman's Settled Estates*. I see no distinction between the two cases so far as the limitation goes, and according to the old authorities such a limitation grants an estate for life: see Co. Litt. 42*a*, and Burton's Real Property (7th ed.), p. 239. It may be that the mansion-house can be sold and the rest of the estate left, and that this is contrary to the intention of the settlor; but the question is, what does the Act say? I do not see my way to put a different construction to that adopted by Romer, J. The trustees of the term, however, are not, in my opinion, trustees for the purposes of the Act, and there must be a reference to chambers for the appointment of trustees.

Solicitors, *G. Terrell; Field, Roscoe, & Co.*

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Court of Appeal.

(A. L. Smith, Collins, and Romer, L.JJ.) March 11.

MOUNTAIN v. PARR. (a.)

Master and servant—Employers' liability—Accidental injuries—Arbitration—Jurisdiction of county court judge—New trial—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 3; *Schedule II., ss.* 2, 4—*Workmen's Compensation Rules,* 1898, *rr.* 1 (4), 24, 64.

A county court judge has no jurisdiction to grant a new trial in an arbitration under the Workmen's Compensation Act, 1897.

Appeal from a decision of the judge of the Nottingham County Court refusing to grant a new trial in an arbitration under the Workmen's Compensation Act, 1897.

The workman in this case having made a claim to compensation under the Act, the matter was heard on the 15th of November, 1898, before the county court judge sitting as an arbitrator under the Act, and an award was made in favour of the workman. On the 10th of December the employer gave notice of his intention to apply to the county court judge for a new trial. On the hearing of the application on the 21st of December it was objected on the part of the workman that the county court judge had no jurisdiction to grant a new trial. The county court judge was of opinion that he had jurisdiction to entertain the application, but he dismissed the application on the merits, refusing to allow a new trial. The employer appealed.

Etherington Smith, for the workman, took a preliminary objection to the hearing of the appeal.—The county court judge had no jurisdiction to hear the application for a new trial, and no appeal lies from his refusal to grant a new trial. At the original hearing he sat as an arbitrator, and when once he had made his award he had no power to review it. The only power of appealing from an award under the Workmen's Compensation Act is that given by section 4 of the second schedule, which is as follows: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal." The only appeal given by this section is an appeal on a question of law decided at the hearing of the arbitration; and it must be brought within twenty-one days: see ord. 59. r. 12, of the High Court Rules. The county court judge has no power to reconsider his award, except in the single case provided for by section 12 of the first schedule, which allows him to review a weekly payment. With this exception his award is final, unless there is an appeal within twenty-one days. The appellant did not give notice of appeal within twenty-one days, and therefore he is out of time for appealing from the original decision.

W. H. Stevenson, for the employer.—The Workmen's Compensation Rules, 1898, show that an arbitration under the Act is an action in all but name. Rule 1 (4) incorporates the County Court Rules. Rule 24 says that "subject to the special provisions of these rules, the procedure in an arbitration shall be the same as the procedure in an action commenced in the county court by plaint and summons in the ordinary way, and determined by the judge without a jury; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such arbitration accordingly; and in the application of such provisions and rules the applicant's request for arbitration shall be deemed to be a summons with particulars annexed, the day fixed for proceeding with the arbitration shall be deemed to be the return day, and the applicant and respondents shall be deemed to be plaintiff and defendants respectively." And by rule 64, "where any matter or thing is not specially provided for under these rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act." Part of the procedure of an action in the county court is the procedure relating to an application for a new trial. The county court judge, therefore, had jurisdiction to hear an application for a new trial, and an appeal lies from his refusal to grant a new trial: see *Pole* v. *Bright*, 40 W. R. 95, [1892] 1 Q. B. 603.

A. L. SMITH, L.J.—I think that the preliminary objection is a good one. The question is whether the county court judge had jurisdiction to entertain an application for a new trial. It is clear from a consideration of the Act that the county court judge at the original hearing was sitting as an arbitrator, and as an arbitrator only. Section 1, sub-section 3, says: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration in accordance with the second schedule to this Act." The first schedule deals with the scale and conditions of compensation. And in passing I may refer to section 12, which gives the arbitrator power to review any weekly payment. Section 2 of the second schedule says that in the absence of agreement as to an arbitrator the matter should be settled by the county court judge. Section 4 of the second schedule is as follows: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court." In my opinion the idea governing the whole of the enactment is that a county court judge who sits to hear a case under the Act sits as an arbitrator. Now, can an arbitrator grant a new trial of a case which he has heard? It is perfectly clear that he has no such power. It was argued that rule 1 (4) and rule 24 of the Workmen's Compensation Rules bring in the County Court Rules and practice, and give the judge the same powers as if he were sitting not as an arbitrator. And reliance was

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

specially laid on rule 64, which says: "Where any matter or thing is not specially provided for under these rules, the same procedure shall be followed, and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act." In my opinion those rules are intended to apply to cases under the Act the powers to which they refer so far as they are applicable to arbitrations, and no further. The county court judge, therefore, was not vested with his ordinary county court jurisdiction, and he had no power to entertain on application for a new trial.

COLLINS and ROMER, L.JJ., concurred.

Objection allowed, and appeal dismissed.

Solicitors for the workman, *J. H. Lee & Watts*, for *Whittingham & Williams*, Nottingham.

Solicitors for the employer, *Bramall, White, & Saunders*, for *Walker & Barker*, Nottingham.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Jan. 24, 26, 27; Feb. 16.

PEMBERTON v. HUGHES. (a.)

Divorce—Foreign law—Decree of foreign court competent to deal with the cause—Irregularity—Want of jurisdiction—Validity.

A decree pronounced by a foreign court competent to deal with the case must, if not contrary to natural justice, be treated in this country as valid until it is set aside, though the irregularities of the process by which it was obtained were such as by the local law to deprive the foreign court of jurisdiction. A decree of divorce pronounced by a Florida divorce court between persons whom it was competent to summon before it will, therefore, be received here as valid, even if it be the law of Florida that, the summons having been issued only ten days (instead of ten clear days) before the return day, the court had no jurisdiction, and its decree is an absolute nullity.

Appeal from Kekewich, J.

The material facts are sufficiently stated in the judgment of Lindley, M.R., to which statement it need only be added that the divorce granted by the Florida court against Mrs. Pemberton, the appellant, on the petition of Holmes Erwin, her former husband, was pronounced on the ground of the lady's violent temper.

Jelf, Q.C., Dicey, Q.C., and *John Henderson*, for the appeal, referred to *Green* v. *Green and Sedgwick*, 41 W. R. 591, [1893] P. 89; *Vanquelin* v. *Bouard*, 12 W. R. 128, 15 C. B. N. S. 341; *Buchanan* v. *Rucker*, 1 Camp. 63, 180b, 9 East 192; *Reynolds* v. *Fenton*, 3 C. B. 187; *Ferguson* v. *Mahon*, 11 A. & E. 179; *Schibsby* v. *Westenholz*, 19 W. R. 587, L. R. 6 Q. B. 155; *Castrique* v. *Imrie*, 19 W. R. 1, L. R. 4 H. L. 414; *Godard* v. *Gray*, 19 W. R. 348, L. R. 6 Q. B. 139; and *In re Trufort, Trafford* v. *Blanc*, 36 W. R. 163, 36 Ch. D. 600. [VAUGHAN WILLIAMS, L.J.—*Henderson* v. *Henderson*, 3 Hare 100; and *Anlaby* v. *Prætorius*, 36 W. R. 487, 20 Q. B. D. 764.]

Warrington, Q.C., and *A. R. Ingpen*, for the defendants, referred to Dicey's Conflict of Laws, pp. 402, 403; Story's Conflict of Laws (8th ed.), p. 829; *Meyer* v. *Ralli*, 24 W. R. 963, 1 C. P. D. 358, at p. 370; *Hawthorn* v *Harris*, 23 W. R. 214; *Phillipson* v. *Emanuel*, 56 L. T. Rep. 858, 35 W. R. Dig. 160; Maddock's Chan. Prac. (3rd ed.), vol. ii., pp. 245, 246, 391.

Jelf. Q.C., in reply, referred to Bullen and Leake's Precedents of Pleading (5th ed.), p. 253.

Cur. adv. vult.

Feb. 16.—The following written judgments were delivered:

LINDLEY, M.R., read the following judgment: The plaintiff in this action claims to be entitled to a jointure of £200 a year under the will of Francis A. R. Pemberton, who died on the 2nd of August, 1892. The plaintiff's right to the sum depends upon whether she is the widow of the testator, and this depends upon the validity of their alleged marriage, and this depends upon the validity of a previous divorce of the lady from a former husband of the name of Erwin.

Kekewich, J., has held the divorce invalid, and has dismissed the plaintiff's action with costs. From this decision she has appealed. The material facts are as follows: In February, 1884, the plaintiff and Erwin, who were both domiciled and resident in the State of Florida, were married in that country according to the laws thereof. On the 18th of January, 1888, Erwin, the husband—the plaintiff and her husband being then in Florida—sued the plaintiff for and obtained a decree for divorce. This decree was pronounced by a court having jurisdiction in Florida to pronounce divorces between persons domiciled and resident in Florida, and the decree has never been set aside or reversed. It stands as a final and subsisting decree. Its validity is, however, impeached by the defendants on grounds which will be stated presently. On the 20th of December, 1890, Erwin being still alive, the plaintiff and Mr. Pemberton married in Florida; they lived together as man and wife until his death in August, 1892. Under the will and codicil of his grandfather, Mr. Pemberton was entitled to certain estates in this country for his life, and he had power to charge them with an annuity or jointure of £200 a year in favour of any woman whom he should marry. In exercise of this power he made a will appointing the £200 a year to the plaintiff. The defendants, who are entitled to the estates, dispute the validity of the appointment, and contend that the decree divorcing the plaintiff from her former husband, Erwin, was void and of no effect by the law of Florida. It is proved that by the law of Florida suits for divorce are commenced by a bill (*i.e.*, a petition) presented to a judge of a circuit court sitting in Chancery. The statements are verified by a short affidavit by the plaintiff made before a notary of the court. The bill and affidavit are then filed in the office of the clerk of the court. A *subpœna* to appear addressed to the defendant is then issued under the seal of the court. The time for appearance must not be less than ten clear days from the issue of the *subpœna*. The *subpœna* is sent to the sheriff for service, and it must be served ten days before the time for appearance. When served the *subpœna* is returned and filed in the office of the clerk of the court which issued it. If the defendant does not appear a *præcipe* for a decree *pro confesso* is obtained by the plaintiff and is filed with the clerk of the court, and after a certain time a decree *pro confesso* under the seal of the court is entered by him. This, however, is not the final decree. Before that is obtained evidence in support of the plaintiff's case is taken before the master. He certifies it to the court, and the evidence and his certificate are then filed in the proper office. Before the case is brought before the court for final decision,

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

a short summary of the proceedings with their dates (called "step notes") is prepared, and is signed by the clerk of the court and is filed. The papers and proofs are then laid before the judge, and if he is satisfied with them a decree for divorce is pronounced and is drawn up and signed by the judge and filed.

The above procedure was followed by Erwin, and save in one respect everything was perfectly regular. His bill was duly presented and filed in the proper court on the 25th of November, 1887; a *subpœna* was duly served on his wife. She did not appear. All subsequent steps were duly taken, and on the 18th of January, 1888, a final decree was pronounced against her, which is as follows. [His lordship read the decree, and proceeded:] The decree was filed on the 28th of January 1888. It has now been ascertained that the *subpœna* to appear did not leave ten clear days between the date of the writ and the time for appearance. The *subpœna* was dated the 25th of November, 1887, and the time fixed for the wife's appearance was the 5th of December, 1887—*i.e.*, ten days, but not ten clear days after the 25th of November, 1887. The writ was, in fact, served on the wife on the 25th of November, so that the rule as to service was complied with, and no application to the clerk to enter a decree against her was applied for until the 2nd of January, 1888. There are no grounds whatever for saying that she did not know of the proceedings, nor that she had not time to enter an appearance on or before the 5th of December, nor that she had no opportunity of defending herself. Moreover, she is not herself questioning the validity of the decree of divorce; on the contrary, she maintains it was and is perfectly valid.

The defendants, however, contend, and they have adduced expert evidence to prove, that as the *subpœna* to appear did not give the wife ten clear days for appearance the *subpœna* was not irregular only, but absolutely void, so that all subsequent proceedings were void also, and that the court had no jurisdiction to pronounce any decree against the wife. The defendants further contend that the decree, being wholly void by the law of Florida, must be treated as wholly void by this and all other civilized countries. The evidence of the law of Florida is not to my mind so clear as to convince me that the decree, standing as it does unimpeached, could be treated in a collateral proceeding as wholly null and void even in Florida. Mr. Struntz, the plaintiff's expert, does not take that view of the law. It is true that in two passages of his cross-examination (pp. 29-31) he says that if proper proceedings were not taken the court would not have jurisdiction, but he insists that as the wife was served in time the defect in the *subpœna* was not fatal to the jurisdiction of the court. The defendant's expert, Mr. Warts, unquestionably goes much further, and says that Mrs. Pemberton and Mr. Erwin, who also married after the divorce, could be both convicted in Florida of bigamy, notwithstanding the decree. But even Mr. Warts says that the defect in the writ of *subpœna* would have been cured by the wife's appearance (see p. 42), which makes me hesitate in saying that I am satisfied that the decree is void, even by the law of Florida, for want of jurisdiction. The court which pronounced the decree ought to be credited with knowing what irregularities (if any) were fatal to its jurisdiction and what were not, and the court had before it all the materials necessary for forming a judgment, and oversight or carelessness ought not to be presumed by us. Although, therefore, Kekewich, J., considered Mr. Warts a more satisfactory witness than Mr. Struntz, I could not myself without further information come to the same conclusion as the learned judge as to the utter worthlessness, even in Florida, of the decree which the defendants impeach. Further information on this point could be procured, if necessary, under the provisions of 24 & 25 Vict. c. 11, but, in my opinion, it is not necessary to pursue this question further.

Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious, or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial injustice, according to English notions, is committed, all that English courts look to are the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—viz., its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed. There is no doubt that the courts of this country will not enforce the decision of foreign courts which have no jurisdiction in the sense above explained —*i.e.*, over the subject-matter or over the persons brought before them. [His lordship referred to *Schibsby* v. *Westenholz*; *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351; *Price* v. *Dewhurst*, 4 My. & Cr. 76; *Buchanan* v. *Rucker*; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670.] But the jurisdiction which alone is important in these matters is the competence of the court in an international sense —*i.e.*, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country. This is pointed out by Mr. Westlake (Int. Law, s. 308) and by Foote (Private Int. Jur. (2nd ed.), p. 547), and is illustrated by *Vanquelin* v. *Bouard*. That was an action on a judgment obtained in France on a bill of exchange. The court was competent to try such actions, and the defendant was within its jurisdiction. He let judgment go by default, and in the action in this country on the judgment he pleaded that by French law the French court had no jurisdiction because the defendant was not a trader and was not resident in a particular town where the cause of action arose. In other words, the defendant pleaded that the French action was brought in the wrong court (see the 13th plea). The Court of Common Pleas held the plea bad and that the defence set up by it should have been raised in the French action. The French action in *Vanquelin* v. *Bouard* was an action *in personam*, and the parties to the action in France were also the parties to the action brought in this country on the French judgment. The decision therefore does not exactly cover the present case, but it goes far to show that the defendant's contention in this case cannot be supported. The defendant's contention entirely ignores the distinction between the jurisdiction of tribunals from an international, and their jurisdiction from a purely municipal, point of

view. But that distinction rests on good sense and is recognized by modern writers on private international law: see Westlake and Foote; Piggott on Foreign Judgments, p. 129, *et seq.* The latter says at p. 130: "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit." Wharton's Int. Law, paragraphs 792, &c., contains a careful review of the question by a learned American lawyer, and brings out the distinction very clearly: see paragraphs 801, 812. In paragraph 812 he says, "The true test is competence according to the rules of international law"; and it is plain that these do include mere rules of procedure.

In Dicey's Conflict of Laws there are some valuable chapters (xi., p. 361; xvi., p. 400) on the jurisdiction of foreign courts; and in them will be found various meanings of the expression "court of competent jurisdiction." Those various meanings show the danger of using that expression without taking care to avoid the confusion to which they may easily give rise.

It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competency of a court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign court of competent jurisdiction in the sense above explained is a matter which the courts of this country are bound to recognize if such irregularity involves nullity of sentence. No authority can be found for any such proposition, and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to show that it cannot be accepted. A judgment of a foreign court having jurisdiction over the parties and subject-matter—*i.e.*, having jurisdiction to summon the defendants before it and to decide such matters as it has decided—cannot be impeached in this country on its merits: *Castrique* v. *Imrie* (*in rem*), *Godard* v. *Gray* (*in personam*), *Messina* v. *Petrococchino*, 20 W. R. 451, L. R. 4 P. C. 144 (*in personam*). It is quite inconsistent with those cases, and also with *Vanquelin* v. *Bouard*, to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique* v. *Imrie* Lord Colonsay said that no inquiry on such a matter should be made (p. 448). A decree for divorce, altering as it does the *status* of the parties and affecting, as it may do, the legitimacy of their after-born children, is much more like a judgment *in rem* than a judgment *in personam*:—see *Niboyet* v. *Niboyet*, 27 W. R. 203, 4 P. D. 1, at p. 12. And where there are differences between the two the decisions on foreign judgments *in rem* are better guides for the determination of this case than decisions on foreign judgments *in personam*. The leading recent cases on foreign judgments *in rem* are: (1866) *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; 15 W. R. H. L. Dig. 8; (1870) *Castrique* v. *Imrie*; (1887) *In re Trufort, Trafford* v. *Blunc*. There is nothing, however, in the decisions in those cases to assist the defendants. On the contrary, the judgments delivered in them are, in my opinion, adverse to the defendants' contention.

In *Doglioni* v. *Crispin*, a Portuguese court decided that the respondent was the natural son of a deceased man domiciled in Portugal and not a noble, and that the respondent was consequently to succeed to his father's personal estate. The appellant was a party to those proceedings, but she afterwards claimed the property in question under a will of the deceased. She was held precluded from disputing the Portuguese decree. Lord Cranworth distinctly stated (p. 315) that the decision, having been pronounced by a court of competent jurisdiction, was one which English courts were "bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced"; and a little lower Lord Cranworth stated that in his opinion evidence to show that the decision was not in accordance with Portuguese law ought not to have been received. Lord Cranworth's judgment did not, as I understand it, turn on the fact that the appellant was personally estopped from disputing the Portuguese judgment because she was a party to the proceedings in Portugal; his decision was based on the competency of the court and the nature of the controversy before it.

It is necessary, however, to bear in mind that undefended proceedings for divorce require to be very narrowly scrutinized, for such divorces may be easily connived at. It is unnecessary to consider whether an English court would recognize a foreign divorce proved to have been obtained by collusion even if the parties divorced were foreigners domiciled and resident within the jurisdiction of the foreign court. No collusion is relied upon or proved in the present case. If, therefore, the principles above explained are correct, I see no ground on which an English court can refuse to recognize the validity of the divorce in question in this case, unless it be on one or other of the two following grounds—viz., (1) that a foreign divorce decree pronounced in an undefended action will never be recognized in this country; or (2) that the courts of this country will not recognize any divorce even of foreigners for any cause other than those for which a divorce can be obtained in this country. To lay down now for the first time either of these doctrines is, in my judgment, quite impossible, nor were they alluded to by counsel. I thought it, however, desirable to mention them in order that it might not be supposed that they had been overlooked.

In the result the appeal must be allowed and the judgment reversed, and a declaration be made that the plaintiff is entitled to the £200 a year with an account and order for payment. The defendants must pay the costs of the action and of the appeal.

RIGBY, L.J.—I agree, and I base my judgment on the ground that we have no right in this action to inquire into the question whether or not the court of Florida did or did not act upon a correct view of the law and procedure of their own State. The State had exclusive jurisdiction to deal with the persons domiciled and resident within its territory, the court which pronounced the decree for a divorce was the proper court, and the only proper court, for entertaining and deciding upon divorce actions within the territory, and it seems to me that on principle and authority the courts of this country are bound to assume that the court understood its own procedure and law, and that the evidence of experts ought not to have been resorted to. *Castrique* v. *Imrie* (a case of a judgment *in rem*) and *Vanquelin* v. *Bouard* (where a judgment of a French court was supported) are two of the more important authorities on the point. The court which has sole jurisdiction over the subject-matter of the action and the parties thereto must by the courts of this country be treated as the only competent tribunal to deal with the question raised in the divorce action. Even though it were possible to point out some mistake as to the municipal procedure or law, the courts of this country ought not on that ground to override the actual decision.

The objection taken is that the court of Florida had, according to the municipal law, no jurisdiction to pronounce a decree, but such an objection as that I

think ought not to be entertained by us. Mrs. Erwin had all the notice of the proceedings which the law of the State required, though if we had a right to inquire further it may well be that there was an irregularity in fixing the day for appearance. The effect of a judgment such as this, determining the *status* of Mrs. Erwin to be that of a *feme sole*, has as much effect as against persons not parties to the action as a judgment *in rem* in analogous circumstances would have had.

VAUGHAN WILLIAMS, L.J.—I agree with the rest of the court that the divorce decree in the court in Florida must be treated as the judgment of a foreign court of competent jurisdiction, and cannot be examined or impeached on any of the grounds suggested. That the Florida court is, from an international point of view, a court of competent jurisdiction is not questioned. The parties were married in Florida, and domiciled there, and present within the jurisdiction.

It is said that the evidence of the foreign experts shows that the judgment is a nullity by reason of the defective process, and that we are bound by their evidence as to what the foreign law is. But this evidence does not show in regard to judgments generally that, if in civil proceedings in Florida the judgment had been relied on, the party against whose interest it was set up would not have had to show that the judgment had been set aside. It is clear in the case of a judgment of a superior court on a personal action in England if a plaintiff arrested on a process sued in trespass, and the defendant justified under process under a judgment of a superior court, the plaintiff, if he impeached this judgment, even on the ground that the action was wrong in its inception, would have had to allege and prove that the judgment had been set aside and that error had been successfully brought.

There is no evidence that this law is not the same in Florida, and I think that we ought, in favour of the foreign judgment, to make this presumption in favour of the judgment—that is to say, to treat it in civil proceedings as we should treat the judgment of a superior court.

The present case is analogous to the case where, in in a foreign country, the proceedings have been taken against a person subject to the jurisdiction, but not in the proper court. In *Vanquelin* v. *Bouard* and *Doglioni* v. *Crispin*, the defendant was properly served and had the opportunity in the suit of pleading to the jurisdiction of the court which was not the proper court. Here there was no proper service. The true principle seems to me that a judgment, whether *in personam* or *in rem*, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid; as, for instance, a case where there had been not only no service of process, but no knowledge of it.

The allegation of no service alone would not in such a case avail the defendant: *Buchanan* v. *Rucker*, *Ferguson* v. *Mahon*, Bullen and Leake's Pleadings, (5th ed.), p. 748.

Appeal allowed.

Solicitors, *Frere, Cholmeley, & Co.; Hopgoods & Dowson.*

High Court of Justice.

Chan. Div. North, J. — Jan. 25.

In re SMITH.
GROSE-SMITH *v.* BRIDGES. (*a.*)

Settled land—Pecuniary legacy—Gift over in event of sale of settled land—Invalidity—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 51.

The widow of a settlor died in 1869 *leaving a will bequeathing personal property to the person entitled to the ownership and enjoyment of the settled estate, with a gift over in the event of a sale of the settled real estate.*

Held, that the gift over was inoperative if a sale was made under the Settled Land Acts.

Adjourned summons.

Henley Smith devised the Priory estate to trustees upon trust for his wife for life, and after her death on trust, by sale or mortgage, to raise portions for his daughters, and, subject as aforesaid, on trust for his son Henley Grose Grose-Smith (the plaintiff) for life, and after his death in trust for his first and other sons in tail male with remainders over. There was a power of sale with the consent of the tenant for life. The testator died in 1867. His widow, who died in 1869, directed the accumulation of the income of her residuary estate for twenty-one years, and directed that after the expiration of that period the income should be paid to the person entitled to the ownership and enjoyment of the Priory estate under her husband's will, with a gift over to Charles Dodgson in the event of a sale of the Priory estate within twenty-one years of her death.

The plaintiff took out this summons in order to determine whether the gift over was valid.

Carson, for the plaintiff.—Section 51 of the Settled Land Act applies, although the testatrix died before the Act was passed: *In re Ames*, 41 W. R. 505, [1893] 2 Ch. 479; *In re Paget's Settled Estates*, 33 W. R. 898, 30 Ch. D. 161.

Dibdin, for the trustees, referred to *In re Eastman's Settled Estates*, [1898] W. N., p. 170.

D. Jones, for the executors of C. Dodgson.—Section 51 only applies where a fetter on sale is imposed by the settlor. These settlements were made before the Act was passed, and the Legislature cannot have altered the existing rights of persons.

NORTH, J.—I do not see how to escape from the decision urged on me by Mr. Carson. At the time these instruments were prepared a man was allowed by law to tie up land during the life of a tenant for life. The Legislature considered the law ought to be altered and power to sell was given to tenants for life by statute. The Legislature further provided that any attempt to induce a tenant for life not to sell should be ineffectual. The provision in the widow's will was, I cannot doubt, inserted to induce the tenant for life not to exercise the power of sale. It is suggested that the fact that this is contained in a settlement made by a person who did not settle the real estate, makes a difference. I do not see that it does, and I think the words of the section are too strong. The object of the Act cannot be defeated by the use of two deeds instead of one. And the words of the Act show that the Act applies not only when the settle-

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

ment is before the Act or after the Act, but even provide for the uncommon case of a settlement being partly before and partly after the Act.

Solicitors, *Lingard; Nicol, Son, & Jones; Bridges, Sawtell, & Co.*

Chan. Div. Stirling, J. } Feb. 17, 22; March 1.

SEN SEN CO. v. BRITTEN. (a.)

Trade-mark—Passing off—Improper use of the words "trade-mark"—Misrepresentation—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), s. 105.

Where a name is put on goods, with the addition of the words "Trade-Mark," but the trade-mark has not been registered, it does not necessarily follow that there is a representation that the trade-mark had been registered, so as to disentitle the plaintiff to relief in a passing-off action.

Held, on the facts, that the plaintiffs were entitled to an interlocutory injunction to restrain the defendant from passing off his goods as or for those of the plaintiffs.

Lewis's *v.* Goodbody, 67 *L. T. Rep.* 194, 41 W. R. Dig. 250, *distinguished.*

Motion.

The plaintiffs in this action sought to restrain the defendant from passing off certain goods as and for the goods of the plaintiffs by means of the get-up of the goods. The goods in question consisted of a medical preparation which was said to be useful for the voice. The plaintiffs were an American company, which, since 1896, had sent large quantities of these goods to England and sold them. The goods were made up in small packages, and in a certain distinctive way. They bore on them, at the top and bottom and front portions of the parcel, the words, "Sen Sen—Trade-mark"; under that and diagonally across there was a ribbon made up in a bow. Various packages were made up in this way in different colours. In addition to that the packages were sold in boxes. The striking feature of these boxes was, that there was on each of the two opposite sides a transparency, behind which was seen a placard containing representations of three of the small packages, and the evidence was that at the time they were introduced into England that was a very distinguishing feature of the parcel. The defendant was the agent in England of a Canadian company who had recently introduced their manufacture into England. They made up their goods in small packages of the same shape as those of the plaintiffs. They marked these packages "Santé," and instead of a ribbon passing diagonally across the front there was a cord which was passed lengthwise and breadthwise across the package with a knot in the middle. The colours were not exactly identical in tint with those used by the plaintiffs, but closely resembled such colours. The defendants had also adopted a box in which they sold those packages, and which differed in shape from the plaintiffs' box, but there was also this characteristic feature of a transparency on one side, and behind that there was, as in the case of the plaintiffs' box, a card containing a representation of three of the defendants' packages.

The Patents, Designs, and Trade-Marks Act, 1883, s. 105 (1), provides: "Any person who represents that any article sold by him is a patented article, when no patent has been granted for the same, or describes any design or trade-mark applied to any article sold by him as registered which is not so, shall be liable for every offence, on summary conviction, to a fine not exceeding five pounds."

(2) "A person shall be deemed, for the purposes of this enactment, to represent that an article is patented or a design or a trade-mark is registered, if he sells the article with 'patent,' 'patented,' 'registered,' or any word or words expressing or implying that a patent or registration has been obtained for the article, stamped, engraved, or impressed on, or otherwise applied to, the article."

Upjohn, Q.C., and *Sebastian*, for the plaintiffs.—There may be a trade-mark, although it is not registered. There are two modes of acquiring a trade-mark, by user or by registration. It is no offence to call a mark a trade-mark although it is not registered. "Sen Sen" is a trade-mark in the old common law sense of the term. The plaintiffs are suing to prevent the defendant from dressing up his goods so as to pass them off for the plaintiffs' goods.

They referred to the Patents, Designs, and Trade-Marks Act, 1883, ss. 62, 66, 71, 76, 77, 78, 87, 92, 105; Patents, Designs, and Trade-Marks Act, 1888 (51 & 52 Vict. c. 50), s. 10; Trade-Marks Registration Act, 1875 (38 & 39 Vict. c. 91), ss. 1, 3, 5; *Mouson & Co.* v. *Boehm*, 32 W. R. 612, 26 Ch. D. 398; *In re Hudson*, 34 W. R. 616, 32 Ch. D. 311; *Barlow* v. *Johnson*, 34 SOLICITORS' JOURNAL 298, 7 Rep. Pat. Cas. 395; *Hall* v. *Barrows*, 12 W. R. 322, 4 De G. J & S. 150; *Ford* v. *Foster*, 20 W. R. 311, L. R. 7 Ch. App. 611.

Gatey.—When you put the words trade-mark on goods, that is a representation that there is a registered trade-mark.

He referred to *Lewis's* v. *Goodbody*, 67 L. T. Rep. 194, 41 W. R. Dig. 250.

Upjohn, Q.C., replied.

March 1.—STIRLING, J., after stating the facts, said: Now, the question is whether all this combination of the defendant's goods is such as to lead the unwary purchaser to purchase the goods of the defendant as and for the goods of the plaintiffs. That is a question which must be mainly decided by the eye. There has been the usual conflict of evidence and as usual certain distinctions between the two were pointed out, both as to the packages and the boxes. But in my judgment looking at the matter as a whole this is a case in which the unwary purchaser would very easily be led to mistake the defendant's goods for those of the plaintiffs. Of that I have no doubt at all. The doubt which is occasioned in my mind is as to whether an injunction can be granted in the circumstances mentioned by the learned counsel for the defendant—namely, that the plaintiffs have throughout used parcels and packages on which are found the words "Sen Sen—Trade-mark." Now, as regards their right to a trade-mark the position is this. On behalf of the plaintiffs an affidavit has been filed in which it is said that the trade-mark "Sen Sen" had been adopted in America and that although it was not registered here steps had been taken with a view of getting that registration effected. In 1896 the first boxes were shipped to this country, and they were marked in the same way as those which were sold in the United States. Now, it is alleged that that statement which was found upon those packages amounted to a misrepresentation so as to disentitle the plaintiffs to relief by way of injunction. How stands the law? I take it that the law is that a trader may still acquire a right to a trade-mark in the United Kingdom by user. The effect

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

of the Trade-Marks Act is not to provide that no one shall have a trade-mark unless he register it in accordance with the Act, but only that the person using such trade-mark is not to be entitled to sue in respect of it unless he have it registered. On that I would refer to the law as laid down by Cotton, L.J., in *In re Hudson*, 32 Ch. D. 320, and by Chitty, L.J., in *Barlow v. Johnson*, 7 Rep. Pat. Cas. 404-5. Then is the statement on the goods that a particular mark is a trade-mark a misrepresentation such as will prevent the plaintiffs from exercising their rights in respect of the get-up which they would otherwise have had? Now, my attention has been called to the Patents, Designs, and Trade-Marks Act, 1883, s. 105. [His lordship read sub-section 1.] Of course, if the plaintiffs were brought within the terms of that enactment they must be denied relief. And I would go further and say that by committing an offence under this section the plaintiffs might be guilty of such a misrepresentation as would not entitle them to relief in a court of equity. Now, what is the offence which the Legislature desires to punish. It is, as regards trade-marks when "Any person who describes any trade-mark applied to any article sold by him as registered which is not so." The offence is not in applying the word "trade-mark," but in representing that that trade-mark has been registered. The contrast is very strong with what is said with respect to a patent. If he represents any part of an article as patented when it is not so that is an offence. It is not said that if he represents that he has a trade-mark when it is not registered that he commits an offence. But that is not the whole of it. [His lordship read sub-section (2) of section 105.] Now, the plaintiffs have certainly not used the word "registered." Have they used any words implying that registration has been obtained? That comes very close to the general question as to whether there is such a misrepresentation as to disentitle to relief in equity. Now, it seems to me that the words in the front, "Sen Sen—Trade-mark," are susceptible of meaning that the trade-mark referred to is a trade-mark that possesses the ordinary rights and incidents, including the right to sue, and therefore implying registration; but that at the same time it has not necessarily that meaning. It may mean simply an intimation to the person intending to deal in or buy the goods, that if they desire to make sure that the goods they are buying come from the plaintiffs, they can see those words which are one indication by which the genuineness of the article may be ascertained. Now, I have no evidence before me as to the effect which this representation has had upon anybody. I have nothing before me but the bare fact that this appears. My attention has been called by Mr. Gatey to a case before Kekewich, J., of *Lewis's* v. *Goodbody*, in which in a part of the judgment the learned judge used language which possibly might be read as an indication of opinion on his part that under such circumstances it ought to be taken that there was a representation that a trade-mark existed. I have made some inquiry with respect to it, and it appears that these observations were delivered with reference to certain evidence which does not appear in the report. However that may be, I do not think that the learned judge meant to say that in any circumstances to put a name on the goods with the simple addition of the word "trade-mark" necessarily carried with it the implication that the trade-mark had been registered.

Therefore, upon the materials now before me, I am unable to come to the conclusion that the plaintiffs have been guilty of such a misrepresentation as to disentitle them to an injunction, and whatever may happen at the trial, I think that an interlocutory injunction ought to be granted. I think the proper order will be to restrain the defendant, his servants and agents, until judgment in this action or further order, from selling or offering or exposing or advertising for sale or procuring to be sold any medical preparation in the boxes, packets, or wrappers or other enclosures so got up or contrived as, by colourable imitation of the plaintiffs' boxes, packets, wrappers, or enclosures or otherwise, to be calculated to represent or lead to the belief that such preparations are of the plaintiffs' manufacture or merchandise. Costs to be costs in the action.

Solicitors for the plaintiffs, *Keddy, Fletcher, & Fry.*

Solicitors for the defendant, *Church, Rendell, Todd, & Co.*, for *W. S. Restall*, Birmingham.

Chan. Div. } Stirling, J. } Nov. 10.

In re WATSON.

GUARDIANS OF STAMFORD UNION *v.* BARTLETT. (*a.*)

Poor law—Pauper lunatic—Expenses of maintenance—Arrears—Statute of Limitations (21 *Jac.* 1, *c.* 16).

W., a lunatic not so found, was maintained by the guardians of the S. Union in a pauper lunatic asylum from 1882 *until her death in* 1898. *In* 1894 *W. became entitled to a share of a fund, and in* 1895 *a person was appointed to exercise the powers of a committee of W., but the fund was not in fact paid into court to the credit of W. until after W.'s death.*

In 1895 *the guardians gave notice to the Master in Lunacy of their claim in respect of the past and future maintenance of W.*

After the death of W. this action was commenced by the guardians against the administratrix of W., claiming arrears of maintenance.

Held, that the expenses of maintenance was a debt of the lunatic, and that arrears of maintenance could only be recovered in respect of six years prior to the commencement of the action.

Stedman *v.* Hart, 2 *W. R.* 462, *Kay* 607, *discussed.*

In re Newbegin's Estate, 36 *W. R.* 69, 36 *Ch. D.* 477, *followed.*

This case raised a question as to the right of guardians to recover moneys paid by them for the maintenance of a lunatic in the following circumstances.

The above-named Elizabeth Watson, who was a person of unsound mind not so found, was from 1882 until her death in 1898 maintained in a pauper lunatic asylum by the Guardians of the Stamford Union. She had no means at the time when she was admitted to the asylum, but in January, 1894, upon the death intestate of an illegitimate son in Kimberley she became under the law of Cape Colony entitled to a share in his estate. These facts were, early in 1894, communicated to the solicitors of the guardians.

By an order made in May, 1895, but not drawn up till August, 1895, under section 116 of the Lunacy Act, 1890, Mrs. Bartlett, a sister of the lunatic, was appointed to exercise the powers of a committee of the lunatic.

On the 19th of November, 1895, the solicitors to the guardians wrote to the Master in Lunacy asserting the claims of the guardians in respect of the past and future maintenance of the lunatic, and on the 21st of November, 1898, the master replied that the claims of the guardians would be borne in mind in dealing with the fund belonging to the lunatic.

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

On the 8th of June, 1898, an order was made in Lunacy directing that a sum of £1,691 15s. 2d. should be paid into court by Mr. Greenfield, the solicitor to the person appointed in Cape Colony to represent the intestate son's estate, such sum being the balance of moneys admitted by Mr. Greenfield to have been received by him in respect of the lunatic's share of that estate.

On the 9th of June, 1898, a summons was taken out in Lunacy on behalf of the guardians claiming payment of the expenses of the past and future maintenance of the lunatic.

The lunatic died on the 11th of June, 1898.

On the 29th of June, 1898, Mr. Greenfield, in pursuance of the order of the 8th of June, 1898, duly paid into court the balance of the lunatic's said share in his hands, he being then unaware of the lunatic's death.

On the 2nd of July, 1898, letters of administration to the lunatic's estate were granted to Mrs. Bartlett.

On the 4th of July, 1898, this action was commenced by an originating summons by the guardians against Mrs. Bartlett asking for a declaration that the plaintiffs were entitled to the sums expended by them in respect of the maintenance of the lunatic for the six years immediately preceding the 1st of January, 1894, and in respect of her maintenance as from that day down to her death, and also of the sums expended by them in respect of her funeral expenses.

On the 20th of July, 1898, the defendant offered to pay to the plaintiffs all arrears of maintenance not barred by the Statute of Limitations, together with the costs of this action to that date, but such offer was declined.

By an order made in Lunacy on the 4th of August, 1898, it was by consent ordered that £1,400, part of the fund in court, should be paid to the defendant as administratrix of the lunatic, and that the residue should be carried over to the credit of this action.

Sheldon, for the plaintiffs.—The plaintiffs are entitled to arrears of maintenance in respect of the period of six years prior to the 1st of January, 1894, or at least for a period of six years prior to the 21st of November, 1895, when notice was given to the Master in Lunacy of their claims. *Stedman* v. *Hart*, 2 W. R. 462, Kay 607, covers the case, and shows that the Court in Lunacy would have applied the lunatic's property in payment of necessaries supplied to the lunatic without regard to the Statute of Limitations.

George Henderson, for the defendant.—The defendant relies on *In re Newbegin, Eggleton* v. *Newbegin*, 36 W. R. 69, 36 Ch. D. 477, as establishing first that the sums paid by the plaintiffs constitute a debt; and, secondly, that the lunatic might have pleaded the statute as a defence to an action brought by the guardians against her. Arrears can only be claimed in respect of six years prior to the commencement of this action. The defendant has offered to pay all that the plaintiffs are entitled to, and the plaintiffs ought to pay the defendant's costs as from the 20th of July, 1898, the date of her offer.

Sheldon replied.

The case of *Brockwell* v. *Bullock*, 37 W. R. 455, 22 Q. B. D. 567, was referred to in the judgment.

STIRLING, J.—The substantial question upon this summons is whether the plaintiffs are entitled to more than six years' arrears of maintenance of an intestate, who was a lunatic, from the date at which the summons was taken out. The defendant is the legal personal representative of the lunatic who, from a date not later than 1882, was maintained in the county lunatic asylum by the Guardians of the Stamford Union, who are the present plaintiffs. [His lordship stated the facts.]

The first question is, Do the sums expended by the guardians for the maintenance of the lunatic constitute a debt? The second is, Assuming that to be so, is the legal personal representative of the lunatic entitled to set up the Statute of Limitations? Both these questions were considered and decided by Chitty, J., in *In re Newbegin's Estate*. Upon the first point he came to the conclusion that there was a debt arising either by virtue of a pre-existing common law liability or by virtue of a new obligation created by statute. Upon the second point he says this: "If this is a debt apart from the statute"—he was there dealing with the Lunatic Asylums Act, 1853, which has now been replaced by the Lunacy Act, 1890—"then it follows as a matter of course that the lunatic, appearing as he does now by his guardian *ad litem*, is entitled to set up the Statute of Limitations, and there is no pretence, as was partly suggested in argument, for saying that this court is to administer the lunatic's estate in some such way as to pay all the debts without regard to the question of the Statute of Limitations. The lunatic is entitled to defend himself in this proceeding as if it was an action brought against him." Upon the alternative view, that the debt arose by virtue of a new obligation, he says, "the section is silent with regard to the Statute of Limitations, and it is competent for the lunatic to set it up," and he held that the guardians were not entitled to recover more than six years' arrears. That applies to the present case. The defendant is not the lunatic, but is the legal personal representative of the lunatic, and it appears to me that, no less than the lunatic herself, the legal personal representative is entitled to set up the Statute of Limitations. The only answer to the statute is that certain applications were made in Lunacy, and it is said that if the Lunacy authorities had had the fund in their control to be distributed by them they would have done what is just, and given the applicants six years' arrears from, at any rate, the 19th of November, 1895, when the letter to which I have referred was sent by the guardians to the Master in Lunacy. How that may be I do not know. I cannot say how they would have exercised their jurisdiction over that part of the estate which was in their custody. But the jurisdiction of the Lunacy authorities has ceased: the lunatic is dead, and if that is not enough, the fund has been partly paid to the legal personal representative, and partly paid into court to the credit of this action, and it appears to me that I am bound to administer it according to the law of which the Statute of Limitations forms part.

It is said that there is a decision which warrants me in holding that greater arrears can be given. That is the case of *Stedman* v. *Hart*. In that case an order was made in Lunacy by the Lord Chancellor, directing taxation of the costs of a firm of solicitors employed in prosecuting the commission in Lunacy, and subsequently as the solicitors of the committees. That order was made in 1842, but owing to the small amount of the lunatic's income the taxation was deferred, and in 1848, pending the proceedings for that purpose, the lunatic died. In 1852 a second order was made in the lunacy for taxation of the costs properly incurred by the solicitors in the lunacy to the committees, and in 1853 the solicitors filed a bill against the legal personal representatives of the lunatic for the amount found due on taxation. Wood, V.C., held that these costs constituted a debt for necessaries supplied to the lunatic, and that the Statute of Limitations was out of the way because it

was a debt due to the solicitors in the lunacy who were subject to the jurisdiction of the Lord Chancellor, and would have been restrained if they had attempted to bring an action to recover these costs. The Vice-Chancellor says this: "I think that I must treat the costs incurred in this case as a debt for necessaries supplied to the lunatic, and imply a contract on the part of the lunatic for that purpose. It is argued for the defendants that in that case an action might have been brought against the lunatic, as no doubt it might, and that therefore as no proceedings have been taken for six years, nothing can prevent the operation of the Statute of Limitations to bar the claim. But I have considerable doubt whether that is the correct view in a case of this description. Suppose the lunatic had been placed in an asylum under the direction of the Lord Chancellor in Lunacy and there supplied with the necessaries of life, and that payment for these was not enforced for seven or eight years during the lunacy—would this court say that time had run against all the demands? I think that the court would take notice of these circumstances and of the certainty that the moment any action was brought the Lord Chancellor would deal with it on a petition in the matter of the lunacy. There might be some difference in the case of a common tradesman, but as regards these solicitors the Lord Chancellor in Lunacy would have perfect control over them and would not allow them to enforce their demand; and in this case he appears to have exercised his jurisdiction by ordering taxation of their costs. I think I must take judicial notice of what the Lord Chancellor would do under such circumstances." Does that reasoning apply here? I cannot see how it does. The Vice-Chancellor himself takes notice of the fact that there might be a difference in the case of a tradesman suing for goods supplied. It was established by the case of *Brockwell* v. *Bullock* that an action may be brought against a lunatic for the purpose of recovering a debt for necessaries and that a creditor is not compelled to have resort to proceedings in Lunacy. It seems to me, therefore, that as a matter of law six years' arrears only can be recovered from the date at which this summons was taken out.

On the 20th of July, 1898, an offer was made by the legal personal representative of the lunatic to pay that amount with the costs of the proceedings in the action down to that date, and I am asked to order the plaintiffs to pay the subsequent costs down to the present time. I do not think I ought to accede to that view. Undoubtedly it is a hard case, because according to the rules of simple honesty the guardians seem entitled to be recouped for the sum paid for the maintenance of the lunatic for the earlier period. But of course I am bound to decide the case according to the legal rights of the parties. At the same time, having regard to the decision of Wood, V.C., in *Stedman* v. *Hart*, I think that this was a proper case to bring before me. I do not see my way to give the plaintiffs any costs after the date of the defendant's offer, but, on the other hand, I do not think that they ought to be required to pay any costs.

Solicitors, *Stileman, Neale, & Toynbee*, for *Toynbee, Larken, & Toynbee*, Lincoln; *J. W. Sykes*, for *Edgell*, Kingston-on-Thames.

Q. B. Div.
(Bruce and Ridley, JJ.) } Jan. 27, 28; Feb. 18.

THE LANCASHIRE ASYLUMS BOARD *v.* THE MANCHESTER CORPORATION. (*a.*)

Local government—Rating—Asylums board—Proportion between county and county boroughs—Assessable value—Rateable value—Principles of apportionment Agricultural Rates Act, 1896 (59 & 60 *Vict. c.* 16).

An asylums board in estimating the apportionment of the total amount necessary to be raised for the purposes of an asylums fund by contributions from the county and the county boroughs respectively, must do so in proportion to the assessable values of the county and county boroughs as ascertained by the Agricultural Rates Act, 1896, *and the regulations the Local Government Board issued under that Act; and not as formerly, in the proportion to the rateable value of the county and county boroughs as ascertained in accordance with section* 33 (2) *of the Local Government Act*, 1888.

Special case stated by order, raising questions of law.

The plaintiffs claimed £359 9s. 5d. balance alleged to be due from the defendants in respect of a precept dated the 8th of November, 1897, sent by the chairman of the plaintiff board to the defendant corporation pursuant to section 26 of the Lancashire County (Lunatic Asylums and Other Powers) Act, 1891 (54 Vict. c. 20), and in accordance with the Agricultural Rates Act, 1896.

The questions for the opinion of the court were whether the asylums board, in dividing the total amount required by it to be raised by contributions for any year during the continuance of the Agricultural Rates Act, 1896, was to divide that amount between the county and the county boroughs (1) in proportion to the assessable values of the county boroughs as ascertained by the Agricultural Rates Act, 1896, and the regulations the Local Government Board issued under that Act; or (2) in proportion to the rateable value of the county and county boroughs, as ascertained by the Local Government Act, 1888, s. 33, sub-section 2.

C. A. Cripps, Q.C., F. H. Mellor, and *R. Cunningham Glen*, for the asylums board.

A. Macmorran, Q.C., and *W. C. Ryde*, for the Manchester Corporation.

Cur. adv. vult.

The judgment of the COURT was delivered by

RIDLEY, J.—The question raised by this case is whether during the continuance of the Agricultural Rates Act, 1896, the Lancashire Asylums Board ought to divide the amount yearly required to be raised for their purposes in proportion to the rateable value of the county and the county boroughs as ascertained by the Local Government Act, 1888, s. 33, or in proportion to the assessable value of the same as ascertained by the Agricultural Rates Act, 1896, and the regulations of the Local Government Board issued under that Act.

By the Lancashire County (Lunatic Asylums and Other Powers) Act, 1891, a board was constituted called the Lancashire Asylums Board, to which were transferred the lunatic asylums of that county; and it was provided that all expenses incurred by them in the execution of their duties should be paid out of a fund to be called the asylums fund. Section 24 deals with the raising of this fund, and is as follows: "The board shall before the first day of March in

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

every year estimate the total amount required to be raised by contributions for the ensuing year, and shall divide that amount between the county and the county boroughs in proportion to the respective rateable values (as ascertained under section 33 of the Local Government Act, 1888) of the county and the county boroughs, and shall add to the amount apportioned to the county boroughs the sum of £4,000 or such other sum as may from time to time be fixed by agreement or by arbitration in manner provided by this Act (in this Act referred to as 'the added sum').

"The amount so apportioned, together with the added sum shall be the aggregate amount required to be contributed by the county boroughs and shall be contributed by them respectively in proportion to their respective rateable values ascertained as aforesaid."

The balance of the amount required to be raised by the Board shall be contributed by the county council. Section 33 (2) of the Local Government Act, 1888, which provides for the appointment of a joint committee appointed by the counties and the county boroughs for the ascertainment of the respective values and gives them certain powers, continues as follows: "Under these powers from 1891 to the passing of the Agricultural Rates Act, 1896, the amounts required to be contributed were calculated upon the respective values of the county and the county boroughs as ascertained by this section; and the Lancashire Asylums Board under section 26 of their Act sent precepts to the county council and the borough councils for payment of the amount to be raised by each of them respectively."

It was not their duty to find the rateable values but to take them as found by the authorities and to divide the total amount required in accordance with those values.

But by the passing of the Agricultural Rates Act, 1896, a different set of circumstances was constituted out of which has arisen the question now for decision. For the asylums board it is argued that it is now their duty to take as the basis of the division to be made by them "the assessable value" of the counties and county boroughs as specified by the Rating Act, 1896, in place of the rateable values as calculated under the Local Government Act, 1888. For the city of Manchester, on the other hand, it is contended that these "assessable values" have no operation except for the levying of rates, and that as the asylums board is not an authority levying rates, they ought to base their calculations on the "rateable values" found as they were before the passing of the Rating Act, 1896, which, as they contend, operates upon the amount so apportioned to each council after it is so apportioned, and not before. The difference brought about is considerable in effect; for if the contention of the asylums board is right the amount found as due from the borough councils must be largely increased in comparison with that left to be raised by the county; while, on the other hand, the boroughs, which for the most part contain little agricultural land, will receive but a small annual grant from the Local Government Board.

Since the Act of 1896 came into operation the county rate basis has been altered accordingly by the authorities, and the asylums board have, in fact, made their calculations upon this new basis instead of on the "rateable values" as they were ascertained before that Act.

We proceed to examine the provisions of the Rating Act, upon the effect of which the decision of this case depends.

By section 1 the occupier of agricultural land in England was liable to pay one-half only of the rate in the pound payable in respect of other hereditaments.

By section 2 in respect of the deficiency which will arise in the produce of rates made by the "spending authorities" there is to be paid by the Commissioner of Inland Revenue to the "local taxation account" an annual sum, and this sum is to be issued from such account in half-yearly payments of the amount certified under the provisions of the Act to each spending authority. The spending authorities are defined in a schedule to the Act to be divers bodies, such as county councils, councils of boroughs, and boards of guardians; but the term does not include the lunatic asylums board.

By section 3 any spending authority requiring to raise from two or more parishes a sum by rate is, in determining the amount to be raised, to deduct the sum issuable to them in respect of the rate on account of their share in the annual grant provided for in section 2 for the period of the rate, and to raise the net amount after making such deduction in proportion to the assessable value of these parishes. And such assessable value is to be the rateable value of each of the parishes reduced by an amount equal to one-half of the rateable value of the agricultural land in the parish.

It seems perfectly plain that the effect of this is to give the relief intended by the Act to be given to agricultural land by assessing it at half its value instead of assessing it at the full value and allowing the ratepayer to pay his rate at half the rate in the pound at which the rate is made. The same result is arrived at by one method as by the other.

Section 4 deals with the amount of the annual grant issuable as stated above, and it is not necessary to state the provisions relating to this except that it is (by the effect of this section and section 6) to be ascertained by returns made to the Local Government Board by the spending authorities of the sums received by them in the year next before the passing of the Act.

Section 5 deals with the preparation of valuation lists, and the basis or standard for any county rate, and with valuations made by borough councils for raising the borough or other rate; and it provides that where separate hereditaments are specified therein, the value of agricultural land is to be stated separately from that of any other hereditament; and that in every case the total rateable value of the agricultural land in each case shall be stated separately from the total rateable value of the other hereditaments in each parish.

It appears to us that this provision was necessary in order properly to carry out the enactments contained in section 3: for it would not be possible to get at the "assessable value" of a parish or a hereditament under the Act unless the value of the agricultural land contained in either were separately set out in the valuation list or in the county rate basis, as the case might be. That is to say, the portion of the whole value which is to be taken at half its value must be ascertained before it can be so treated, and, therefore, by this section it is provided that the valuation lists or the county rate basis is in future to contain separately the value of the agricultural land (if any) included in each hereditament or parish.

By section 6, sub-section 3, the Local Government Board has power to make regulations for carrying out the Act, to which allusion must be made; but it is desirable first to refer to the definition of "rate" contained in section 9 of the Act; and this is "a rate made during the continuance of this Act, and the proceeds of which are applicable to public purposes, and which is leviable on the basis of an assessment in respect of the yearly value of property, and includes

any sum which, though obtained in the first instance by a precept certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate as before defined."

Regulations were issued by the Local Government Board under the Act providing for the returns required, and various other matters of detail not material to this case. It is then ordered by way of carrying into effect the provision contained in section 5 of the Act, that the valuation list is to be made in a particular form shown in the schedules, with a separate column showing the rateable value of the agricultural land (if any) contained in any hereditaments and that the lists are to be in this form instead of in the form provided by the Union Assessment Committees Act, 1862, for every rate to be made hereafter.

Finally, as to the county rates, it is ordered that county councils and other councils, whose duty it is to make, for the purposes of any rate, a basis or standard of valuation, which will not contain particulars of separately-rated hereditaments, but only the total rateable value of each parish, shall cause a basis or standard or valuation to be prepared in the form set out in Schedule II.

It is further ordered that, notwithstanding anything contained in the County Rates Act, 1852, or in any other Act from the 31st of March, 1897, the values of the several parishes as shown in the column of such basis or standard or column headed "Assessable Value," &c., "shall, during the continuance of the Act, be the basis, standard, or valuation for the levying of the county rate or any other rate leviable by the council according to the assessable value of the several parishes on which the same is levied, unless or until the council shall make a new basis, standard, or valuation in manner provided by law."

It seems perfectly clear that this statute and the regulations carrying it out were intended to be comprehensive during the period of its continuance in operation. The new valuation lists and the new county rate basis are to take the place of the former ones in all respects. The Union Assessment Committees Act, 1862, the County Rate Act, 1852, and the Local Government Act, 1888, so far as they conflict with the new statute, are superseded. And it is equally clear that the rate in question is a rate within the scope of the statute.

But it was argued, as has been said, that, although this is perfectly true, the duty of the Lancashire Asylums Board still is, as it was, to divide the sum they require in proportion to the rateable value of the boroughs and county, and not according to their assessable value. That section 3 of the Rating Act, 1896, is the leading section of that Act and defines its scope, and that as the Lancashire Asylums Board is not a spending authority it has no application to them. Further, that the regulations which provide for the new county rate basis say that it is to be the basis for the levying of the rate; and that the Lancashire Asylums Board is not a levying authority, but performs a duty previous to, and quite distinct from, the levying of the rates, and that if this were held otherwise, the Act would apply twice over in relief of the agricultural ratepayer.

We do not think, however, that this argument is well founded. It is not correct to say that section 3 is the leading section of the Act or defines its application. Rather it prescribes the method by which the relief granted to the agricultural ratepayer is to be carried out. That relief is to be in respect of all rates, but by this action of the "spending authorities" it is to be obtained not by payment of half the rate, but by payment of the rate on half the value; and when the provisions of section 5 and the Local Government Board's regulations are considered it becomes clear that in all valuation lists the value of the agricultural land is to be separately stated; and, secondly, that in the county rate basis that separate value and the assessable value of the parish are to be stated, not as enacting the object of the Act, but as providing the method of carrying out that object. Reliance was placed on article 17, section 2, of the regulations because of the words which it contains, "for the levying of county rate or any other rate leviable by the council," and so forth; but we do not think that to those words can be given the effect of limiting the application of the Act.

To begin with, the regulations are "generally for carrying into effect this Act" (section 6, sub-section 3), and further, the words are contained in the same article which prescribes this assessable value or new basis to be the law, notwithstanding anything contained in any other Act. This is tantamount to saying that the new basis or assessable value is to be read in section 24 of the Lancashire Asylums Board Act, 1891; and we cannot place any more limited construction on the words without some precise indication in the Act of 1896 or the regulations that this ought to be done.

It is true that the precise position and duties of the Lancashire Asylums Board is not dealt with in the 1896 Act; but we cannot, therefore, exclude it from an Act of so general an intention. No doubt the construction so placed on the Act is favourable to agricultural land. Whether it amounts to applying the Act twice over, is a question of words, but we find in that circumstance no reason why it should not have its plain meaning. We therefore answer question 1 in the affirmative, and question 2 in the negative.

Judgment for the plaintiffs, with costs.

Solicitors for the plaintiffs, *Ridsdale & Sons*, for *F. C. Hulton*, Preston.

Solicitors for the defendants, *Austin & Austin*, for the Deputy Town Clerk of Manchester.

Q. B. Div.
(Lawrance and Channell, JJ.) Jan. 12.

THE WEST LANCASHIRE RURAL DISTRICT COUNCIL (*Appellants*) *v.* OGILVY (*Respondent*). (*a.*)

Local government—Water—Supply brought to reasonable distance from dwelling-house—Cost of communicating supply to house—Limit of cost—Liability of owner of house—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 62—*Public Health (Water) Act,* 1878 (41 & 42 *Vict. c.* 25), *s.* 3.

A rural sanitary authority brought a supply of water into a certain district and within a reasonable distance of a dwelling-house, and then required the owner of the house to make a communication of the supply to his house. The owner not complying, the local authority made the communication of the supply to the house at a cost exceeding the scale of charges which had been fixed by the Local Government Board under section 8 of the Public Health (Water) Act, 1878, *for the compulsory supply of water within the district. The owner of the house having refused to pay to the authority in respect of the communication of the supply to his house more than the limit fixed by the Local Government Board,*

Held, that the owner was bound to pay the whole of the cost, as the provisions of section 3 of the Public Health (Water) Act, 1878, *applied only to the bringing*

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

of the supply to a reasonable distance from the house, but did not apply to the communication of the supply to the house, and that as to the latter there was no limit of cost.

Case stated by justices of the peace for the county of Lancaster.

The respondent was summoned by the West Lancashire Rural District Council, the appellants, to show cause why an order should not be made for payment by him to the appellants of the sum of £6 10s. 5d., the balance of expenses incurred by them in executing works for obtaining and furnishing a supply of water for premises situate at Holmeswood, Tarleton, in the West Lancashire Rural Sanitary District, of which premises the respondent was the owner.

The following facts were admitted:

The appellants are the local authority within the meaning of section 4 of the Public Health Act, 1875, for the rural sanitary district of West Lancashire, and the respondent is and was the owner of the dwelling-house, farm, and lands known as Shortwood Hall in that district.

In the year 1897 the appellants, acting under the powers conferred upon them by the Public Health Act, 1875, provided a supply of water for a portion of their district—namely, the township of Tarleton, in which the respondent's premises are situate, and laid down at a cost of about £340 a three-inch water main or pipe in a highway known as Marsh-lane for the supply of premises belonging to the respondent and known as Mere House, Holmeswood Hall, and Fells Farm, as well as Shortwood Hall. There was no invitation to the appellants on the part of the respondents to furnish such supply.

In order to provide a supply of water for the the respondent's premises known as Fells Farm and Shortwood Hall, the appellants laid in a public footpath leading from Marsh-lane to Fells Farm, to a point about 293 yards from Shortwood Hall, a branch main or pipe which was connected with a main or pipe in Marsh-lane. The footpath is upon land of which the respondent is the owner, and the land between such footpath and Shortwood Hall is also the property of the respondent. The mains so laid by the appellants are connected with other mains forming part of the appellants' water system to Marsh-lane, and by means of such mains water could have been furnished to Shortwood Hall had it been connected therewith by means of service pipes and the necessary fittings to such pipes.

By an order dated the 19th of June, 1897, the Local Government Board, in pursuance of section 8 of the Public Health (Water) Act, 1878, fixed a general scale of charges for the compulsory supply of water to houses within their area of that part of the West Lancashire Rural Sanitary District which comprises the township of Tarleton, and declared that the charge for a supply of water according to the scale so fixed shall be deemed to be a reasonable cost within the meaning of section 62 of the Public Health Act, 1875, and section 8 of the Public Health (Water) Act, 1878.

On the 5th October, 1897, the appellants' surveyor examined Shortwood Hall and found that it was without a proper supply of water, and he reported such fact to the appellants, and also that a proper supply of water could be furnished thereto at a cost not exceeding the scale of charges authorized by the order of the Local Government Board.

The appellants, being satisfied that Shortwood Hall was without a proper supply of water, and that such supply could be furnished thereto by them at a cost not exceeding the scale of charges authorized by the Local Government Board, resolved that notice be given to the respondent requiring him to obtain such supply, and accordingly a notice was given by them to the respondent requiring him within fourteen days to obtain a proper supply of water for his house and provide and lay a branch pipe from the appellant's main, and affix a tap thereto on his premises.

The respondent did not comply with this notice, and the appellants themselves executed the necessary works for obtaining a proper supply of water to Shortwood Hall from their main in the footpath, and in so doing they incurred expenses amounting to £19 10s. 5d. The respondent paid £13, but refused to pay the balance of £6 10s. 5d., stating that in his opinion the sum of £13 was the maximum an owner could be required to pay.

On behalf of the appellants it was contended that upon the foregoing facts they had power under section 62 of the Public Health Act, 1875, having first provided an available supply of wholesome water within about 293 yards of the respondent's premises, to require the respondent to obtain a proper supply of water to Shortwood Hall, and to execute the works necessary for that purpose, and upon his default, to execute such works themselves and recover the whole expenses incurred by them from the respondent; that with the exception of the provision that it was the appellants' duty under section 3 of the Public Health (Water) Act, 1878, to see that the respondent's house had, within a reasonable distance, an available supply of wholesome water sufficient for the consumption and use for domestic purposes of the inmates of the house, the provisions of such last-mentioned section did not apply; and that there was an available supply of such water within a reasonable distance of the respondent's house.

On behalf of the respondent it was contended that the appellants could not recover a greater sum for putting the water on the premises of the respondent than the sum of £13 paid by the respondent, being the maximum amount allowed to be charged under the provisions of the Public Health (Water) Act, 1878, and that the appellants could not in this case proceed under section 62 of the Public Health Act, 1875, but should have proceeded under section 3 of the Public Health (Water) Act, 1878.

The justices were of opinion that the effect of section 3 of the Public Health (Water) Act, 1878, was that the appellants were not entitled to recover from the respondent a greater amount than £13, and such sum having been paid by the respondent to the appellants, they dismissed the summons.

The question for the opinion of the court was whether or not the justices were right in their decision.

Section 62 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), enacts: "Where on the report of the surveyor of a local authority it appears to such authority that any house within their district is without a proper supply of water, and that such a supply of water can be furnished thereto at a cost not exceeding the water rate authorized by any local Act in force within the district, . . . or at such other cost as the Local Government Board may, on the application of the local authority, determine under all the circumstances of the case to be reasonable, the local authority shall give notice in writing to the owner, requiring him within a time specified to obtain such supply, and to do all such works as may be necessary for that purpose. If such notice is not complied with within the time specified, the local authority may, if they think fit, do such works and obtain such supply, and any expenses incurred by the local authority in doing any such works may be recovered in a summary manner from the owner of the premises."

Section 3 of the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), enacts: "It shall be the duty

of every rural sanitary authority, regard being had to the provisions in this Act contained, to see that every occupied dwelling house within their district has within a reasonable distance an available supply of wholesome water sufficient for the consumption and use for domestic purposes of the inmates of the house. Where it appears to a rural sanitary authority, on the report of their inspector of nuisances . . . that any occupied dwelling house within their district has not such supply within a reasonable distance, and the authority are of opinion that such supply can be provided at a reasonable cost not exceeding a capital sum the interest on which . . . would amount to twopence per week, or at such other cost . . . as the Local Government Board may, on the application of the local authority, determine under all the circumstances of the case to be reasonable, and that the expense of providing the supply ought to be paid by the owner, or defrayed as private improvement expenses, proceedings may be taken as follows." The section then goes on to enact that notice may be served on the owner requiring him to provide such supply, and if he does not do so the local authority may provide the supply and recover the expenses from the owner; and section 8 enables the Local Government Board, on the application of the local authority under section 62 of the Public Health Act, 1875, to determine what is a reasonable cost within the meaning of that section.

R. Cunningham Glen, for the appellants.

Macmorran, Q.C., for the respondent.

LAWRANCE, J.—It seems to me that section 3 of the Act of 1878 does not apply in this case, because there was a supply of water within a reasonable distance, as the local authority thought. If the owner had been dissatisfied as to that his proper remedy would have been to the Local Government Board under section 268 of the Act of 1875. Section 3 does not apply, and therefore the appellants were not confined to the limit fixed by the Local Government Board. The appellants are therefore entitled to our judgment.

CHANNELL, J.—Section 62 of the Act of 1875 proceeds upon the assumption that there is already a water supply within a reasonable distance, and there being that supply within a reasonable distance, section 62 says that the owner shall make a communication from that supply to his own house and pay the cost of so doing. Section 3 of the Act of 1878 applies to a different state of things—namely, the bringing of the supply of water into the neighbourhood of the house and within a reasonable distance from the house. The cost of bringing the water within a reasonable distance of the house may be put upon the owner, as well as the cost of the communication from the mains to the house. As to the latter cost—namely, the cost of communicating the supply to the house, as in this case, there is no limit of cost. The only limit of cost in section 62 is the cost of the water, and the result is that if the local authority were to require the owner to lay on water to the house from an unreasonable distance such owner would have an appeal to the Local Government Board. We therefore say that the decision of the magistrates as to the £13 limit was wrong, and the case must go back to the magistrates for them to order the balance of the expenses to be paid.

Appeal allowed.

Solicitors for the appellants, *Rowcliffes, Rowle, & Co.*, for *Alfred Dickinson*, Ormskirk.

Solicitors for the respondent, *Patersons, Snow, Bloxam, & Kinder*, for *Wilson, Wright, & Wilsons*, Preston.

Q. B. Div.
(Lord Russell of Killowen, C.J.) Nov. 23, 28.

WEIR & CO. v. GIRVIN & CO. (a.)

Ship — Charter-party — Advance freight — Destruction of part of cargo before sailing—Liability to pay advance freight on cargo destroyed.

By a charter-party it was provided that the charterers should load the ship with a full and complete cargo such as would load the vessel to her water-marks, and that the freight, which was to be at a certain rate per ton on the quantity delivered to the consignees, should be due and paid as follows: "Two-thirds in cash three days after sailing, ship lost or not lost, and the balance on unloading and right delivery of the cargo"; and that, "in the event of the charterers not loading vessel to her marks, the freight shall be paid on the basis of 4,350 tons, which the owners guarantee to be vessel's capacity of cargo for the voyage."

A portion of the cargo which had been loaded on board was destroyed by fire—which was a peril mutually excepted—before the sailing of the ship, and the ship sailed with other cargo on board. Three days after the sailing of the ship the shipowners claimed, but the charterers refused to pay, two-thirds advance freight on the whole cargo, including the part destroyed.

Held, that the shipowners were not entitled to the two-thirds advance freight on the part of the cargo which had been destroyed, but that they were entitled to the advance on the basis of the 4,350, less the part destroyed.

Commercial cause tried before Lord Russell of Killowen, C.J., without a jury.

A charter-party dated the 31st of March, 1898, was made between the plaintiffs, as owners of a ship called *The Olivebank*, and the defendants, Messrs. Girvin, Roper, & Co., of London, "as agents for Girvin & Eyre, of San Francisco," the charterers; but although the defendants contracted as agents only for the charterers, they agreed to undertake responsibility in the present action.

Under this charter-party the ship was to proceed to a loading berth in the River Tyne or Tyne Dock, and there load a full and complete cargo (excluding certain specified kinds of cargo), and the cargo was to be of such a nature as would load the vessel to Lloyd's freeboard (subject to the provisions of side clause), and the vessel so loaded was to proceed therewith to San Francisco and deliver the cargo in the usual and customary manner as ordered by the consignees.

The charter-party contained the following clause: "Freight for the said cargo to be paid on final discharge at the rate of 16s., except on cargo shipped in Hull, as hereinafter provided, per ton of 2,240 lbs. on the quantity delivered to the consignees. The freight to be due and paid as follows: Two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the cargo to be paid in United States gold coin at the exchange of 4 dols. 80 cents. per £ sterling"; and the peril of fire was one of the things mutually excepted.

In the margin or side of the charter-party was the following clause (referred to as the "side clause" in writing): "In event of charterers not loading vessel to her marks, it is agreed that freight shall be paid on the basis of 4,350 tons, which owners hereby guarantee to be vessel's capacity of cargo for the voyage, less *pro ratâ* freight on any quantity of cargo short delivered in San Francisco."

The charterers loaded on board at Hull 1,017 tons of cargo. The vessel then proceeded to the Tyne and

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

loaded 461 tons more, when a fire broke out and the whole of the 1,478 tons of cargo already loaded was so damaged by the fire that for the purposes of this case it was treated as destroyed.

The charterers subsequently loaded 2,590 tons more, which, with the 1,478 tons destroyed, would not have brought the vessel down to her marks, though it exhausted the carrying capacity of the vessel.

The ship sailed for San Francisco, and three days after sailing the plaintiffs demanded two-thirds advance freight on the basis of the 4,350 tons, which was the basis on which freight was to be paid according to the charter-party.

The nature of the arguments appears sufficiently in the judgment; and for the defendants reference was made to the cases of *Allison* v. *The Bristol Marine Insurance Co. (Limited)*. 24 W. R. 1039, 1 App. Cas. 209; *Aitken, Lilburn, & Co.* v. *Ernsthausen & Co.*, [1894] 1 Q. B. 773.

Carver, Q.C., and *J. A. Hamilton*, for the plaintiffs.

Joseph Walton, Q.C., and *Scrutton*, for the defendants.

Cur. adv. vult.

Nov. 28.—Lord RUSSELL OF KILLOWEN, C.J.—When this case was being discussed before me I formed rather a strong view against the contention of the plaintiffs, but the case was so strenuously argued for the plaintiffs that I thought it better to take time to consider my judgment. Having done so I still adhere to the view I formed during the argument, and I am clearly of opinion that the plaintiffs are not entitled to recover.

The plaintiffs are the owners of a ship called *The Olivebank*, which they chartered on the 31st of March, 1898, to a firm of Girvin & Eyre, of San Francisco. I mention that in order to explain the position the defendants occupy in this case. The contract of charter-party was in fact executed by the defendants, Girvin, Roper, & Co., of London, but they are described both in the body of the charter-party and in their signatures in execution of the contract as agents for the San Francisco firm, and therefore they are not liable upon the contract at all, but the defendants have expressed that they were willing to litigate the question with which alone I have to deal in this case. That question is: Are the defendants liable to pay advance freight in respect of 1,478 tons of cargo loaded on board the chartered ship, but afterwards destroyed by a peril mutually excepted in the charter-party—namely, by fire? That is the short point. If the plaintiffs are entitled to advance freight on that 1,478 tons, then the defendants admit that they are liable to pay it. Are the defendants so liable? The charterers loaded on board this 1,478 tons; that quantity was destroyed by fire, the result being that the charterers, who were bound to supply the cargo conformably to the charter, had, *quoad* that 1,478 tons, fulfilled the obligations that were cast on them. The shipowners had, *quoad* that 1,478 tons, fulfilled the obligation cast upon the ship, because they had taken it on board intending to carry it. The result was that the charterers were under no obligation to substitute other 1,478 tons for that quantity when destroyed, nor, on the other hand, were the shipowners under any obligation to accept from the charterers that 1,478 tons, even if the charterers had been willing to supply it. The result in point of law on that state of facts is the same as if the charter had been a charter of the carrying capacity of the ship, less 1,478 tons, assuming that it was a charter, as it was in this case, of the whole capacity of the ship. The further result is, that the shipowners, not being obliged to take goods in substitution of that quantity, had that cargo space at their own disposal, and might use it in any way they chose consistent with their remaining obligations under the charter. The point, therefore, is this. Are the plaintiffs entitled to an advance of two-thirds of the freight on that 1,478 tons, although it is conceded that they never would be entitled to a single penny of freight on that part? Their claim is that they are entitled to an advance of two-thirds freight on that 1,478 tons, although *ex concessis* they never will earn, and therefore never will be entitled to receive, any freight at all in respect of that 1,478 tons. That contention for the plaintiffs must depend on the construction of the charter-party itself. Freight is a payment to be made to the ship for the carriage and safe delivery of the goods; and until there has been carriage and delivery, the ship is not entitled to demand or recover freight at all, in the absence of circumstances giving rise to an altered state of things out of which there may be implied obligations. The parties, however, may make for themselves any agreement they choose, and they may make a stipulation that the whole freight is to be payable the moment the cargo is put on board, or that the whole is to be paid the moment the ship sails, or to be paid in any proportion or at any time they choose; but if they do so they must do it in a way which makes it very clear that the obligation is altered from that which is the obligation in respect to freight on the principle I have mentioned. It is very common and often very convenient to stipulate in charter-parties for an advance of freight.

I now turn to the charter-party, which is a charter-party of *The Olivebank*, which is to load at Hull or in the Tyne, and then sail to San Francisco. After the enumeration of the different articles of which the cargo may consist, these words are introduced, which are important as showing the meaning of the clause on which this controversy mainly turns—namely, "subject to the provisions of side clause." Then there is the stipulation in the charter-party as to the freight, and if it stood there it is clear that the freight stipulated was to be paid on each ton weight of the quantity delivered to the consignees at San Francisco, and no right to any freight would accrue until those events had happened. Then follows the stipulation that the freight is to be due and paid as follows, "two-thirds in cash three days after sailing from Tyne, ship lost or not lost." There is here, therefore, an express stipulation that the freight as to two-thirds shall be paid, that is, that there shall be an advance of freight to the extent of two-thirds, less 6 per cent. charges, three days after the sailing of the ship, ship lost or not lost. Then finally there is this clause (written at the side): "In the event of charterers not loading vessel to her marks it is agreed that freight shall be paid on the basis of 4,350 tons, which owners hereby guarantee to be vessel's capacity of cargo for the voyage." What was the object to which that side clause was mainly directed? I have pointed out that the charterers might have loaded one or more commodities differing largely in weight, so that it might happen that unless some protection was given to the ship—the freight being per ton weight—the charterers might load the ship in a way that would not bring her down to her load lines, in which the cargo when delivered would work out at a comparative small number of tons weight, although the ship's space might be fully occupied by the cargo. The main object, therefore, of that clause is to protect the shipowners from having an unduly light cargo loaded on board, and to ensure that they shall have a cargo to the dead weight capacity of the ship. Accordingly a clause is introduced that the freight is to be paid on the basis of 4,350 tons. The plaintiffs say that although the

1,478 tons is gone out of the charter, and although they (the plaintiffs) can never earn a penny of freight in respect of that quantity, yet, under this clause, as it provides that freight is to be on the basis of 4,350 tons, they are entitled to have their advance calculated on that basis. The short answer to that contention is that by the events which have happened before the moment arrived when the plaintiffs were entitled to any advance at all, the 1,478 tons had dropped out of the charter, and there was a disturbance therefore of that basis, so that by causes for which neither party is responsible—namely, by fire, which was one of the mutual exceptions in the charter-party, and which applies to shipowners and charterers alike—causes which relieve the charterers, the basis is 4.350 tons, less that quantity of 1,478 tons. Advance freight is ordinarily calculated, where there are no more definite data for calculation, upon what the probable freight will be assuming the success of the adventure and the safe arrival of the cargo. Here in one event, and in one event only, is that mode of calculation displaced. That event is that, by the stipulation that the freight is to be paid three days after the ship sails, lost or not lost, the plaintiffs would be entitled to demand their two-thirds freight, although the ship having been lost they would otherwise not be entitled to any freight at all on the ship's arrival. It seems to me that the short answer to that is, that is a case so expressly provided for that effect must be given to it; but it does not at all affect the construction of the clause or the liabilities of the parties in the event which has happened in this case—namely, an event which has happened before the ship has sailed at all. I agree that we are to take as the original basis for calculation of advance freight the 4,350 tons; but, in my view, we are to deduct from that the 1,478 tons destroyed by an excepted cause, which would leave a balance of 2,872 tons to load. In my judgment the plaintiffs are entitled, and entitled only, to two-thirds of the freight on 2,872 tons. The defendants, who, as I have pointed out, were not under any obligation at all under the charter, had paid into court on the basis of 2,590 tons, and therefore they have paid in 282 tons short, because it is conceded that the quantity put on board—namely, 2,590 tons, which were loaded, together with the 1,478 tons which were destroyed, would not bring the ship down to her marks within the meaning of the clause. The defendants therefore ought to have increased their payment into court by two-thirds of the freight on 282 tons more; but as by the assent of both parties the sole question to be determined was whether the defendants were liable to pay two-thirds freight in respect of the 1,478 tons destroyed, and as I come to the conclusion that they were not, the defendants are in my opinion entitled to judgment in the ordinary way.

Judgment for the defendants.

Solicitors for the plaintiffs, *Thomas Cooper & Co.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

C. C. R.
(Lord Russell of Killowen, C.J., and Wills, Grantham, Day, Lawrance, and Wright, JJ.) — Dec. 10.

THE QUEEN v. SENIOR. (a.)

Criminal law—Manslaughter—Infant child—Neglect to provide medical aid—Religious belief that medical aid is wrong—Wilful neglect—Prevention of Cruelty to Children Act, 1894 (57 & 58 *Vict. c.* 41), *s.* 1.

Section 1 *of the Prevention of Cruelty to Children Act,* 1894, *enacts that "If any person over the age of sixteen years, who has the custody, charge, or care of any child under the age of sixteen years, wilfully . . . neglects . . . such child . . . in a manner likely to cause such child unnecessary suffering or injury to its health, . . . that person shall be guilty of a misdemeanour."*

On the trial of an indictment for manslaughter it was proved that the prisoner was the father and had the custody of a child of the age of eight or nine months; that the child died of diarrhœa and pneumonia; that during its illness the prisoner, though aware of the gravity of its condition, had not provided it with any medical aid or medicine; that he had the means to do so; that he belonged to a sect called the "Peculiar People," who think it contrary to the teaching of the Bible to use medical aid or drugs for the sick; that the prisoner employed an experienced nurse, also a member of that sect, to nurse the child; that he was in other respects a kind father; and that the child's life would have been prolonged and probably saved if medical assistance had been procured. The prisoner was convicted.

Held, that there was evidence that the prisoner had "wilfully neglected" the child within the meaning of the above section, and that, death having ensued from such neglect, the prisoner was properly convicted of manslaughter.

Case stated by Wills, J., as follows:

The prisoner was indicted and tried before me at the Central Criminal Court on the 24th of November, 1898, for the manslaughter of his child—an infant of the age of eight or nine months.

The child had died of diarrhœa and pneumonia. The prisoner had not supplied it with any medical aid or medicine, though aware that the case was of great gravity and that the child would probably die. The medical evidence was that the child's life would certainly have been prolonged, and in all probability saved, if medical assistance had been procured. No question was raised as to the prisoner's ability to procure and pay for medical assistance, and it was shown that he earned about 35s. a week. He was shown to have been a good and kind father in all other respects, and he bore an excellent character for general good conduct. He had had twelve children, of whom seven were dead; and he had had before experiences of the same kind as those relating to the present inquiry, for the question he put to the inspector of police was "Except in regard to this case," and he then corrected himself, "Except in regard to *these cases*, have you ever known anything against me?"

The prisoner is a member of a sect called the "Peculiar People," whose religious doctrines as to the treatment of sick people are certainly to the ordinary apprehension remarkable. They base them upon the Epistle of St. James, chapter v., 14th and 15th verses: "Is any sick among you? let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord: and the prayer of faith shall save the sick, and the Lord shall raise him up; and if he have committed sins, they shall be forgiven him." They do not allege that medical aid is here expressly forbidden, but say that to make use of it is to indicate a want of faith in the Lord. I inquired if they held that any other parts of the Scriptures—the Gospels, for instance, were of divine authority, and was answered that the Gospels certainly were so recognized. I called attention to the fact that our Lord said: "They that are whole need not a physician, but they that are

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

sick," and asked why they thought that it could be wrong to consult a physician if the sick man was pronounced on such authority to need a physician. The answer was that the sickness here alluded to was moral sickness or sin, and that the Physician meant our Lord himself.

I inquired further if they held that it was wrong to give extra food or wine or brandy to a sick person, or to put an extra blanket on his bed if the weather were cold or the nature of his sickness required him to be kept warm. The answer was, No; that they give the sick every species of comfort; and it appears that this child had had much attention paid to its food and diet, though the medical witnesses did not think the dietary altogether judicious; and that it had had brandy administered. I inquired also if they objected to experienced nursing. They said No, and that they resorted to it and did so in the case of this child, but that the nursing must be by one of their own people who would not use drugs.

It thus appears distinctly that they do not object to the use of many human appliances and efforts to save the sick, but that they draw the line at the doctors and drugs, and I think at doctors not so much on account of their superior knowledge of the human frame and its needs as because they are likely to use or prescribe drugs.

I told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance; and secondly, that medical aid and medicine were such essential things for the child that reasonably careful parents in general would have provided them; and thirdly, that the prisoner's means would have enabled him to do so without an expenditure such as could not be reasonably expected from him. I then directed them upon the more difficult part of the case, and told them that in order to make out a case of manslaughter by negligence of this kind purely at common law the negligence must be gross and wanton, so much so as to indicate something, at all events, of an evil mind, and that it was impossible to say that of the prisoner, who was shown to have spared neither expense nor care, and to have taken in all respects but one every precaution to do the best for the child. But I added that if he had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind. I read to them the provisions of the statute 31 & 32 Vict. c. 122, s. 37 (Poor Law Amendment Act, 1868), which provided that "when any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody under the age of fourteen years, whereby the health of the child shall have been or shall be likely to be seriously injured, he shall be guilty of an offence," and said that had that statute been in force the case would have admitted of no doubt; but I told them it had been repealed by the statute for the prevention of cruelty to and the better protection of children 52 & 53 Vict. c. 44, s. 18, and that the enactment now in force was contained in section 1 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), which provides that "If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years wilfully assaults, illtreats, neglects, abandons, or exposes such child . . . in a manner likely to cause such child unnecessary suffering or injury to its health . . . that person shall be guilty of a misdemeanour," and that therefore if the prisoner had brought himself within that statute and the child had died in consequence, he would have caused the death of the child by a course of conduct forbidden by statute and therefore unlawful, and would be guilty of manslaughter.

I said there could be no doubt that the prisoner had wilfully and deliberately abstained from calling in medical assistance, though he and those about the child were aware for some considerable period before its death that it was in a state of great danger, and that therefore the question was narrowed down to whether his failure to procure medical aid could be called "neglecting the child in a manner likely to cause injury to its health."

I pointed out that the language was very different to that of the repealed enactment, and said that neglect was not a word of art, but a word of ordinary English, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidences of neglect in one generation which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the day. I told them that it was for the jury to say whether any particular state of things which might be established came up to the description of "neglecting," not to do a specific thing, as to supply medicine, in which case it would mean very little more than omitting or failing to do it, but to "neglecting a child," which is a very different thing, always bearing in mind that it must be to such a degree and in such a manner as to endanger its health.

The jury found the prisoner guilty, adding that they considered medical aid and medicine to have been necessary for the child, but that they were of opinion that the prisoner had done all that he could in the best interests of the child except in not providing medical aid and medicine.

I said nothing to the jury as to whether the prisoner was acting *bonâ fide* and according to his conceptions of duty because the learned counsel had in his opening speech said that it was not in question that he was so doing.

The prisoner was not represented by counsel. I had not the advantage of any argument on his behalf as to the meaning of "wilfully neglects" in the Act, and I therefore reserved the case for the opinion of the Court for Crown Cases Reserved.

The questions for the opinion of the court are whether my direction was right in law, and, if so, whether there was evidence upon which the jury could properly convict the prisoner. If both these questions are answered in the affirmative the conviction is to stand. If either is answered in the negative the conviction is to be quashed.

The prisoner was released on bail pending the decision of this court.

Henry Sutton, for the prisoner.—The prisoner having done all that his conscience permitted him to do for the child could not be guilty of neglect. He had provided a nurse for the child and everything except drugs and medical attendance; these he did not provide because of his religious belief. At common law the indictment would not lie, because a father was not obliged to provide medical attendance or drugs for his child: *Reg.* v. *Hines*, 80 C. C. Sessions Papers, *per* Pigott, B., at p. 312; *Reg.* v. *Wagstaffe*, 10 Cox C. C. 530; *Reg.* v. *Hurry*, 76 C. C. Sessions Papers 63. Nor was the prisoner guilty of the statutory offence of wilfully neglecting his child. Section 37 of the Poor Law Amendment Act, 1868, which made it an offence to wilfully neglect to provide medical aid for a child to the injury of its health, was repealed by 52 & 53 Vict. c. 44, s. 18. The words "medical aid" are omitted from that statute and from the Prevention of Cruelty to Children Act, 1894, which repealed it and is now in force. In *Reg.* v. *Downes*, 24 W. R. 278, 1 Q. B. D. 25, a conviction

was upheld because of the words of the now repealed enactment of 1868.

Horace Avory, for the Crown, was not called on to argue.

Lord RUSSELL OF KILLOWEN, C.J.—In this case we have to deal with a case stated by my brother Wills, on the trial of the defendant on a charge framed with reference to the statute 57 & 58 Vict. c. 41. The first question is whether the learned judge was right in his direction to the jury as to what constitutes wilful neglect, and the second question is whether there was any evidence on which the jury could convict the defendant of wilful neglect. [His lordship read section 1 of 57 & 58 Vict. c. 41.] It is useful to refer to the history of the legislation upon the subject. By section 37 of 31 & 32 Vict. c. 122, which is a statute dealing with the relief of the poor, it was enacted that any parent who wilfully neglected to provide adequate food, clothing, medical aid, or lodging for his child being in his custody under the age of fourteen years, whereby the health of such child was likely to be seriously injured, was guilty of an offence. Therefore it became under that statute the duty of a parent to provide medical aid, for his children. The statute was followed by a statute of 1889 with which it is not necessary to deal. It is important to remember that the statute of 1868 was passed after the judgment of Willes, J., in *Reg.* v. *Wagstaffe*, 10 Cox C. C. 530, that judgment having been given in January while the statute received the Royal Assent on the 31st of July. That statute was repealed by an Act of 1889, with which it is unnecessary to deal, for it was itself repealed by the statute of 1894. Now, there is a great difference in the wording of the Acts of 1868 and 1894, for in the latter Act the words "medical aid" are dropped. It is difficult to believe that the Legislature was taking a retrograde step, for the statute shows that it was passed in consequence of increased anxiety for the welfare of children. In the present case it is not disputed that the child was in a dangerous state to the knowledge of the parent. It is not disputed and the jury have found that its life might have been saved if medical assistance had been given; that the parent was in a position to provide medical aid; further, that the parent did not give medical aid because he believed that to do so would be a want of faith in the methods which he believed to be prescribed by the Bible; that otherwise he was an attentive parent; and lastly, that the child died. These being the facts, the learned judge charged the jury as follows: "I told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance. Secondly, that medical aid and medicine were such essential things for the child that reasonably careful parents in general would have provided them; and thirdly, that the prisoner's means would have enabled him to do so without an expenditure such as could not be reasonably expected from him." Was that direction substantially right? I think it was. The words are, if a person "wilfully neglects." It seems to me very clear what this phrase means: "wilfully" means deliberately, and not by inadvertence, and "neglect" means the omission to do something for the benefit of the child—in other words, intentional failure to take those steps which the experience of mankind shows to be generally necessary. In these days the resources of medical science are within the reach of the humblest and the poorest. It has been argued before us, that because the father was an affectionate parent and neglected to provide nothing for the child except the medical aid which its condition urgently required he could not be held to be guilty of wilful neglect. When a child breaks its thighbone and an operation is necessary, but in the highest degree dangerous while the child is in a state of consciousness, would the father be guilty of neglect if he refused to permit the administration of an anæsthetic drug? I think that in such a case the parent would properly be convicted. I dissent entirely from the view said to have been expressed by Pigott, B., in *Reg.* v. *Hines*, 80 C. C. Sessions Papers, p. 312, and I think that in this case an indictment for gross and culpable neglect could be supported at common law.

WILLS, J.—This is a case of a class which so frequently comes before the judges that I thought it well to state the case in order that an authoritative decision might be delivered on the point.

GRANTHAM, J.—I agree with the judgment of my lord. I think it would be well to break up the section, and to put to the jury a question founded on the last part of the section. Was something left undone which ought to have been done? Was there an action of the will brought to bear on his conduct by the father of the child as to whether or not he should do that thing? If his conduct was intentional it was wilful; if he wilfully left the thing undone how is it possible to say that he was not guilty of wilful neglect? For these reasons I think that the summing up of the learned judge was right.

DAY, LAWRANCE, and WRIGHT, JJ., concurred.

Conviction affirmed.

Solicitor, *Solicitor to the Treasury.*

Chan. Div. }
Stirling, J. } Jan. 12, 17; Feb. 22.

In re MILNER.
MILNER *v.* BRAY. (*a.*)

Power—Special power of appointment—Exercise by will—"Give, bequeath, and appoint"—Bequests to persons not objects of power.

In determining whether a testator has exercised by will a power of appointment, the court will look at the will to discover therefrom evidence of the testator's intention, and if it finds therein a general expression of intention to exercise the power, it will not infer a contrary intention from such circumstances as bequests to persons not objects of the power.

A testatrix had, under her father's will, a power of appointment in favour of her husband. By her will she bequeathed certain legacies out of "my separate estate or out of the estate and effects over which I have any disposing power," and gave, bequeathed, and appointed all the residue of her estate and effects to her husband.

Held, that the power was exercised.

This was a summons raising a question whether a testatrix had exercised by her will a special power of appointment.

Under the will of her father, Henry Milner, his daughter, Mrs. Bray, had power to appoint a life interest in certain funds to her husband. By her will dated the 16th of November, 1882, she bequeathed as follows: "I bequeath the following legacies out of my separate estate or *out of the estate and effects over which I have any disposing power, all free from legacy duty.*" She then specified the legacies, and proceeded: "I give, bequeath, and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband . . . absolutely."

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Mrs. Bray died on the 20th of July, 1883, leaving her husband her surviving. The question was whether she has exercised in his favour the special power conferred on her by her father's will.

P. B. Lambert, for the summons.

Beaumont, for the husband.—The testatrix's will operates as an exercise of the power. It begins with a clear expression of intention to exercise every power. The general principle is that where a will purports to exercise powers of appointment without saying what powers, it is to be assumed that the intention was to execute special powers if the disposition of the property would thus be rendered effectual. The court ought not to be readily deterred from applying this principle. [*Upjohn, Q.C.*, referred to *In re Williams, Foulkes* v. *Williams*, 42 Ch. D. 93, 37 W. R. Dig. 137, and also cited *In re Huddleston, Bruno* v. *Eyston*, 43 W. R. 139, [1894] 3 Ch. 595, as to the inadmissibility of evidence that the testatrix had no other power of appointment.] *In re Williams*, as well as the other cases relied on by the other side, was a case in which there was a general residuary devise and bequest, but here the testatrix has used the word "appoint."

He referred to *Clogstoun* v. *Walcott*, 13 Sim. 523; *Ferrier* v. *Jay*, 18 W. R. 1130, L. R. 10 Eq. 550; *In re Teape's Trusts*, 21 W. R. 780. L. R. 16 Eq. 442; *Thornton* v. *Thornton*. L. R. 20 Eq. 599, 24 W. R. Dig. 330; *Hope* v. *Hope*, 2 W. R. 674, 5 Giff. 13; *Greville* v. *Browne*, 7 W. R. 673, 7 H. L. Cas. 689.

Upjohn, Q.C., and *M. Romer*, for the next-of-kin of the testatrix.—The power here is to appoint in favour of the husband. The bequests here are not in favour of the husband, and consequently are not in favour of objects of the power. In no case has the mere use of the word "appoint" been held enough to show an intention to exercise the power, and wherever the word "absolutely" has occurred, the court has been able to give effect to the disposition by saying that the word "absolutely" was used by the testator in referring to his own property. Here the word "appoint" is not enough in itself, and a contrary intention is shown by the use of the word "absolutely."

They referred to *Greville* v. *Browne*; *In re Teape's Trusts*; *Cowx* v. *Foster*, 1 Joh. & Hem. 30, 9 W. R. Ch. Dig. 55; *Hope* v. *Hope*; *Cooke* v. *Cunliffe*. 17 Q. B. 545; *Ferrier* v. *Jay*; *Gainsford* v. *Dunn*, 22 W. R. 499, L. R. 17 Eq. 405; *Thornton* v. *Thornton*; *In re Swinburne, Swinburne* v. *Pitt*. 33 W. R. 394, 27 Ch. D. 696; *In re Mills, Mills* v. *Mills*, 35 W. R. 133, 34 Ch. D. 186; *In re Williams*; and *In re Huddleston*.

H. Greenwood, for other parties interested.—I adopt the latter argument.

Beaumont replied.

Cur. adv. vult.

Feb. 22.—STIRLING, J., stated the facts as above, and continued: It is stated, and for the present purpose I assume, that this power was the only testamentary power to which Mrs. Bray was entitled. This is a circumstance which has in many cases been held to afford evidence, of considerable cogency, of an intention to exercise such a power: see *Pidgely* v. *Pidgely*, 1 Coll. 255; *Banks* v. *Banks*, 1 W. R. 511, 17 Beav. 352; *In re Teape's Trusts*; *In re Swinburne*. It was contended that evidence of the fact was inadmissible, regard being had to the decisions in *In re Mills*, *In re Williams*, and *In re Huddleston*, but all of these cases are directed to a different point and were not intended, so far as I can see, to overrule the series of cases just referred to, not one of which is mentioned in the judgments of any one of the learned judges by whom those decisions were given. The rule applicable to cases of this sort is thus stated by Pearson, J., in *Von Brockdorff* v. *Malcolm*, 33 W. R. 934, 30 Ch. D. 172, in a passage cited with approval by North, J., in *In re Cotton, Wood* v. *Cotton*, 37 W. R. 232, 40 Ch. D. 41. [His lordship then read Pearson, J.'s, judgment on p. 179 of 30 Ch. D.: "The simple question is . . . except what you find in his will?" and continued:] In applying a rule of this kind little assistance is to be got from decisions on wills differing in form and expression. I may state, however, that where a will is found containing a general expression of intention to execute any disposing power to which the testator may be entitled, the court has repeatedly refused to infer the contrary intention from such circumstances as a direction to pay debts or personal expenses or legacies or bequests in favour of persons not objects of the power. As to this, in addition to the cases already mentioned, I may cite *Cowx* v. *Foster*, *Ferrier* v. *Jay*, *Thornton* v. *Thornton*, and *Price* v. *Price*, 46 L. T. Rep. 228, 30 W. R. Dig. 150. *In re Cotton* is the strongest case in which, in recent times at all events, the contrary intention has been held to be sufficiently indicated.

In the present case the circumstances relied on as showing an intention not to exercise the power are, first, that not one of the legatees is an object of the power; and, secondly, that all that is given to the husband is the residue of the testatrix's estate and effects. Still she does at the commencement of the will indicate an intention to exercise the power vested in her as well as dispose of her own estate, and by the use of the word "appoint" in addition to "give," "bequeath," she seems to me to show that that intention extended to what she describes as the residue of her estate and effects. On the whole, applying the rule stated as well as I can, I am of opinion that the power has been exercised.

Solicitors, *W. Stubbs*, for *Hirst & Capes*, Harrogate; *Frank Richardson & Sadler*; *T. B. & W. Nelson*, for *Nelson, Eddisons, & Lupton*, Leeds.

Chan. Div. } Nov. 1, 2, 3; Feb. 4.
Stirling, J. }

HAYLES v. PEASE & PARTNERS. (*a*.)

Inclosure Act—Construction—Owner of mines—Owners of surface—Right to sink pits—Buildings affixed to surface.

Where, under an Inclosure Act, full enjoyment of the minerals under the common inclosed is reserved to the owner of the soil, it must be held that the intention of the Legislature was to confer on the owner all powers which are reasonably necessary for him to win, work, and carry away the minerals. The owner of mines is, therefore, entitled to sink pits and erect buildings for the purpose of working the pits on any part of the inclosed common, though he is not justified in destroying or using existing buildings which are the property of the surface owners.

Bell *v.* Love, 10 *Q. B. D.* 547, 31 *W. R. Dig.* 33, 32 *W. R.* 725, 9 *App. Cas.* 286, *considered.*

This was a special case stated for the opinion of the court under ord. 34, r. 1. It raised a question as to how far owners of minerals lying under a common were entitled to use the surface of the common for the purpose of working the minerals.

The facts were as follow: In 1764 one William Campbell was entitled, as owner of an ancient freehold

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

estate called Dicken House, to rights of common over Crook and Billy-row Common, in the parish of Brancepeth, in the county of Durham.

By an Inclosure Act, 4 Geo. 3, c. 45, the common was inclosed and divided among one Farrer Wren, the owner of the soil and royalties of the common and the several persons entitled to rights of common, including William Campbell, who received an allotment of some forty-seven acres to be held by him, his heirs and assigns, as part and parcel of his ancient freehold estate.

The plaintiffs were the successors in title of William Campbell both as to his ancient freehold estate and the allotment.

The Inclosure Act, s. 15, provided that nothing therein contained "shall prejudice, lessen, or defeat the right, title, and interest of the said Farrer Wren of, in, or to the royalties incident or belonging to the said common of Crook and Billy-row aforesaid, but that the said Farrer Wren, his heirs and assigns, and all and every person and persons claiming under or in trust for him or them as owner or owners of the royalties of such common, and all succeeding owners thereof for the time being shall, and may at all times for ever hereafter, hold and enjoy all rents, perquisites, profits, mines, quarries, waifs, estrays, and other royalties and jurisdictions whatsoever to the owner of the royalties of the said common incident, appendant, and belonging or appertaining" (other than such common quarries, liberty of digging clay, and right of common as could or might be claimed by him or them respectively as owner or owners of the soil and inheritance of the said common or otherwise in and upon the said common so to be inclosed as aforesaid) in as full, ample, and beneficial manner to all intents and purposes as he or they could or might have held and enjoyed the same in case this Act had not been made."

Section 16.—"Provided always, and it is hereby further enacted and declared by the authority aforesaid, that in case the said Farrer Wren or the owner or owners for the time being of the royalties of the said vill, village, or township, or any person or persons claiming under him or them shall after such inclosure made as aforesaid work any mine or mines lying within or under any of the said allotments or inclosures, then and in such case such person or persons so working the same shall make reasonable satisfaction for the damage and spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil."

The defendants were lessees of the mines and minerals under the common by virtue of leases granted to them by the successors in title of Farrer Wren, and were entitled to exercise all rights reserved to Farrer Wren under the Inclosure Act in respect of such mines and minerals. By an agreement of the 12th of February, 1881, the plaintiffs leased to the defendants the coal under Dicken House with power for the defendants to use the surface of their allotment for winning, working, or leading away either the Dicken House minerals or the minerals out of any adjoining royalty. The defendants, or their predecessors in title, had sunk two pits on the allotment, and also erected thereon engine-houses, engines, shops, a reservoir, and other works for winning and working coal. The agreement of the 12th of February, 1881, came to an end on the 13th of May, 1896, and the defendants after that date made arrangements for working the coal underlying other parts of the common, not being a part of the plaintiffs' allotment. The defendants claimed by virtue of the Inclosure Act (s. 15) the right to go upon the surface of the allotment at all times for all purposes incidental to the using of and to use the pits and shafts and the works on the allotment to win, work, and carry away coal and other minerals lying and being under and within the allotment, and also lying and being under and within other parts of the common. The plaintiffs contended that the Inclosure Act did not give the defendants the right to use the surface of the allotment for any of such purposes, and that the right of the defendants (if any) to use the surface of the allotment for colliery purposes was limited to purposes connected with the winning, working, and carrying away of coals or other minerals lying under or within the allotment, and not for the purpose of winning, working, or carrying away coal or other minerals lying within or under land other than the allotment. The defendants, on the other hand, contended that they were entitled under the Inclosure Act to use the surface of the allotment for all purposes incidental to the winning, working, and carrying away of coal lying under the common. The court was asked to decide whether the defendants were entitled to use the surface of the allotment and the works thereon for any and, if so, what purposes.

Upjohn, Q.C., and *Manisty*, for the plaintiffs.—*Primâ facie* the surface owner has a right to the enjoyment of his property, and the burden is on the mine owner to show the contrary. The defendants are entitled to do only such acts as do not interfere with the enjoyment of the surface by the plaintiffs and their tenants. The right claimed is in the nature of an easement, and such an easement can only be established by express words of grant or right of necessity. Here the right claimed is under the words of reservation. The compensation clause does not increase the rights reserved by the reservation clause. The large quantity of land allotted to the lord by way of compensation for his interest in the soil shows that he was only to have surface access to the mines from land in his own possession.

They referred to *Buccleugh (Duke)* v. *Wakefield*, L. R. 4 H. L. 377, 18 W. R. H. L. Dig. 10; *London and North-Western Railway* v. *Evans*, 41 W. R. 149, [1893] 1 Ch. 16; *Bradford Corporation* v. *Pickles*, 42 W. R. 697, [1894] 3 Ch. 53, [1895] 1 Ch. 145, 43 W. R. Dig. 189, 44 W. R. 190, [1895] A. C. 587; *Bell* v. *Lord Dudley*, 43 W. R. 122, [1895] 1 Ch. 182; *Bell* v. *Love*, 10 Q. B. D. 547, 31 W. R. Dig. 33; *Love* v. *Bell*, 32 W. R. 725, 9 App. Cas. 286; *Goold* v. *Great Western Deep Coal Co.*, 13 W. R. 1111, 2 De G. J. & S. 600; *Rogers* v. *Taylor*, 1 H. & N. 706, 5 W. R. Dig. 224; *Durham and Sunderland Railway* v. *Walker*, 2 Q. B. 940; *Midgley* v. *Richardson*, 14 M. & W. 595.

Grosvenor Woods, Q.C., and *Meek*, for the defendants.—Section 15 operates as a parliamentary conveyance of surface reserving to former owner full enjoyment of mines and minerals together with powers of working the same, subject only to giving reasonable satisfaction for the time being to the occupier of the surface damaged. Clause 16 is merely the usual compensation clause. We submit that power of working is not limited to way of necessity, but includes all reasonable powers.

They referred to *London and North-Western Railway* v. *Evans*; *Kerr* v. *Pawson*, 6 W. R. 447, 25 Beav. 394; *Micklethwaite* v. *Winter*, 6 Ex. Ch. 644; *Eardley* v. *Granville*, 24 W. R. 528, 3 Ch. D. 826; *Earl of Jersey* v. *Neath Guardians*, 37 W. R. 388, 22 Q. B. D. 555; *Ramsay* v. *Blair*, 1 App. Cas. 701, 25 W. R. Dig. 158; *Bell* v. *Love* and *Love* v. *Bell*; *Rogers* v. *Taylor*; *Darley Main Colliery Co.* v. *Mithull*, 11 App. Cas. 127, 34 W. R. Dig. 108; *Attorney-General* v. *Welsh Granite Co.*, 35 W. R. 617; *Richards* v. *Jenkins*, 17 W. R. 30.

Upjohn, Q.C., replied.

Cur. adv. vult.

Feb. 4.—STIRLING, J., after stating the facts, continued: It is to be observed that question 1 of the special case is directed to the use "of the surface of the allotment and the said works thereon," those works being existing works. Nothing is said in the special case as to the right to sink additional pits or the right of making spoil banks upon any parts of the property. It was admitted by the learned counsel for the defendants that the defendants intended to sink additional pits, and he was willing that the opinion of the court should be taken as to that right, but he did not consent to any amendment of the case or to giving the court power to decide any question as to the right to deposit the spoil. Under those circumstances I propose to discuss, as indeed I think I cannot avoid discussing, the question as to the right of sinking pits, but as to the right of depositing spoil I say nothing.

Now, the question turns on the conditions of the Inclosure Act, and it is necessary shortly to refer to those. [His lordship read the Act, and continued:] I may first notice a contention on behalf of the plaintiffs which was placed before me in a short and very forcible argument by Mr. Manisty, that section 15 operates as a mere reservation of the ownership without any grant of working rights, and that no working rights in consequence belonged to those in whose favour a reservation is made, except such as are necessary in a legal sense for the enjoyment of the mines. He pointed out that a return had been made of a considerable portion of the common to the lord of the manor, and that no case of necessity had been made out, and as to clause 16 the contention was that its object was to compel the owners of the minerals to make compensation in case such rights of necessity existed.

In my opinion this contention is not well founded. It appears to me to give too little effect to the strong words at the close of the section, and to be contrary to the opinion expressed, at all events by the majority of the learned judges who had to consider the case of *Bell* v. *Love*, which I shall presently have to deal with. As regards clause 16, it is to be remarked that it is unusual in Acts of Parliament of this description to provide compensation for the exercise of common law rights, such as rights of necessity would be, and for that I desire to refer to the observation to that effect of Lord Esher, the late Master of the Rolls, in the case *Attorney-General* v. *The Welsh Granite Co.*

The main further contention on the part of the plaintiffs was that these words were not sufficient on their true construction to confer on the defendants the rights claimed by them. Reference was made on both sides at very considerable length to the law laid down by the various courts before whom came the case of *Bell* v. *Love*. In that case the point to be decided was whether under somewhat similar words in another Inclosure Act the owner of the minerals was entitled to work so as to let down the surface. The effect of the clause was very much considered by all the judges who dealt with the case, and I do not propose to read very much of what was said, but I think it desirable I should refer to a few passages in each of the judgments which were given. In that case the Inclosure Act provided that the dean and chapter, who were owners of soil of a common inclosed, and their successors and so forth, might thereafter enjoy amongst certain other things all mines in as full, ample, and beneficial a manner as if to all intents and purposes the Act had not been made. Then it was provided "that in case the dean and chapter, or their successors, shall make use of or work any mines, and so forth, such persons so working the mines shall make satisfaction for any damage or spoil of ground occasioned thereby to the person or persons in possession of such ground, and such damage is to be ascertained with the limitation that it is not to exceed £5 yearly during the time of working of such mine, or continuing or using the ways for every acre of ground damaged or spoiled"; so that a limit was placed upon the amount of compensation in that case which does not exist in the present case, and that is referred to by some of the learned judges. At p. 566 (10 Q. B. D.) Baggallay, L.J., states the conclusion at which he arrives with regard to determining the rights of the parties. He says this: "Upon the whole I have come to the conclusion that the rights reserved by this proviso to the dean and chapter or other the owners for the time being of the royalties of the manor are the fullest and most ample rights of getting the minerals underlying the several allotments of portions of the moor which are consistent with the tenure by which such allotments are held, but that such rights do not extend to authorize them, in getting such minerals, to disturb or let down the surface of freehold allotments." At p. 570 the present Master of the Rolls, then Lindley, L.J., says: "Construing the statute by the light of former decisions I am of opinion that the short legal effect of the Act is to convert the commoners into owners of the surface, subject to such rights of interference as are clearly reserved to or conferred by the Act upon the lords of the manor. On the other hand the Act reserves to the lords the mines and the right to hold and enjoy them as owners, but with no additional rights except such as are clearly reserved or conferred by the Act itself, and I cannot find any right to let down the surface reserved or conferred in sufficiently clear language to justify the lords in so working their mines as to let the surface down." In the House of Lords at p. 291 of 9 App. Cas., Lord Selborne says this: "What is there in that clause of reservations which can possibly be relied on as depriving the freeholder to whom an allotment has been made of the right of support to his freehold? The only words which have been insisted upon as capable of having that effect are the words 'in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same' (which means, as I understand it, held and enjoyed those rights, titles, and interests which are reserved) "if this Act had not been made." Applying that to the mines, although it is not more applicable to the mines than to any other subject, I quite agree that it at least carries so much as this, that they were with the mines to have all usual powers and surface privileges for working them. Suppose that in the clause of reservation these words had been expressly inserted "reserving the mines and minerals with all usual powers and surface privileges for working them," would that have given a right to let down the surface? Would that have destroyed the freeholder's right of support? I apprehend that it clearly would not. At the bottom of p. 292 he expresses his agreement with what Baggallay, L.J., had said in the Court of Appeal. His lordship says: "I quite agree with what Baggallay, L.J., in the Court of Appeal, suggested on that subject—namely, that the substituted rights are not given with power to the lord to take them away, which he could not have done with regard to the original rights, and that this reservation if it stood alone must be construed subject to the surface rights of the person to whom the allotment had been made."

Then at p. 293 he deals with the words of the proviso, and continues: "It is contended, however, that

the usual powers of working mines do involve some right of interference with the surface; and that is contemplated by this proviso. But why should more be contemplated? What word is there which shows more than this, that it is contemplated that in the working of mines as well as in the use of way-leaves, there may be some interference with the surface in respect of which compensation is to be made? That would necessarily follow from the usual powers of working; but this consequence which is now sought to be established would not follow from the usual powers of working. Why, therefore, should it be supposed to follow, because the effects on the surface which are contemplated are provided for by way of compensation? The whole proviso, in my opinion, is satisfied by ordinary surface damage, such as might arise from the exercise of usual working powers."

Lord Watson, at p. 298, in the course of his judgment, says: "No compensation is provided to the owner of the surface, who is not in the personal occupation of it during the time of working, though his property may be permanently injured; and, even if he does occupy himself, he is not to be compensated for any damage occurring (as, for instance, from subsidence) after the workings have ceased. A compensation clause in these terms, so far from suggesting or supporting the inference that the mine-owner was to have power to let down the surface, points to the very opposite conclusion." Then a little lower down he says: "I think it must always be presumed that a clause providing compensation was intended to cover the damage resulting to the landowner from the exercise of the powers previously reserved or granted to the owner of the mines. It is not the proper office, nor is it presumably the intention of such a clause, to define or extend the powers given to the mine-owner; and it is frequently *ob magorem cautelam*, and in the interest of the landowner, expressed in comprehensive terms, so as to include every species of damage which may result from operations which are consistent with giving support to the surface. The clause may, nevertheless, be so expressed as to explain the character and extent of these powers, as was the case in *Aspden* v. *Seddon*, 23 W. R. 580, L. R. 10 Ch. App. 394, where the power reserved to the mine-owner was to work the subjacent minerals without entering upon the surface of the lands." And Lord Bramwell at p. 300 says: "It is clear to me that that does not relate to working, but to property. The section begins that the title of the dean and chapter to the royalties incident or belonging to the manor shall not be prejudiced, lessened, or defeated by anything in the Act," but that "they as owners of the royalties shall hold and enjoy all rents, mines, &c., to the owners of the manor, incident, belonging, or appertaining. This relates to property. The power of working, so far as given, is in the next section." And on the next page he says: "I am of opinion, however, that the damage contemplated is temporary only, a damage to the person in possession, not to any reversioner or remainderman. The statute uses the present participles, 'working,' 'laying,' 'making,' 'using,' and says that satisfaction shall be made for the 'damage' and 'spoil of ground' occasioned thereby to the person in possession at the times of such damage and spoil, and the damage is to be paid yearly during the time of working or continuing or using such ways for every acre so damaged. This, I think, clearly contemplates temporary damage during the working from which the person in possession alone suffers." Then his lordship points out that there was no proviso for subsidence, and refers to an argument of the Solicitor-General, and says: "I am not insensible to the force of the argument of the Solicitor-General. He says if the argument for the respondents is right, inasmuch as the damage from a spoil bank or a shaft is permanent, either there is no right to sink a shaft or make a spoil bank, or the Legislature has thought that compensation to the person in possession was enough, and, if so, why is not the same true of subsidence, it being always the surface which is injured.

"This is a strong argument. It is singular that no express power is given to sink shafts or deposit spoil. Whether this matter was not thought of, or the right was supposed to be 'incident' to the manor, or it was thought that damage to the reversion from shafts and spoil was not of sufficient consequence to the reversioner to require compensation to be provided, I cannot guess. Perhaps there is no right to sink shafts and deposit spoil. I think there is. But it does not seem to me that because no provision is made for compensation to the reversioner for one permanent damage there is therefore a right to inflict on him another one which may damage him only, and not the person in possession during the working."

Now, the views of the authorities to which I have referred are not perhaps altogether in accord, but it appears to me the weight of authority is in favour of the view that clauses such as those with which I am dealing were meant to confer on the owner of the mines, as an incident to the enjoyment of them, some powers of working minerals, though the extent of those powers is left very far from being completely defined. It was urged before me that those powers ought not to be extended to anything which would operate as a destruction of the surface or the permanent exclusion of the owner from it, and it was pointed out that clause 16 gives no compensation to the owner of the ground, but only to the person or persons for the time being in possession of the ground. It was therefore contended that these powers ought not to be held to include the powers of sinking a pit for the purpose of winning the minerals. If so, the rights reserved to the owner of the mines would give little more than rights of way over the surface or rights of a similar kind. I cannot think that the construction is so limited. I think that the enjoyment spoken of in clause 15 is not meant to be a mere barren ownership of the minerals in the bowels of the earth, but includes the winning, carrying away, and disposing of them. I think the power to sink pits must be included in the "usual powers and surface privileges for working" spoken of by Lord Selborne in advising the House of Lords. Lord Bramwell expressly states his opinion to be, though not free from doubt, that under the Act in question a right to sink shafts was intended.

The omission of the Legislature to provide complete compensation for damage caused by sinking pits has not been considered a sufficient ground for holding that the right does not exist in other cases, as, for example, in *Goold* v. *The Great Western Deep Coal Co.* After all, it is to be borne in mind that the diameter of the pit is only a few feet at most, and that the amount of soil carried away in constructing it may not necessarily be very large or very important, and that after the pit has ceased to be used, it may be either filled up or arched over, and the surface restored so that it can be enjoyed by the surface owner

In my opinion therefore the Legislature has conferred on the mine owners all such powers as would be reasonably sufficient to enable them to dig and carry away the minerals, and it follows that the owners are entitled to dig pits and *a fortiori* to use existing pits. It appears to me also to follow that they are entitled to fix to the surface such machinery as may be reason-

ably sufficient to drain the mines and to draw the minerals to the surface, and to erect such buildings as may be reasonable for the protection and effectual working of such machinery.

But the case asks the opinion of the court whether the defendants are entitled to use certain existing works which includes "engine houses, engines, shop and other works for winning and working coal." These works were erected by the defendants while they were tenants of the plaintiffs under the agreement of the 12th of February, 1881. That agreement has now come to an end, and the works in question being affixed to the soil have become and are, as I understand, the property of the plaintiffs.

Now, the decision in *Love* v. *Bell* was that the mine owner was not entitled to work his mines so as to destroy or cause damage to the buildings erected on the surface. Still less then would he be entitled to destroy or damage such buildings in the exercise of the working privileges conferred on him by the Act. He could not, for example, pull down a house in order to sink a pit, nor could he take and use for the purpose of working the minerals existing buildings or fixed machinery belonging to another person. I am not aware of any case in which such a proposition has been laid down. Such a power would not be usual and could only, I think, be conferred by express words. I cannot see that it makes any difference in point of law that the buildings and machinery were originally erected by the mine owner under a different right if they had in fact ceased to be his property.

In my opinion the first question ought to be answered as follows: The defendants are entitled to use the surface of the allotment in the special case mentioned for the purpose of sinking and to sink pits or shafts thereon, and for all purposes incidental to the using, and to use such pits or shafts when sunk, and also the existing pits or shafts, to win, work, and carry away coal and other minerals lying and being under and within the allotment in the special case mentioned, and also lying and being under and within other parts of the common, and to take water from the reservoirs in the special case mentioned for the purpose of such winning and working, but not to use any of the engine houses, engines, or shops in special case mentioned being the property of the plaintiffs.

It follows from that that there ought to be an injunction as regards the user of the engine houses, engines, and shops, and as regards the costs I think each party ought to bear his own.

Solicitors, *King, Wigg, & Co.*, for *J. & R. D. Proud*, Bishop Auckland; *How & Rake*, for *Lucas, Hutchinson, & Meek*, Darlington.

[NOTE.—This case was argued and judgment delivered on the understanding that the buildings referred to in the last part of the judgment were the property of the plaintiffs, as having been erected by the defendants as the plaintiffs' tenants. The fact was, however, that the defendants had erected them after their tenancy had expired in order to work the mines. The judgment was accordingly amended on application by the defendants by omitting the last sentence of the declaration.]

Chan. Div.
Kekewich, J. } Feb. 11, 21, 1899.

In re BIRKS.
KENYON *v.* BIRKS. (*a.*)

Will—Issue—Simple gift over of legacy to issue—Other gifts over restricting "issue" to children—Canon of construction.

A testator bequeathed twelve distinct legacies, with gifts over to the issue of the legatee dying in his lifetime. In the case of eleven of the legacies the gifts over contained words restricting, either expressly or by the application of the principle of Sibley *v.* Perry, 7 *Ves.* 522, *the class of issue to children. The word "issue" in the gift over of the remaining legacy was not qualified by any such restriction.*

Held, that, in the gift over of the remaining legacy, the word "issue" must be construed in its wider sense, on the following grounds: (1) *That there was no expression of a general intention to limit the word "issue" to mean children throughout the will;* (2) *that no manifest inconsistency would arise from construing the word "issue" in its wider sense; and* (3) *that the court was not bound by the canons of construction laid down in* Ridgeway *v.* Munkittrick, 1 *Dr. & War.* 84, *and* Rhodes *v.* Rhodes, 8 *W. R.* 204, 27 *Beav.* 413.

Adjourned summons.

By his will, dated the 9th of July, 1895, William Birks, the testator, bequeathed (*inter alia*) the following legacies—namely, legacies to the sons and daughters of each of five named persons, and provided that "if any of them shall die in my lifetime leaving lawful issue such issue shall have and be entitled to his, her, or their deceased parent or parents' share." Then followed a legacy to each of the three sons of a named person, "and if any of them shall die in my lifetime leaving lawful issue such issue shall have and be entitled to the legacy to which his, her, or their deceased parent or parents would have been entitled if living at my decease." Then the testator bequeathed another legacy, and added, "but if" the legatee "shall die in my lifetime leaving lawful issue such issue shall have and be entitled to the said legacy in equal shares if more than one, and if only one the whole to such one child." Then followed three more legacies, with gifts over to the issue of such of the legatees as should die in the testator's lifetime leaving lawful issue, in words similar to those used in the gift over secondly above mentioned. Then came the following bequest: "I bequeath to my cousin John Birks Pigott the legacy or sum of £5,000, but in the event of his death in my lifetime leaving lawful issue, I direct that the said legacy shall not lapse, but such issue shall have and be entitled thereto in equal shares and proportions." Then followed a legacy to the son and daughter of a named person in equal shares, with a gift over in the event of either of them dying in the testator's lifetime leaving lawful issue in words similar to those used in the gift over first above mentioned. The testator died on the 17th of June, 1897, and his said will was duly proved.

John Birks Pigott died on the 1st of June, 1886, leaving nine children, six of whom predeceased the testator, four of them leaving children. The three surviving children were not married. This was a summons taken out by the executors and trustees of the will asking (*inter alia*) for the determination of the following question—namely, "Who upon the true construction of the said will, and in the events which have happened, is or are entitled to the sum of £5,000

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister at-Law.

primarily bequeathed to the testator's cousin John Birks Pigott."

P. O. Lawrence, Q.C., and *J. G. Wood*, for the plaintiffs.

Warrington, Q.C., and *John Dixon*, for Henry Pigott, one of the three children of John Birks Pigott surviving the testator.—The canon of construction which restricts issue to children is applicable in this case: *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84; *Rhodes* v. *Rhodes*, 8 W. R. 204, 27 Beav. 413; *In re Harrison's Estate*, 3 L. R. Ir. 114, 27 W. R. Dig. 238; *Carter* v. *Bentall*, 2 Beav. 551. In the other gifts the direction that the issue are to take their deceased parent's share restricts the meaning to "children": *Sibley* v. *Perry*, 7 Ves. 522.

S. Dickenson, for the defendant George Herbert Woodhouse, representing by order all the grandchildren of John Birks Pigott.—The fact that the testator has in one part of the will explained "issue" to mean "children" is not sufficient to restrict issue to children in another part of the will where there is no explanatory context. That has been held in many cases: *Head* v. *Randall*, 2 Yo. & Coll. Ch. 231; *Hedges* v. *Harpur*, 9 Beav. 479; *Williams* v. *Teale*, 6 Hare 239; *In re Warren's Trusts*, 32 W. R. 641, 26 Ch. D. 208; *Waldron* v. *Boulter*, 22 Beav. 284, 5 W. R. Ch. Dig. 116; *Carter* v. *Bentall*. The canon of construction was dealt with in *Thompson* v. *Robinson*, 8 W. R. 34, 27 Beav. 486, which was a later case than *Rhodes* v. *Rhodes*. The decision *In re Corrie's Will*, 32 B. 426, is not consistent with the canon of construction, and the weight of English authority is against the canon. J. B. Pigott had been dead nine years before the date of the will, and his children therefore must be taken to be the first legatees, and if *Sibley* v. *Perry* be applied, then the children of such of those first legatees as are dead will take a share.

Warrington, Q.C., replied, and referred to *Turner* v. *Mullineux*, 9 W. R. 252, 1 Joh. & Hem. 334, and *In re Buckle*, 42 W. R. 449, [1894] 1 Ch. 286, as showing that a testator must be taken to have used the same word in the same sense throughout his will.

H. Charlton Hawkins, Church, Dibdin, Micklem, Harman, Napier, E. F. Ball, and *Sims*, for other parties to the summons.

KEKEWICH, J.—The gift which I have to construe is short and simple; the gift is "I bequeath to my cousin John Birks Pigott the legacy or sum of £5,000, but in the event of his death in my lifetime leaving lawful issue I direct that the said legacy shall not lapse, but such issue shall have and be entitled thereto in equal shares and proportions." About the construction of that gift standing alone I think there would be no difficulty whatever. The testator has provided that in event of the death of John Birks Pigott in his lifetime the £5,000, which would strictly lapse, should go to the issue, so that however many generations there were they should all take. But it is said that I must not give the word "issue" such a wide interpretation because the testator has made himself his own dictionary or glossary, and has said in other parts of the will that "issue" is not to be considered as issue of any generation but as meaning children only. If I can find that on the face of the will I am bound to interpret the testator's language according to his own interpretation and construe the word "issue" in that way. One often has to do that, and there is no difficulty about it when once the intention is ascertained. The question is whether the testator has said that "issue" shall mean children, and Mr. Warrington's position is that the will clearly indicates that when the testator uses the word "issue" he means children only, and therefore he must be taken to have used that word to the exclusion of issue other than children. That is what Mr. Warrington has to establish, and if he does so I must construe the will according to that view. In eleven other different gifts the testator has restricted the word "issue" to mean children, either from language which has that effect according to *Sibley* v. *Perry*, or in some other way. And he has again and again used language in connection with the gifts over which shows that he meant children only. Is that enough? Let me venture to construe that first, apart from authority, if I am at liberty to do so. According to my inclination, I ought to hold that every generation should take. In one place the testator says in making the gift to "issue," "Here I mean children." Then in another case—the present case—he uses "issue" without that qualification. Am I then, apart from authority, to say that in the latter case he uses the word in that restricted sense? If I follow my own inclination I should say not. I should rather infer the exact contrary. That certainly would be my conclusion apart from authority. This case seems to me to differ from the general rule which I noticed just now. He has not said once for all that where he uses the word "issue" he means children; he has not made himself a dictionary with reference to the whole will but only to the particular gift with which he is dealing. That would be my conclusion, but it is said that I am bound by authority. The leading case is *Ridgeway* v. *Munkittrick*, decided by Lord St. Leonards, and apart from his judgment, on the facts it is singularly like this case and more like this case than the other cases which can be cited on the other side, because there he uses the word "issue" several times as restricted to children, and there are several instances of his use of the word, but Lord St. Leonards only notices one—namely, in the passage to which I refer, which is on p. 92, where, referring to the argument that the gift over in default of issue gave an absolute estate, he says: "But in this argument the parties have quite overlooked this, that the word issue cannot have the meaning which they would ascribe to it. The testator has over and over again translated 'issue' to mean 'children,' and this enables or rather compels me to put a particular construction on the word. It is a well-settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word where it occurs twice or oftener in the same instrument unless there appear a clear intention to the contrary." I do not criticize that language. It might be possible to express his rule in a different manner, and that has been done more than once. But I shall not attempt to criticize the language of the rule, the meaning of which is clear. Then there is the case of *In re Harrison's Estate*, which was decided also in Ireland thirty-eight years later. That is a case which, if it stood alone, would have a considerable bearing on this case, but if *Ridgeway* v. *Munkittrick* had not been before the court in that case they would have considered the question more open than they did. I cannot, therefore, regard the judgment in *In re Harrison's Estate* as adding to the authority, for if it binds me, so does *Ridgeway* v. *Munkittrick*, and if the latter does not, then I need not look at *In re Harrison's Estate*. Then there is the case of *Rhodes* v. *Rhodes*. In that case the Master of the Rolls found that on five separate occasions the testator used the word "issue" as equivalent to children, and there was a general use of the word. The judge says: "It is a canon of construction that where the testator

has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of his will if it do not violate the sense." The language is different from that of Lord St. Leonards, and critically considered it might mean something different, but I think that the judge meant to say in effect what Lord St. Leonards had said before him. Before going to the other cases I shall notice those two cases which were cited in reply, and which in my opinion do not apply, for there the testator used a translation or interpretation clause, and he had thus explained himself. On the other hand I have had several cases cited by Mr. Dickenson, and I take it that, though there is a long list of cases which might have been cited here, Mr. Dickenson has selected the most useful. I shall not refer to all of them, because most of them differ from *Ridgeway* v. *Munkittrick* in this, that besides there being a special will to deal with with, there was only one of two gifts to be construed. For instance, in *Carter* v. *Bentall*, where there were only two gifts to be contrasted, the Master of the Rolls says expressly "the word 'issue' may and does often mean children, and more than children. The testator in one place accompanies the use of the word by expressions which signify that on that occasion he means children only; but it does not follow that in another place where the word is not accompanied by such expressions, the same limited meaning is intended." Here he is dealing only with a gift of two moieties, and the case is distinguishable at once from that of Lord St. Leonards. A similar remark may be applied to the other cases, and, in some of them it is somewhat difficult to see how the principle was applied.

Then there comes the case before Pearson, J., of *In re Warren's Trusts*. That judge did deal with the point after what was an elaborate argument, and Mr. Upjohn cited *Ridgeway* v. *Munkittrick*, *Rhodes* v. *Rhodes*, and *Carter* v. *Bentall*, together with other cases, and I take it, and I think that the judgment shows, that the learned counsel relied on *Ridgeway* v. *Munkittrick* and what was laid down by Lord St. Leonards. Pearson, J., sums up as follows: "Am I then bound by authority to construe the word 'issue' in the former clause as meaning children only merely because I find that it is expressly restricted to children in the latter clause? I think I am not. I think I am bound to look at the whole of the deed, and if I find that it was not intended to restrict the meaning of the word in the earlier clause, I must give the word in that clause its proper unrestricted meaning. I am not bound to restrict the meaning unless there would otherwise be a manifest inconsistency, or I should be defeating the plain intention of the parties." In this case there would be no inconsistency in giving the word "issue" its unrestricted meaning, nor is there any plain intention which would be defeated by so doing, unless I am bound to infer it, and to say that I am bound to infer it is rather in the nature of a circular argument. I must look at the whole of the will to see whether there is expressed a general intention to restrict the meaning of the word "issue" to children. If there is I am bound by it, but if there is not I need only consider this particular clause and not the other clauses in the will which restrict the meaning of the word "issue," that is, unless there would otherwise be a manifest inconsistency. So, then, I have that guide, and I must consider whether there is a manifest inconsistency. It seems to me that there is no manifest inconsistency in construing the word "issue" in its unrestricted sense in this particular gift, which is entirely different from the other gifts, and in which it may well be that the testator intended to provide for all the issue of John Birks Pigott, although in the other cases he only meant to provide for children.

The learned judge in *In re Warren's Trusts* said: "Am I then bound by authority?" He does not refer to *Ridgeway* v. *Munkittrick*, nor does he refer to the other cases, but seeing that they were brought before him, and by a good counsel, I must take it that he was applying his mind to the cases which had been brought before him. In that case, then, Pearson, J., I assume, did not think himself bound by *Ridgeway* v. *Munkittrick*, and he distinctly says he was not bound by authority, and I shall say the same. But there is one other point—*Ridgeway* v. *Munkittrick* is not only the decision of an eminent judge, but it was decided a great many years ago, and is in all text-books and in many of the reported cases, and *Rhodes* v. *Rhodes*, too, is a case of ancient history, and has also been cited in other cases. Even if I think I am not bound by authority, still I ought not to depart from that rule of construction if I think that it has been adopted by the profession, or if by departing from it I should occasion confusion. But Mr. Dickenson has cited many cases which do differ from the decision of Lord St. Leonards, and *In re Warren's Trusts* has been before the profession for fifteen years, and I think that the point must be taken as open to some doubt, and therefore I do not think that the decision which I am about to make will cause confusion. I therefore hold that the word "issue" must be taken in its larger sense.

Solicitors, *Charles Capron*, for *Kenyon & Son*, Thorne; *Andrew Wood & Purves*, for *Newman & Bond*, Barnsley; *A. W. W. Holt*; *Simpson & Co.*; *Prior, Church, & Adams*; *Crowders & Vizard*; *T. A. Dennison & Co.*; *Steadman & Van Praagh*.

Chan. Div. }
Kekewich, J. } Jan. 26, 27.

ROBERTS *v.* GWYRFAI DISTRICT COUNCIL. (*a.*)

Local government—Public health—District council—Riparian owner—Water rights—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 53, 327, 332.

The owner of a corn-mill sought to restrain a district council from interfering with the natural flow of the stream working his mill. The council owned land on one side of the lake from which the stream flowed, and proposed to construct a dam there so as to increase the storage of water to be supplied for their district, thereby diminishing the stream flowing down to the mill.

Held, that a riparian owner was entitled to an uninterrupted flow of water as in the past; Public Health Act, 1875, *s.* 332, *did not enable the council to "injuriously affect" the plaintiff's right to an uninterrupted flow of water without his consent, nor was there a statutory power enabling them to interfere with the plaintiff's common law rights. Injunction granted.*

Action.

Plaintiff, the owner of a corn-mill worked by a stream flowing from a lake situate at the foot of mountains some distance above the mill, sought for an injunction to restrain the defendants, a district council, from interfering with the natural flow of the stream. The defendants were the owners of land on one side of the lake. The plaintiff claimed a prescriptive right to put stones and sods in the pipe to regulate the flow of water and to go on the land for that purpose. The defendants were proposing to

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

construct a dam across the end of the lake of which the stream was the outlet in order to increase the water storage for the supply of water to their district by regulating the outflow. They had offered to allow a sufficient outflow to work the plaintiff's mill, but he declined their offer.

T. R. Warrington, Q.C., and *Bryn Roberts*, for the plaintiff, contended that the plaintiff, so far from being at the defendants' mercy, was entitled to the free and uninterrupted flow of the water as it had always been, without diminution or alteration, subject only to the rights of other riparian owners; it was sufficient to prove violation of the right, and the law would presume damage: *Embrey* v. *Owen*, 6 Ex. Ch. 352 (where judgment was given for the defendant, because the use was reasonable, but see p. 369, where Parke, B., states the rights of upper riparian proprietors); *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co.*, 22 W. R. 444, 30 L. T. Rep. 443, L. R. 9 Ch. App. 451, 457; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, 24 W. R. 284, 33 L. T. Rep. 513, L. R. 7 H. L. 697—at p. 702 Cairns, L.J., points out the two different titles of the defendant company. The Public Health Act, 1875, ss. 51, 53, 327, 332, gave the defendants no right to take water, except by contract with the riparian proprietors or by special authority of the Act, which they had not got here. That Act is an enabling Act only, by which the council may supply water to their district, but it gives no compulsory powers; section 332 is in similar words to section 68 of the Lands Clauses Consolidation Act, 1845. Upon section 73 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), there is the case of *Reg.* v. *Darlington Local Board of Health*, 13 W. R. 789, 35 L. J. Q. B. 45, where it was held that Acts of the board were in excess of the powers given them by statute, and that they had "injuriously affected" the river.

Cooper v. *Crabtree*, 30 W. R. 649, 20 Ch. D. 589, at p. 592, was also referred to.

W. C. Renshaw, Q.C., A. Macmorran, Q.C., and *A. Glen*, for the defendants, denied liability to an injunction and relied on plaintiff's admission that this was a *quia timet* action, there being no damage and no probability that the apprehended danger would ensue. The defendants are lessees of land all round the lake and licensees of the Crown under a grant of 1896 giving them authority to construct and maintain an embankment and other works. They have a right to take water so long as they do no damage to other riparian owners: *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, per Cairns, L.J., at p. 705 of L. R. 7 H. L. By section 332 of the Public Health Act, 1875, it is the duty of the district council to supply water if they do not "injuriously affect": *The Attorney-General* v. *The Corporation of Manchester*, 41 W. R. 459, [1893] 2 Ch. 87. There seems to be no authority on the words "injuriously affect," but it is suggested they mean an injury which would give the plaintiff a right of action for damage done to his property. Such injury might arise from dealing with the river-bed or banks, and the Act says it is not to be done if the damage created by it could be restrained by injunction. In the case of *Earl of Sandwich* v. *Great Northern Railway Co.*, 27 W. R. 616, 10 Ch. D. 707, the railway company was held to be entitled to subtract a reasonable amount of water for their station. *Reg.* v. *Darlington Local Board of Health* does not apply, because there the board took the whole supply of water. Here the defendants' act is not an illegal act, and so they cannot be said to be "injuriously affecting" the stream in the sense of section 332.

KEKEWICH, J.—So far as the plaintiff's claim to relief is founded upon the ground of prescription, I did not call upon counsel for the defendants. The plaintiff's claim in the second paragraph of his statement of claim is this: "The plaintiff's said mill is driven by the water of the said stream. The plaintiff whenever necessary for the purposes of the said mill, owing to the scarcity of water in the said stream through drought, is entitled by prescription to dam up the water of the said lake as a reservoir for the supply of water to his said mill." That was put by Mr. Warrington into this form. I asked him at the conclusion of his case what he claimed as a prescription, and he said he sought to place at his will and pleasure stones and other refuse so as to regulate the flow of the stream, and to go upon the land for that purpose. That is attempted to be supported by the evidence of two witnesses. The second witness had never any connection with the plaintiff's mill. What he had done was solely for the benefit of what has been conveniently called the other mill, which is on the other portion of the stream, and although he had on one or two occasions, perhaps three in all, assisted the son, or the survivor of the previous persons in possession, it was entirely in reference to the other mill and had nothing to do at all with the plaintiff's mill. Therefore I put the evidence of the second witness David Evans aside. Then I have the evidence of the plaintiff himself.

I do not wish to be too severe upon the plaintiff, especially as he was examined through an interpreter. There is then always some difficulty in getting exactly what the witness says, and what he means, but even if I gave full credit to his testimony, which I am bound to say I certainly do not, it would only come to this, that he "occasionally" made openings, although he says "frequently," and he dammed up this lake for purposes connected with his own mill with a view to increasing or diminishing the supply of water; as I understand, diminishing it in the first instance so as to obtain increased quantities afterwards.

Having regard to the authorities and the principles on which prescription is regulated, I am prepared to hold that his claim to a prescriptive right is not within the particulars he alleges. It is very difficult to know what he did in particular. It is difficult to say what he did, even supposing he has established a right to what is disputed.

I think it would be waste of time to criticize his claim, but I thought it right to say so much, and get rid of that part of the case.

So far as the costs have been increased by that, the plaintiff must pay those costs, whatever may be the result of the case generally, and those costs must, I suppose, be taxed as between solicitor and client.

With regard to the rest of the case it raises an entirely different question. The defendants in the exercise of what they conceived to be their duty and within their powers utilized the waters of this lake by constructing certain works which are admitted at present to be properly constructed, with a view of supplying the district with water. It is not suggested that the plaintiff would be any the worse off now than he was before. If I may venture to suggest from the way in which he was speaking with a knowledge of the facts, I should certainly hazard the conclusion that he would probably be better off in the future than he has been in the past. The supply may not be the same, but it will be sufficient, and if that is constant at all, it will be more constant than it has been before when, as we know from the evidence, it was of an intermittent character, and sometimes very

much less than was required for the purposes of the mill. But the plaintiff says, "I am entitled to insist upon having what I had before. It is immaterial whether the water I had before is better or worse than what is now proposed to be given to me; it is for me to consider whether I shall derive any benefit from the alterations; I protest against any alterations at all." There are several cases which have been referred to, and I do not intend to refer to any of them with the exception of one, and there is only one passage to which Mr. Renshaw called my attention. The law on this subject has been thrashed out again and again, and I do not think that any advantage would be gained now by going through the authorities. A riparian proprietor or owner is entitled to say that the water which flows by his property, and which is used by him for ordinary, or it may be for extraordinary purposes shall flow in the future as it has done in the past. That seems to me to be the common law right, and unless that common law right has been affected by statute he is entitled to insist upon it; but then Mr. Renshaw says there is one passage in Lord Cairn's judgment in the House of Lords in the case of *The Swindon Waterworks Co.* v. *The Proprietors of the Wilts and Berks Navigation Co.* which, instead of being in the plaintiff's favour, is against him. I do not so read it. What Lord Cairns says is this: "Therefore, my lords, so far as regards the position of the respondents as riparian owners, it appears to me that they clearly have a right to complain of that which is done by the appellants, if what is so done by them is insisted upon as a thing which they have a right to do"—that is the qualification—"I put this qualification, because, if, when the attention of the appellants had been called to what they were doing, they had not insisted upon doing it as a matter of right, I can well understand that if the Court of Chancery found" (I will leave out the words in brackets, which are unnecessary for the present purpose) "that no sensible damage had accrued to them, it might not have thought it necessary to interfere with them by injunction or declaration." What I understand Lord Cairns to mean is that, there being no sensible damage, an injunction or declaration would not have been granted unless the appellants had insisted upon what they were doing as a matter of right; from which I should conclude also that as they did insist upon it as a matter of right, whether a variation did occur or not, the respondents were entitled to an injunction or declaration. That, as I understand, is the meaning of his lordship's observation, and what he means by the qualification and what he deduces from it. Therefore it seems to me that unless the defendants, prescription being out of the question, have some higher authority by statute to interfere with the flow of water, they have no right to alter the flow of water even although the alteration may not inflict any injury upon the plaintiff. He is entitled to have his water, and so far I am entirely in his favour. But then it is said that the defendants have a title to interfere under the Public Health Act of 1875. That is based entirely upon the 332nd section. It has been pointed out by Mr. Bryn Roberts that that section does not enable the local authority to do anything of the kind at all. All it says is that nothing in this Act shall be construed to authorize them to do certain things. It does not say that it shall enable them to do these things. It only says that the other part of the Act shall not enable them to do the things there mentioned without the consent in writing of the persons there described. That seems to me to be an extremely pertinent observation. But what are they not authorized to do? Section 332 provides that "nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir, canal, river, or stream, or the feeders thereof, or the supply, quality, or fall of water contained in any reservoir, canal, river, stream, or in the feeders thereof, in the cases where any body of persons or person would, if this Act had not been passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, canal, river, stream, feeders, or such supply, quality, or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid." Adopting Mr. Bryn Roberts' argument on that section, I say that it does not enable the defendants to "injuriously affect" the plaintiff's right. It only says that they shall not be allowed to do it without the consent of the person who has the right to complain. What is the exact meaning of "injuriously affect"? There may be some difficulty in deciding. My attention has been called to the Local Government Act of 1858 (21 & 22 Vict. c. 98), which contains a similar section—namely, section 73, but I go back to the Lands Clauses Consolidation Act of 1845, where the words are to be found in section 68, and there is a very large body of authority upon that. In that Act the distinction is taken quite clearly, and in a number of authorities the distinction is drawn between taking lands and injuriously affecting them. The words are: "If any party shall be entitled to any compensation for injuriously affecting," &c. The taking of lands and the injuriously affecting are entirely separate things. Compensation in respect of either can only be awarded because the Act legalizes what otherwise would not be legal, and, therefore, as a result, the amount has to be found by a jury or by an arbitrator. When land is taken compulsorily, or when it is not taken, but is injuriously affected, it is more naturally called acquiring land by compensation, but the words injuriously affecting occur in both cases. The Lands Clauses Consolidation Act only provides for compensation for injuriously affecting, and although a man might make a claim on the ground that his land was injuriously affected, he would get no compensation unless he proved the injury, and so far it is difficult to apply that Act to a case of this sort, where the injury cannot be assessed in pounds, shillings, and pence.

It strikes me, therefore, that you cannot strictly apply the provisions of the authorities relating to the Lands Clauses Consolidation Act, 1845, and, more than that, we can only estimate the loss by the thing which may have been injuriously affected. In section 332 of the Public Health Act, 1875, it is injuriously affecting any reservoir, canal, river, stream, or the feeders thereof; or the supply, quality, or fall of water, and so on. That is quite different from injuriously affecting lands, and the cases referred to on injuriously affecting lands, although right enough, I think must be irrelevant in a great measure to injuriously affecting a reservoir, or the supply, quality, or fall of water. It is this they must not do—injuriously affect the supply of water, and if they do they must not obstruct it in a manner which is not authorized by the ordinary law. That is the meaning of the words, and I think I ought to take that view. They must not interfere with the supply of water in such a way that any body of persons or person shall be entitled by law to prevent it. I have already expressed my opinion that the plaintiff is entitled to be relieved from any alteration in the supply of water. If that be so, then the Public Health Act, 1875, comes in and says that there is nothing in it which will enable the defendants to do

that without the consent of the plaintiff, which consent, of course, is not forthcoming. On that ground, so far from defendants being under the protection of the Act, the Act saves the plaintiff's rights. Beyond that there is the other point, which has been raised by the plaintiff's counsel, that there is no power under the Act to do the thing which the defendants are doing. The defendants are seeking to interfere with the plaintiff's common law right, and there is no statutory power which authorizes them to do that. The common law right seems to me to be unaffected by the statute.

The result is that in my opinion the plaintiff is entitled to the injunction which he asks for, and to the costs of the action, with the exception I have already mentioned. If I properly could (seeing that I can only give the plaintiff the costs of the whole action in the ordinary way as between party and party), I should wish to set off the costs taxable in the same way, but the Legislature has thought fit, and far be it from me to say unwisely, that when a public body is attacked then the costs shall not come out of the funds or other property which the public body holds for the public but that they shall come out of the unsuccessful parties' pockets.

The plaintiff, therefore, is entitled to an injunction and the costs of the action as between party and party, the defendants to have the costs as between solicitor and client on the question of prescription.

The injunction will be to restrain the defendants from causing a diminution in the flow of water of the stream by supplying water to their district.

Solicitors, *Hamlin, Grammer & Hamlin*, for *Carter, Mostyn, Roberts, Vincent, & Co.*, Carnarvon; *Robins, Billing, & Co.*, for *Morris Owen*, Carnarvon.

Chan. Div. } Romer, J. } Jan. 19; Feb. 6.

In re DUNCAN.
TERRY *v.* SWEETING. (*a.*)

Executor — Action for testator's misrepresentations — Actio personalis moritur cum persona.

An action claiming unliquidated damages arising from the misrepresentations of a testator will not lie against his personal representatives, but only if that which it is sought to recover from his estate can be shown to be still the property of the plaintiff.

This was a claim by a Mr. Seddon in a creditors' action for the administration of the estate of a deceased testator who died in February, 1895. It was stated by Seddon that in October, 1895, he was induced by the testator to agree to purchase 500 £1 shares in a gold mining company by representations made by the testator that the company owned certain mines. In payment of the shares the testator drew upon Seddon, and Seddon accepted two bills of exchange for £250. One of such acceptances matured shortly after the testator's death and was met by Seddon. It appeared that the company never owned any property or any assets, and the shares were worthless. Seddon contended that the consideration for the bills wholly failed. He declined to meet the other bill, and the executors threatened to sue him thereon. No offer was made by Seddon to return the shares until December, 1898. Seddon claimed that the testator was at the time of his death, and that his estate was still, indebted to him for £250 money paid, and in the alternative he claimed £250 damages. The master had not allowed the claim on the ground that acceptance of the shares formed consideration, and that according to the authorities damages for misrepresentation would not lie after the wrongdoer's death.

Borthwick, for the claimant.—The maxim *actio personalis moritur cum persona* does not apply if it can be shown that the loss to my client arising from the misrepresentations of the testator has increased the testator's estate: *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6 H. L. 377; *Phillips* v. *Homfray*, 32 W. R. 6, 24 Ch. D. 439.

Levett, Q.C., and *F. Thompson*, for the defendants.—The test to apply is, could the claimant have brought an action for *assumpsit* during the testator's lifetime? In this case he could not, and therefore he cannot now sue the executors: *Archer* v. *Bamford*, 3 Stark. 175. He cannot sue executors for unliquidated damages. His proper remedy was rescission.

ROMER, J.—It is important to bear in mind what is the nature of the claim before me. It is a claim for damages suffered by the claimant by reason of his being induced by misrepresentation of the testator to buy shares belonging to the testator in a limited company.

It is not a claim for rescission of the contract. The claimant has retained, and still retains, the shares, and so far as appears he has never repudiated the contract either during the lifetime of the testator or since. Notwithstanding the lapse of time and change of circumstances, it is conceivably possible, though not very probable, that even now the claimant would be in a position to repudiate the contract, and on that footing recover back the price. But I am satisfied that a claim of that kind was not the one made before the master, or adjourned to me for decision, or which the respondents were or are now asked to meet.

It is true that in the claimant's affidavit he speaks of the consideration for the payment of the purchase price having wholly failed. It is clear that what he means is that the shares eventually proved to be worthless, and certainly the respondents were never given to understand by the claimant that he claimed damages, but only to repudiate the contract, otherwise they would have had the opportunity of saying that through the delay of the purchaser in repudiating the contract or change of circumstances he is not now in a position to repudiate the contract.

I therefore proceed to deal with the case as being at present one only for damages, but should the claimant desire to make a claim on the other footing I will give him an opportunity of doing so, reserving all question of costs hitherto incurred. Dealing solely with the claim for damages it is one for unliquidated damages, and not less so because the claimant seeks to establish that the damage is the full amount of the contract price. Now, can such a claim be brought against the legal personal representatives of the testator. I think not. In my opinion the principle applies *actio personalis moritur cum persona*, the case not falling within any statutory or other exception to the rule. It was suggested that the case was excepted from the rule because the testator obtained from the claimant the price of the shares by reason of the fraudulent misrepresentation. But this suggestion is, in my judgment, based on a misapprehension of the principle on which the court acts in these cases. If the claimant was suing, or was entitled to sue, on the footing that the price paid for the shares was still the claimant's property, then I agree that the rule does not apply: see *Phillips* v. *Homfray*, 32 W. R. 6, 24 Ch. D. 439, where the limits of the rule

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

are examined; on the other hand, if the claimant can only sue for unliquidated damages, then the rule applies: see *Kirk* v. *Todd*, 31 W. R. 69, 21 Ch. D. 484, at p. 488, where Jessel, M.R., observes: "As I understand the rule at common law it was this, you could not sue executors for a wrong committed by their testator, for which you could only recover unliquidated damages"; and see the judgment of the majority of the Court of Appeal as delivered by Bowen, L.J., in *Phillips* v. *Homfray* at p. 454, where he states: "The only cases in which apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act appear to us to be those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which in the lifetime of the wrongdoer could have been recovered from him can be traced after his death to his assets and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby."

The question, then, that I have to consider in the case before me narrows itself to this: Can the claimant, while retaining the shares purchased, and while not in a position to insist upon repudiation of his contract under which he purchased the shares, sue for the purchase-money at law as remaining his own property by reason of the fraud which induced the contract? In my opinion clearly not; he can not so sue. See, for example, the judgments in *Campbell* v. *Fleming*, 1 A. & E. 40, where it is pointed out that in such a case the purchaser, to be able to sue for the purchase-money, must, at the time of discovering the fraud, elect to repudiate the transaction. If for any reason the purchaser is not entitled to insist on rescission of the contract he cannot sue for the purchase-money, and can only sue for damages in an action of deceit: see *Clarke* v. *Dickson*, E. B. & E., 148, 6 W. R. C. L. Dig. 21. In the case before me, as already pointed out, the claim has not to be treated as one for rescission. It is, in fact, at present a claim for damages for the deceit, and, as already pointed out, is legally one for unliquidated damages. It is a fallacy for the claimant to suppose that his claim becomes less one for unliquidated damages because he hopes to establish that the measure of his damages is the contract price he paid. Still less can he say if he is not in a position to insist on rescission of his contract that the purchase price he paid is his property because it equals the amount of damage he has sustained.

Solicitors, *Oldham, Clabburn, & Co; Crowders, Vizard, & Oldburn.*

Q. B. Div.
(Lawrance and Channell, JJ.) Jan. 23.

EDWARDS *v.* PURNALL AND OTHERS. (a.)

Weights and measures—Sale of coal—Weight ticket or note—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 21.

Section 21, *sub-section* 1, *of the Weights and Measures Act,* 1889, *enacts that, "where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver or cause to be delivered . . . to the purchaser or his servant, before any of the coal is unloaded, a ticket or note according to the form in the third schedule to the Act . . ."*

A penalty for non-compliance with the section is provided by sub-section 2.

Section 22, *sub-section* 1, *enacts that, where such coal is conveyed for delivery in bulk, the seller shall cause the weight of the coal and the vehicle containing it to be previously ascertained by a weighing machine duly stamped, being on or near to the place from which the coal is brought.*

A quantity of coal exceeding two hundredweight was conveyed for delivery on sale in bulk in a vehicle belonging to the seller. The coal and vehicle were weighed by the seller's servant and the purchaser's servant on a weighing machine on the purchaser's premises, and a ticket in the form given in the third schedule of the Act was filled in by the purchaser's servant at the request of the seller's servant.

Before delivery of the coal was accepted, or any part of it was unloaded, the ticket was delivered by the seller's servant to another servant of the purchaser.

Held, that the seller, having complied with the requirements of section 21, *sub-section* 1, *was not liable to a penalty under sub-section* 2.

Case stated by the justices of the county of Devon.

An information was preferred by the appellant against the respondents charging them with selling coal without complying with the requirements of section 21 of the Weights and Measures Act, 1889.

The respondents were coal merchants carrying on business at Exeter and had been in the habit of supplying coal to the Devon County Asylum at Exminster.

On the 14th of June, 1898, at the request of the committee of the asylum, the respondents sent to the asylum 1¾ tons of coal in bulk in one of their own vehicles in charge of one of their carters. On arriving at the asylum the coal and the vehicle were weighed by the respondents' carter and by the storekeeper of the asylum upon a weighbridge duly stamped and certified which belonged to the asylum. This was done in accordance with an arrangement previously made between the respondents and the committee of the asylum. The respondents' carter carried a book of forms prepared in accordance with the form in Schedule III. of the Act. At his request the storekeeper filled in one of the forms with the weight of the coal and vehicle and the tare weight of the vehicle and the net weight of the coal. The ticket was then torn out of the book and delivered by the carter to one of the servants of the asylum. Till this was done delivery of the coal was not accepted nor was any part of it unloaded.

The justices, holding that the ticket was in the form in Schedule III., dismissed the information.

Section 21 (1) of the Weights and Measures Act, 1889, is as follows: "Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

therewith deliver, or cause to be delivered or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the third schedule to the Act, or according to a form to the like effect."

Sub-section 2 is as follows: "If default is made in complying with the requirements of this section with respect to the delivery or sending of a ticket or note for delivery to the purchaser, or if the quantity of coal delivered is less than the quantity expressed in the ticket or note, the seller of the coal shall be liable to a fine not exceeding five pounds."

Section 22, sub-section 1, provides: "Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall, unless the vehicle is provided by the purchaser, cause the weight of the vehicle, as well as of the coal contained therein, to be previously ascertained by a weighing instrument stamped by the inspector of weights and measures, and being on or near to the place from which the coal is brought, and shall from time to time cause the tare weight of the vehicle to be marked thereon in such manner as the local authority approve."

Duke, Q.C. (*Kerly* with him), for the appellant.—Section 22, sub-sections 1 and 2, ought to have been complied with. The particulars ought to have been entered on the ticket by the defendants or their servant, and the coal and vehicle ought to have been weighed on or near the place from which it was brought, not on the purchaser's premises. These requirements not having been complied with, the ticket was not such a ticket as was required by section 21. *Knowles* v. *Sinclair*, 46 W. R. 188, 77 L. T. Rep. 624, is in point.

Foote, Q.C., for the respondent.—The ticket handed by the respondent's carter to the servant of the purchaser is in the form given in Schedule III., and all the other requirements of section 21 have been complied with.

LAWRANCE, J.—The magistrates were right. In most cases it is the right thing to weigh the coal in the yard from which it is brought. In ninety-nine cases out of a hundred it is weighed at the yard because there are no weighing machines elsewhere. In yards where there is no weighing machine it would be necessary to send the coal to be weighed at a public weighing machine. The object of the Act is to protect purchasers, and not to protect sellers against their servants.

CHANNELL, J.—I think that the magistrates were right. The proceedings were taken under section 21. All the requirements of that section have been complied with. But something is supposed to have been laid down in *Knowles* v. *Sinclair* which is said to be in point. It was argued in that case that the ticket must show the correct weight of the coal at the time of delivery and not at some previous time. But the court said that the ticket must contain a statement of the weight at some previous weighing. That case was decided under section 22.

In this case all the ticket had to show was the weight at the last place of weighing. That was, in the present instance, the weighing machine belonging to the purchasers. The prosecution was misconceived in consequence of a misunderstanding of *Knowles* v. *Sinclair*.

Appeal dismissed.

Solicitors for the appellant, *Ford, Lloyd, & Co.*, for *Michelmore*, Exeter.

Solicitors for the respondent, *Coode, Kingdon, & Cotton*, for *F. H. H. Orchard*, Exeter.

Q. B. Div. (Wills and Bruce, JJ.) } Dec. 15, 16.

UNITED REALIZATION CO. (LIMITED) (*Appellants*) *v.* THE COMMISSIONERS OF INLAND REVENUE (*Respondents*). (*a.*)

Inland revenue—Stamp duty—Mortgage—Covenant—Agreement under seal to execute mortgage when required—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Schedule I.*

By an instrument under seal a company agreed, in consideration of a sum of money then advanced to them by a building society, to execute, whenever called upon by the society, a mortgage or charge of the company's interest in certain lands in such form as the society should request, to secure the repayment of the sum so advanced and interest; and, by the same instrument, the company agreed to pay interest on the sum advanced until repayment, and appointed a person receiver of the rents and profits of the lands so long as any money remained due to the society, such receiver not to take possession until default had been made in payment after demand of the principal and interest.

Held, that the instrument was a "mortgage" or a "covenant" within the meaning of the Stamp Act, 1891, *and was chargeable with* ad valorem *duty under the head "Mortgage, Bond, Debenture, Covenant," in the first schedule to that Act.*

Case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891, for the opinion of the court as to the amount of duty chargeable upon an instrument presented on behalf of the appellants to the commissioners under section 12 of the same Act for their opinion as to the duty with which it was chargeable.

The instrument was under seal and was expressed as follows:

"To the Liberator Permanent Benefit Building Society.—In consideration of the sum of £373,374 11s. 7d. this day advanced by the Liberator Permanent Building Society to J. W. Hobbs & Co. (Limited) (hereinafter called "the company"), the receipt whereof the company hereby acknowledge, the company hereby undertake and agree whenever called upon by the society to execute at the expense of the company a mortgage or charge of all their interest in the hereditaments and premises known as Albert Gate-mansions, Knightsbridge, Middlesex, and more particularly described in an indenture dated the 26th day of May, 1892, and made between the company of the one part and the Founders' Stock and Share Trust (Limited), of the other part, in such form as the society shall request to secure the repayment of the said sum of £373,374 15s. 7d. and interest at the rate of £7 10s. per cent. per annum payable by equal quarterly instalments, and the company hereby agree with the society that until payment of the said sum of £373,374 15s. 7d. they will pay interest on the same, or on so much thereof as shall be due at the rate aforesaid, and the company hereby appoints Joseph George Coldwells or such other person as the society may hereafter substitute for him the receiver of the rents and profits of the said hereditaments and premises so long as any money still remains due to society: Provided always that the said Joseph George Coldwells or such other person as may hereafter be appointed shall not enter possession of such rents and profits until default shall be made in payment of the principal moneys and interest herein referred to within fourteen days after the same shall have been demanded. In witness, &c."

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

At the date of the execution of the instrument there was a legal mortgage and also an equitable mortgage subsisting upon the Albert Gate property, the title deeds being held by the first mortgagee.

The commissioners were of opinion that the instrument was liable to duty under the head, "Mortgage, Bond, Debenture, Covenant" in the first schedule to the Stamp Act, 1891, and they assessed the duty at £466 15s., being at the rate of 2s. 6d. per cent. upon the sum of £373,374 15s. 7d. thereby secured.

By the first schedule to the Stamp Act, 1891, *ad valorem* duties are imposed upon a "mortgage, bond, debenture, covenant . . . being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money," the rate of duty being where the sum secured exceeds £300 2s. 6d. for every £100 or fractional part of £100 of the amount secured. The schedule also contains the heading "Covenant for securing the payment or repayment of money, or the transfer or retransfer of stock."

The definitions of "mortgage" and "equitable mortgage" in section 86 were also referred to.

Pickford, Q.C. (*H. S. Theobald* with him), for the appellants.—The instrument is chargeable with a duty of 10s. only as a deed; it does not fall under the head of "Mortgage, &c." in the schedule to the Stamp Act, 1891. It creates no present charge on the property; it contains an agreement to execute such a charge if required, but until the charge is required to be executed the instrument does not itself operate as a charge: *Ex parte Izard*, 22 W. R. 342. L. R. 9 Ch. App. 271; *Shaw* v. *Foster*, 20 W. R. 907, L. R. 5 H. L. 321, *per* Lord Cairns at pp. 339, 340. The appointment of a receiver does not make the instrument a charge, for the receiver cannot act unless default is made in payment of principal or interest. The instrument contains no covenant to repay money; it is therefore not a "covenant for securing the payment or repayment of money" within the first schedule.

Sir R. B. Finlay, S.G. (*Danckwerts* with him), for the respondents.—The instrument is a "mortgage" within the meaning of the Stamp Act, 1891. It falls within the definition in section 86 (1), as being "a security by way of mortgage for the payment of a definite and certain sum of money advanced." It is an agreement to execute a legal mortgage, and creates a present charge. If it were under hand only it would be an "equitable mortgage" within section 86 (2), and chargeable at the rate of 6d. per cent. only; but being under seal it falls within section 86 (1). There is no real distinction between a mortgage and a charge, except as to the modes of enforcing the lender's rights. The provision that the borrower shall execute a mortgage on demand does not prevent the instrument from creating a present charge, and here the intention to create a present charge is apparent. The following cases are authorities for the contention of the Crown: *Hepworth* v. *Hill*, 10 W. R. 477, 30 Beav. 476; *Dighton* v. *Withers*, 31 Beav. 423; *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345, 30 W. R. 553, 7 App. Cas. 235; *Cradock* v. *Scottish Provident Institution*, 63 L. J. Ch. 15, 70 L. T. Rep. 718; *In re Hurley's Estate*, [1894] 1 Ir. R. 488; *Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99; *City of London Brewery Co.* v. *The Commissioners of Inland Revenue*, *ante* p. 216, [1899] 1 Q. B. 121. In any case the instrument is a "covenant for securing the repayment of money," and is therefore, according to the first schedule, chargeable as a mortgage. It is also a debenture.

Pickford, Q.C., replied.

WILLS, J.—I think it is clear that the Crown is entitled to our judgment. I do not propose to go minutely through the series of cases which have been brought before us, because I think it is much more satisfactory that we should, if we can, extract a clear principle from the decisions rather than undertake the task of commenting upon each case and the expressions of individual judges in it. I agree that the real question here is whether the instrument in question was intended to give an immediate charge. With respect to the difference between "mortgage" and "charge," the cases cited by the Solicitor-General, and particularly that of *Heath* v. *Pugh*, have satisfied me that there is no distinction to be drawn between "mortgage" and "charge" except in respect to the machinery by which each is enforced. A "mortgage" is a charge enforceable by machinery more beneficial to the person who lends the money and is entitled to the benefit of the mortgage than the machinery by which a charge can be enforced. It is plain, I think, from the cases to which the Solicitor-General called our attention, that the introduction into an instrument of a provision that a demand or request shall be one of the preliminaries to the obligation to execute a deed, does not determine the question whether the instrument creates a present charge or not. That question is to be decided upon perfectly different considerations. If an intention to give a present charge can be collected from the instrument, the introduction of such a provision does not make it the less a present charge; it is only part of the machinery by which the obligation which effects that charge shall be carried out. If, on the other hand, no intention to constitute a present charge can be collected from the instrument itself—as none could in *Shaw* v. *Foster*—then the introduction of words requiring that there must be a demand or request to execute a deed is material, because until the demand has been made, upon which alone the obligation to create anything, or the fact of the creation of anything, in the nature of a charge must depend, the condition upon which a charge comes into existence is not satisfied. The question, therefore, in this case is whether the parties intended that the instrument should create a present charge. I think it cannot be entirely left out of consideration that the instrument here is the only security given for a sum of over £370,000. To begin with it is a startling proposition that such a sum was intended by the parties to be advanced without any present or immediate security being given—without any charge which would prevent the property from being misapplied, and the whole of the large sum advanced from being lost. Unless there is something to indicate that the words importing that the further instrument to be executed is only to be executed on demand are meant to postpone the creation of the charge, the natural inference, and especially so where a very large sum is advanced, would be that the parties intended that there should be a present, operative security given for the repayment of the money. It was argued for the appellants that the instrument before us was in effect only a covenant to give a charge, and that where there is a covenant simply to give a charge it is a strong proposition to say that a charge has already been created, because in that case the covenant would be to give that which had already been given. In my opinion that argument leaves out of consideration some very material words in the covenant. It is a covenant not merely to give a charge, but to give a charge "in such form as the society," who advanced the money, "shall request." Those words supply a reason why, there being a present charge created, the obligation to execute a deed should be imposed. It is imposed

for the protection of the persons who have advanced the money, in order to enable them to perfect their charge, and make it more operative by inserting any further protective provisions which they may think necessary. I think, therefore, that the sting is taken out of the argument that this instrument is merely a covenant to create a charge. Further, looking at the whole of the instrument, I cannot help thinking that the provision for the immediate appointment of a receiver is important, and indicates the intention to create a present charge, although no doubt the provision—an ordinary one in a receivership deed—that the receiver shall not interfere unless the money has been demanded and not paid renders the argument of less strength than in a case where a receiver is appointed without that qualification, as in *Cradock* v. *Scottish Provident Institution.*

For these reasons I come to the conclusion that this instrument is a mortgage; it is an equitable mortgage, and one which does not fall within the definition in sub-section 2 of section 86. It is, therefore, subject to the duty which the commissioners have fixed.

But, if I am wrong in the view which I have stated, there is another view which appears to me equally, if not more, conclusive. This is certainly a covenant, and, to my mind, it is "a covenant for securing the payment or repayment of money." In this case it is for the repayment of the money advanced. There is no other security for the repayment except this document, and it would, I think, be an extravagant construction of the phraseology used if one were to narrow the meaning so as to make the expression a mere synonym for "a covenant to repay the money." The words are used for the purpose of creating a duty in aid of the revenue, and unless there is some obvious reason—such as was pointed out in the case of equitable mortgages by deposit of title-deeds—why a smaller duty, or no duty, should be imposed upon one description of subject-matter rather than another, I cannot conceive why, because the only security is a covenant to do something which will effectually protect the money, that covenant is not a covenant in the nature of a primary security for the repayment of the money just as much as if it were an actual covenant to repay. A covenant to repay would probably be valueless, or comparatively valueless, and it seems to me an extravagant proposition to say that a far more effectual security—namely, a covenant to assign property—is not a covenant or security for the repayment of money.

I am, therefore, of opinion that the instrument in question falls under the description both of "mortgage" and of "covenant" for the purpose of the Stamp Act, 1891, and as such is liable to the duty which has been demanded in respect of it.

BRUCE, J.—I am content to rest my opinion upon the single point that this instrument is a covenant, being a security for the repayment of money. That it is a covenant is beyond doubt, and it seems to me impossible to contend that it was not intended to be, and did not in fact operate as, a security for the repayment of money. It was contended by Mr. Pickford that it did not operate as a security, because it could not become operative as a charge until demand was made. But even assuming that he was well founded in that contention, still I think a covenant that gives me a right to a charge on my making a demand for the charge is still a security. The very circumstance that I have a covenant from my debtor to give me a charge if I demand it, even though it may not constitute a charge until the demand is made, yet does at once operate as a security. The right that I possess by virtue of the covenant to demand a charge does in itself, I think, constitute a security. Suppose a promissory note payable on demand, or payable fourteen days after demand, to be deposited for a loan, is it to be said that that promissory note would not constitute a security? I think that such a document as that—a mere promise to pay on demand, or fourteen days after demand—would constitue a security; and much more so would a covenant.

Judgment for the Crown.

Solicitors for the appellants, *Thorne & Welsford.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Q. B. Div.
(Wills and Bruce, JJ.) } Dec. 13, 15.

STYLES (SURVEYOR OF TAXES) (*Appellant*) v. THE SOCIETY OF THE MIDDLE TEMPLE (*Respondents*). (*a.*)

Inland Revenue — Inhabited house duty — Hall — Library — Liability to be assessed — 48 *Geo.* 3, *c.* 55, *Schedule B., r.* 5—*House Tax Act,* 1851 (14 *&* 15 *Vict. c.* 36), *s.* 1.

The dining hall and offices of the Middle Temple, which are used and occupied during the daytime only, in which no one sleeps or resides, and which have no communication with any premises in which anyone sleeps or resides, are liable to inhabited house duty, as coming within the words "hall or office" in rule 5 *of Schedule B. of* 48 *Geo.* 3, *c.* 55; *but the library is not a "hall" within the meaning of that rule, and is not liable to inhabited house duty.*

Case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of the Middle Temple in the County of Middlesex.

The treasurer of the Middle Temple appealed to the commissioners against an assessment for inhabited house duty of £1,150 (duty £43 2s. 6d.), made on the hall and offices of the Middle Temple and also against an assessment for inhabited house duty of £490 (duty £18 7s. 6d.), made on the library of the Middle Temple for the year ending the 5th of April, 1898.

The Middle Temple hall and offices consist of a dining hall and kitchen for the use of the members of the inn, with the usual offices, rooms for the use of the treasurer and benchers, and two rooms fitted up and used as lecture rooms for law students.

The premises are used and occupied during the daytime only and are closed and locked at night. No one sleeps or resides on the premises, and they are not used or furnished as a dwelling-house or provided with any sleeping accommodation, nor do they communicate in any way with any apartments or premises which are used as a dwelling-house. A fireman takes charge of the premises when they are closed at night.

The library is a separate building some distance from the hall and offices, and is used during the daytime by the members of the inn. A librarian and porters attend during the day, but at night the premises are always closed and the doors kept locked, and no one remains in the premises or in any room or building with which it has any communication.

The treasurer of the Middle Temple contended that, under the above circumstances, no part of the premises was an "inhabited dwelling-house," and that, as no one resided or dwelt or slept on or in any

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

portion of them, none of the premises were assessable to the house duty imposed by the House Tax Act, 1851 (14 & 15 Vict. c. 36), on inhabited dwelling-houses; and he referred to the judgments of Kelly, C.B., in *Riley* v. *Read*, 27 W. R. 414, 4 Ex. D. 100, and Wright, J., in *Clifton College* v. *Tompson*, 44 W. R. 410, [1896] 1 Q. B. 432, and contended that the premises in question were used only for the purposes of "education and sustentation" under the Charter of James I., and were not in any sense "inhabited dwelling-houses."

The surveyor of taxes contended that the premises were liable under rule 5, Schedule B., of 48 Geo. 3, c. 55 (the House Tax Act, 1808), by which rule it is provided that: "Every hall or office whatever belonging to any person or persons, or to any body or bodies, politic or corporate, or to any company that are, or lawfully may be, charged with the payment of any other taxes or parish rates, shall be subject to the duties hereby made payable as inhabited houses," and he referred to the decision of the judges in Scotland in *Free Church of Scotland* v. *Bain*, 3 Tax Cas. 530, the premises being, as was admitted, chargeable to poor rate.

The commissioners were unanimously of opinion that the library was not assessable, and, by a majority of two to one, that the hall and offices were not assessable, and they relieved the treasurer in both cases.

The Surveyor of Taxes appealed.

Sir R. E. Webster, A.G. (*Danckwerts* with him), for the appellant.—The assessment was made under rule 5 of 48 Geo. 3, c. 55, which rule is still in force, and our contention is that not only the hall and offices but the library also come within the words "hall or office" in that rule, and are liable to this tax. It is contended for the respondents that by 14 & 15 Vict. c. 36, the duty is imposed upon "inhabited dwelling-houses," whereas the duty imposed by 48 Geo. 3, c. 55, was upon "inhabited houses" only, and that therefore rule 5 no longer applies. There is really no difference between the language used in the Act of 1851 and in the Act of 1808. In the Act of 1851 the duty is imposed on "inhabited dwelling-houses," and in the Act of 1808 the duty is imposed upon inhabited houses "as set forth in the schedule B.," and when we look at the words used in Schedule B. we see that the words used are "inhabited dwelling-house," so that the subject-matter of taxation in each case is the same—namely, inhabited dwelling-houses. To bring a case within the rule it is not necessary that any person should sleep therein: *Free Church of Scotland* v. *Bain*, 3 Tax Cas. 530. The surveyor of taxes was therefore right in assessing not only the hall and offices but the library also.

Balfour Browne, Q.C. (*W. Graham* with him), for the respondents.—By the House Tax Act, 1851 (14 & 15 Vict. c. 36), the duties are made payable upon "inhabited dwelling-houses" only, and by section 2 it is declared that the previous rules are to be in force only with regard to the duties "hereby granted"—that is, upon "inhabited dwelling-houses," and only in so far as they are "consistent with the express provisions of this Act"—that is, only with regard to "inhabited dwelling-houses." The duties imposed by the Act of Geo. 3 were duties upon "inhabited houses" only, and rule 5 must to that extent be taken to have been repealed by the Act of 1851. The contention of the Crown would require that the word "dwelling" should be read into the Act of Geo. 3. A house cannot be an inhabited dwelling-house unless someone sleeps or resides therein: *Riley* v. *Read*, *Clifton College* v. *Tompson*. With regard to the library, it is clearly not assessable, as it would be a great straining of language to call the library a "hall." The commissioners were therefore right in discharging the whole assessment.

Sir R. E. Webster, A.G., replied.

WILLS, J.—In my opinion the Inland Revenue authorities are right about the hall but wrong about the library. With regard to the hall the argument for the respondents divides itself into two branches. The first was intended to show that there is a distinction between the language used in 48 Geo. 3, c. 55 and that used in 14 & 15 Vict. c. 36, by which the then repealed tax upon inhabited dwelling-houses was revived. I think there is no distinction whatever that can be drawn between the two. The distinction attempted to be drawn was that in the enacting portion of the later Act the words "inhabited dwelling-house" are expressly used as defining the subject-matter of taxation. In the Act 48 Geo. 3 different language is used, which appears to me to have identically the same meaning, and I think it would be lamentable to give effect to so fine a distinction as that which has been drawn. The language used in section 1 of 48 Geo. 3, c. 55, is that the tax should be granted on "inhabited houses as set forth in the schedule marked B.," and when we turn to the schedule we find that the only duties which are imposed are upon "inhabited dwelling-houses." I cannot appreciate the distinction between the two things. It is a mere verbal distinction, and I think that the Act 14 & 15 Vict. c. 36 has really in respect of this matter exactly the same operation as the old Act 48 Geo. 3. Coming to the Act 14 & 15 Vict. c. 36, the powers, provisions, and rules with reference to the duties on inhabited dwelling-houses as set forth in Schedule B. to the Act 48 Geo. 3, c. 55, are incorporated, and become in full force for assessing, raising, and levying "the duties hereby granted"; and it was argued for the respondents that as the "duties hereby granted"—that is, granted by the 14 & 15 Vict. c. 36—were by that Act 14 & 15 Vict. c. 36, limited specifically to "inhabited dwelling houses," therefore these clauses in Schedule B. of 48 Geo. 3, c. 55, could only be repeated so far as they are necessary for raising the duties upon inhabited dwelling-houses. In my opinion the duties were by the Act 48 Geo. 3 imposed just as specifically upon inhabited dwelling-houses as they are by this Act of 1851. No one can doubt that in the Act of 48 Geo. 3 Schedule B. must be taken in some way to operate upon the duties which were thereby granted, which were duties upon "inhabited dwelling-houses" only. When we come to rule 5 it is true that it says "every hall or office, &c., shall be subject to the duties hereby made payable as inhabited houses"—that is to say, as if they were inhabited houses, and it is true that the construction contended for by the Crown does require them to insert in the expression "inhabited house," the word "dwelling," and to say that "inhabited house" there means "inhabited dwelling-house." If it does not, then in my opinion there is not any "dwelling" here, and this could not in ordinary language be considered as a dwelling-house. But rule 5 must have been intended to have something more than the extraordinarily limited operation which it would have if the contention on behalf of the Middle Temple were correct. I cannot believe it was intended to have that limited operation, and I think it is obvious how the expression "inhabited house" came in. It is the expression used in section 1 of the Act, and the draughtsman of the rules repeated that without repeating the other expression "as herein set forth." For these reasons I think that the expression "inhabited house," where it occurs in rule 5, really

means an "inhabited dwelling-house," which is that which is made the subject of taxation by the Act. Though I agree that every tax, if it is to be supported, must be found within the clear language of an Act of Parliament, I am disposed to repudiate the notion of there being an artificial distinction between the rules to be applied to a taxing Act and the rules to be applied to any other Act. It is abundantly clear that under rule 5 "inhabited house" really means "inhabited dwelling-house," and for these reasons I think the Crown are right with regard to the hall.

With regard to the library the matter stands on a very different footing. A library is a perfectly well known thing and is essentially different from a hall. A hall is generally a place which is used for some business purposes connected with the general objects of the society which possesses it, whereas a library is a place devoted to books, reading, and study, and I cannot think it is less a library because it happens to be structurally such a building as, if it stood without the books in it, would be naturally described as a "hall." I think, therefore, that the taxation of the library as a "hall" or "office" is erroneous, and that portion of the appeal of the Crown ought to fail. The other portion relating to the hall ought to succeed, and as each side has succeeded as to part there ought to be no costs on either side.

BRUCE, J.—I agree. The library is not an "inhabited house." It is not an "inhabited dwelling-house," and it is not taxable as such unless it is made liable by the words of rule 5 of the schedule of 48 Geo. 3, or in other words, unless it can be said to be a "hall." I think we ought not to extend the meaning of the word "hall" so as to include a building if such building is not strictly within the meaning of the words. Though I feel there is no great distinction between "hall" and "library," yet there is a distinction, and if "library" does not come within the word "hall" in its natural meaning, we ought not to extend the meaning of the word "hall" to it.

Judgment for the Crown as to the hall; for the respondents as to the library.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Park, Nelson, & Co.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Jan. 12; Feb. 11, 13, 14.

ELLIS AND OTHERS *v.* DUKE OF BEDFORD. (*a.*)

Practice—Parties—Joinder of plaintiffs—Class actions—Common ground of relief—Rights in market—R. S. C., ord. 16, *rr.* 1, 9.

Where certain preferential rights are alleged to have been conferred by statute upon an indefinite class, who claim such rights not as members of the general public, but as a section of and adverse to the general public, then the members of such a statutory class possess a common interest and common rights, and some members of the class can properly bring an action on behalf of themselves and all other members of the class to maintain such statutory interest and rights.

The Attorney-General is a proper party to such an action, but only as representing the public as a whole, and not the statutory class.

A statutory preferential right was claimed in respect of three classes of stands at Covent Garden Market, and it was sought to combine the three claims in one action.

Held, that this was a mere matter of convenience, and that there was nothing in the law to make it necessary that there should be three actions, each confined to one class of stands.

Decision of Romer, J. (ante, *p.* 170) (Vaughan Williams, L.J., dissentiente), *reversed.*

This was an appeal from a decision of Romer, J., (reported *ante*, p. 170).

The facts are fully stated in the report of the case in the court below and are also referred to in the judgment of Lindley, M.R.

It is enough to say here that by the Act for the regulation of Covent Garden Market (9 Geo. 4, c. cxiii.), certain stands were exclusively appropriated for the reception of wagons and carts belonging to growers of fruit, flowers, vegetables, roots, and herbs, at tolls or rent according to a schedule, and such growers were to be deemed to be persons having preferential rights to resort to such stands under the provisions of the Act.

The plaintiffs were six market gardeners who sued on behalf of themselves and all other such growers as aforesaid for a declaration that the defendant, who was the owner of Covent Garden Market, was not entitled to exclude them from the preferential rights conferred by the Act. They alleged that they had each been refused stands when unlet and that the reason of the refusal was not any objection to any of the plaintiffs as a proper tenant but that the defendant had stated it to be his practice not to let such stands and had denied that the growers as a class had preferential rights. They also claimed to be repaid certain overcharges.

The defendant took out a summons to set aside the writ and all proceedings in the action on the ground that the plaintiffs, as having separate and distinct causes of action, could not join, and that also they could not as private individuals sue on behalf of a class of the public in respect of statutory or other public rights. Romer, J., held that the growers as a class had not any proprietary rights in respect of the market under the provisions of the Act in their favour, and that such right which the growers as a class had thereunder was in the nature of a public right which must be enforced at the suit of the Attorney-General. He also held that the plaintiffs had not and did not claim any right to relief "in respect of or arising out of the same transaction or transactions," and that therefore the six several claims of the plaintiffs as individuals were not rightly joined under ord. 16, r. 1. An order was made in accordance with the summons.

The plaintiffs appealed.

Farwell, Q.C., and *J. T. Prior*, for the appellants.—The short point is—the growers say we have preferential rights under the Act of Parliament (9 Geo. 4, c. cxiii.), and the duke says you have no such rights. If the license were given even for a day that would be sufficient to support an action for trespass. Ord. 16, r. 1, must apply to such a case as this.

They referred to *Temperton* v. *Russell*, 41 W. R. 321, [1893] 1 Q. B. 435; *Ellis* v. *Bridgnorth*, 12 W. R. 56, 15 C. B. N. S. 52; *Holford* v. *Bailey*, 13 Q. B. 426; *Stroud* v. *Lawson*, 46 W. R. 626, [1898] 2 Q. B. 44—and other cases as in court below; also to *Attorney-General* v. *Brown*, 1 Swans. 265. [LINDLEY, M.R., referred to *Betts* v. *Thompson*, 19 W. R. 1098; *sub.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

nom. Warrick v. *Queen's College, Oxford*, L. R. 6 Ch. App. 716.]

Levett, Q.C., and *Gwynn James* (*Danckwerts* with them), for the defendant.—It is plain from the preamble of this Act that the only object of the Act was re-arrangement, and it should not therefore be construed so as to effect any alteration of rights. The growers only have the rights which are given them by the Act, and these do not amount to more than a preferential right as against non-growers. They get no proprietary rights at all under the Act. We submit that if there is no proprietary right, but only a right in the nature of a public right, the action must fail. In all cases cited on behalf of the plaintiffs some right of property had been acquired. Then as to ord. 16, r. 1, we submit that it is not enough to show that there is one common question of law, but the relief claimed must arise out of one transaction or a series of transactions. We say that the plaintiffs have shown no connection whatever between these transactions. Here you have two distinct actions—one a common law action for a private wrong, and the other an equitable action for a declaration of rights. We submit, therefore, that they are not within ord. 16, r. 9, because the only reason that a man can bring a representative action is that he represents a large class, while the only reason that he can bring a private action is that he has a private wrong. They cannot join distinct claims to relief.

They referred to *Weale* v. *West Middlesex Waterworks*, 1 Jac. & W. 358; *Jones* v. *Garcia Del Rio*, Turn. & Russ. 297; *Stroud* v. *Lawson*; *The University of Oxford and the University of Cambridge* v. *Gill*, *ante*, p. 248; *Lyon* v. *Fishmongers Co.*, 25 W. R. 165, 1 App. Cas. 662; *Temperton* v. *Russell*; *Wood* v. *McCarthy*, 41 W. R. 523, [1893] 1 Q. B. 775; *Attorney-General* v. *London and North-Western Railway Co.*, [1899] 1 Q. B. 72; *Ellis* v. *Bridgnorth*; *Ware* v. *Regent's Canal Co.*, 7 W. R. 67, 5 Jur. N. S. 25; *Attorney-General* v. *Great Northern Railway Co.*, 8 W. R. 556, 1 Dr. & Sm. 154; *Pain* v. *Patrick*, 3 Mod. 289; *Attorney-General* v. *Great Eastern Railway Co.*, 27 W. R. 759, 11 Ch. D. 449.

Farwell, Q.C., in reply, referred to *Warrick* v. *Queen's College, Oxford*.

LINDLEY, M.R.—This is an appeal from a decision of Romer, J., made upon a summons which runs thus: "That the writ and all other proceedings may be set aside on the ground that the action is improperly constituted and the writ not authorized by the rules of the court, and that several plaintiffs having separate and distinct causes of action not being in respect of or arising out of the same alleged transaction or series of transactions are joined in the writ and action. And on the ground that the plaintiffs cannot sue in respect of the alleged causes of action on behalf of themselves and all other members of the public being growers of fruit and so on, and that such action cannot be maintained by private individuals on behalf of such members of the public as answer the description alleged in respect of public statutory or other rights alleged. And alternatively that the plaintiffs be put to elect the name of a single plaintiff to continue the action, and that in respect of such plaintiffs' alleged personal causes of action only," and so on.

Now, the decision of Romer, J., is in substance in accordance with that summons, and this is the order he has made: "The court being of opinion that the plaintiffs are not entitled to sue on behalf of themselves and all others the growers of fruit," and so on, "within the meaning of the Act of Geo. 4, c. cxiii, and they are not entitled to sue together as co-plaintiffs in one action in respect of the alleged causes of action respectively alleged by them personally and otherwise in their capacity as representing themselves and all other growers as aforesaid, doth order that the action be stayed in respect of all matters and alleged causes of action alleged by the plaintiffs in their representative capacity on behalf of themselves and all other growers aforesaid, and that unless the plaintiffs shall within fourteen days from the entry of this order, or in the event of an appeal within fourteen days from the entry of the order of the Court of Appeal elect by agreement between themselves for one of them to proceed with this action as sole plaintiff, and so far only as he seeks relief as individual and in respect of his individual and personal cause or causes of action only, this action to stand dismissed out of this court with costs, and such dismissal is to be without prejudice to any further action by any of the plaintiffs with respect to his own individual and personal cause of action."

On looking at his judgment the ground on which Romer, J., made the order is plain, as he says, "I am unable to come to the conclusion that the growers as a class have any proprietary rights in respect of the market." Now, although the question is of the nature I have just mentioned, it raises an important principle, which is whether it is possible to have such an action as this. Romer, J., says it is not, and that the only remedy, if any, open to the plaintiffs is that each must sue for his own grievance, or the Attorney-General must sue on behalf of the public. In order to understand that it is necessary to say a few words about the object of this action, and the Act of Parliament which gives rise to it. The action is brought by six persons on behalf of themselves, and all others the growers of fruit, vegetables, and so on within the meaning of what I will call the Covent Garden Market Act (9 Geo. 4). Their grievance so alleged is this: They say that the growers of fruit have certain preferential rights in respect of certain stands, which are referred to in the Act as the "casual cart stands," and form block B on the plan to which we have been referred, the "yearly cart stands" which form block C on the plan, and the "yearly pitching stands" which form blocks F and G on the plan. Their contention is that under the Act the growers of fruit and vegetables have not, as individual members of the public, an ordinary right to resort to Covent Garden Market and have their wagons standing there, but that they have, as a section of the public, certain preferential rights available against all other sections of the public, and which have to be respected by the lord of the manor, who is the Duke of Bedford. Now, if this is true I cannot see why some of them should not be at liberty to test the question whether they have or have not these rights by an action framed as this is, so far as it is an action by some on behalf of themselves and others. I am not going to spell through the Act to ascertain exactly what the rights of any of the growers are in respect of these three classes of stands. I have looked through the Act very carefully, and I have studied it section by section. If I could come to the conclusion on a study of the Act that the action was frivolous, that these growers had not any rights at all, either against the public or against the lord of the market, it would follow that the action was altogether misconceived, and perhaps the sooner it was stopped the better. But I am bound to say I cannot come to that conclusion. I cannot come to the conclusion that there is nothing to try in respect of the controversy which the plaintiffs set up. Take the case of the casual cart stands. I take this case to show why I differ from Romer, J. With regard to

these casual cart stands, I have come to the conclusion that there is an honest question to be tried which can be tried by some growers on behalf of themselves and others. I say no more than that at present. The question who the "growers" are may prove serious, because when this Act was passed we know that London was supplied with vegetables in a very different way to what it is now. In 1828, which was before railways or steamboats carried cargoes to any great extent, London was fed by the market gardeners round London, and depended for its supply on the growers round London, and the growers who actually fed London were the market gardeners of Brompton. Now the "growers" do not only live in the neighbourhood of London, the "growers" send things from Cornwall, from Scotland, from Ireland, from Africa, and what "growers" means now I do not pretend to say. I find the expression in the Act, and I find reason for contending—I am not going to decide it now—that the growers have certain rights as regards these stands in addition and adverse, as I understand it, to the rest of the public, and enforceable against the duke as lord of the market. Now, take the "casual cart stands." Section 7 of the Act is the principal, though not the only, section which refers to the casual cart stands. It says that the "casual cart stands" shall be exclusively appropriated to the reception of wagons, &c., in which fruit and so on shall be brought to the market for sale, and the growers are to have preferable rights to resort to such stands. I cannot say that that means nothing at all. Then section 17 contains a proviso for the use of the stands by others, but they are to remove if the persons having preferable rights have occasion to occupy them. Now observe how impossible it would be, in my judgment, for an action by any single grower to succeed either at law or in equity unless he can prove some definite grievance. It may be immediately checkmated by the lord of the market saying, "You as one individual have no right. I will give your stand to someone else." The lord could play one off against the other and defeat each in turn, and yet he might, as the plaintiffs say he does, deny that the growers have any preferential rights at all. How is that to be ascertained according to the ordinary rules of procedure? It cannot be properly done or adequately done in an action in which each grower is plaintiff. Besides, an action by one would not bind others in any shape or sense. I do not think it could be done on information or action by the Attorney-General, unless he made a party to his proceeding some of the growers on behalf of themselves and others, for this reason, that the claim of the growers is a claim against the public as well as against the lord. They do not allege that they as individual members of the public are impeded by the lord, but that they are a special part of the public and having preferential rights, or whatever the expression is, under the Act of Parliament are met by a denial of all preferential rights. It would be extremely difficult for any one man of them to show that he in particular has a right as distinguished from the others. I doubt whether it could be done. So as regards the yearly cart stands, the grievance or the right they allege is this, that they as growers have preferential rights to leases on the terms mentioned in the Act. I doubt very much whether any one could obtain specific performance for the grant of any lease. They would be all beaten in detail. I have been thinking it over very carefully, and I doubt whether such an action could succeed. There, again, the Attorney-General would not represent the growers. He would represent the public against the growers, and I do not think he would adequately represent the rights which are asserted. There, again, the grievance alleged is not that A., B., or C. being a grower cannot get a yearly cart stand, but that the duke, no doubt from his point of view for the better regulation of the market, says they have no right there at all, and has set them all at defiance. Similar observations apply to the other class of stands—the yearly pitching stands, as to which there is a greater difficulty about the right to any relief at all. There are some preferential rights apparently even there given to growers, but what they are is a matter to be ascertained when the case comes on to be tried. Now take any one of these dissociated from the others. I ask myself whether it would not be right to have the question, whether the preferential rights asserted exist or not, tried in an action brought by some of the growers on behalf of themselves and others. I cannot conceive why not. The growers, who are a statutory indefinite class, whether large or small I do not know, are a class on whom the statute has conferred certain preferential rights. There is a common right, there is a common interest according to the allegation in the statement of claim, because the allegations are that the duke ignores the right of the whole class. Now let us go back to the time before the Judicature Act. I cannot conceive why such an action as this would not lie. Mr. Levett has called attention to one or two cases which he thinks show the contrary. The only one of the slightest importance, to my mind, is the one of *Weale* v. *West Middlesex Waterworks Co.* The decision of Lord Eldon in that case was, I should have thought, extremely easy. In the first place it was not a bill by one on behalf of himself and others. That was carefully avoided, and the real object of the suit was to compel the Court of Chancery to settle the price to be paid for water. The judgment is of considerable importance because it is an extremely instructive one, and Lord Eldon refers to all sorts of cases in which a bill by one on behalf of himself and others would not lie, and the most important of all is that which Mr. Levett relied on. The answer to that case is this—that we have advanced a long way since Lord Eldon's time in suits of this description, and suits have been maintained by one on behalf of himself and others which perhaps Lord Eldon would not have sanctioned. Above all, now you can have under the Judicature Act actions to declare rights. I refer to ord. 25, r. 5, which says: [His lordship read the rule, and continued:] Having regard to that rule it does appear impossible to say now that one grower could not maintain such an action as this —that is to say, on behalf of himself and all othe growers of fruit—to assert the preferential rights which he says the whole class have. Mr. Levett referred to another case of Lord Eldon's, *Jones* v. *Garcia del Rio* in Turner & Russell, which was to the effect that persons who had lost their money in subscribing to the Peruvian Loan could not sue on behalf of themselves and others. But that has been reconsidered and to a certain extent modified in modern times. *Beeching* v. *Lloyd*, 3 W. R. 364, 3 Drew. 227, is an authority to that effect. [His lordship read the head-note to that case, and continued:] Whether that is an advance on Lord Eldon's doctrine or not I do not know. It is under diff-rent circumstances, because there the ground for rescission of the contract was a fraudulent prospectus. I understand that case as warranting an action by one on behalf of himself and others who have been defrauded by the prospectus to get the money back. Now, the principle on which the old Courts of Equity allowed suits by some on behalf of themselves and others was very much discussed in *Warrick* v. *Queen's College, Oxford*, in which there was a most instructive judgment on this particular point. That was a bill filed by two or three freeholders of a

manor claiming commons. There was a very great deal of litigation about the frame of the suit, and in point of fact a great deal depended on it. Lord Hatherley held that an action in that form would lie, although broadly, if you go back to antiquity, each freeholder sued on his separate prescriptive right. Lord Hatherley held that they had such a common interest in the matter in dispute, the rights of the freeholders over the common, that he overruled the objection, and in a passage which I will read he appears to me to have stated the real doctrine as it was then understood and applied. [His lordship then read from the judgment L. R. 6 Ch. App. p. at 726, "It may be of course . . . in respect of that common right," and continued:]Then he goes on to give an instance in modern times of shareholders of a railway company. Now, if the allegations in this statement of claim are true, of which I know nothing, this case is, to my mind, brought within the principle of that case so far as I am at present discussing it—that is to say, I think that case is an authority to show, and apart from that case I should have so thought, that there would be no difficulty in maintaining a bill or an action by some of the growers on behalf of themselves and others to vindicate their rights against what I will call the common enemy, a person who says the class have no rights at all. I do not say this action is properly constituted. I do not think it is. I have already expressed my opinion that these plaintiffs are asserting as against the public rights which the Attorney-General ought to be here to protect. That difficulty can be got over in a way which I will mention presently. I am addressing my mind to the view of Romer, J., who said that, even if these folks have these rights, the action is wrong, because they cannot sue on behalf of themselves and others, but each must sue alone, or the Attorney-General must sue on their behalf. From that I respectfully differ. That applies not only to the first lot of stands, the casual cart stands, but it applies, and I need not repeat it, to the yearly cart stands and the yearly pitching stands; that is to say, I have got so far that in my judgment one grower could sue on behalf of himself and others in one action with reference to each of those stands.

I now pass to the question whether they can combine the three causes of action in one. That is a pure question of convenience, to my mind. The right of the classes of growers depend on the construction of, I may say, the same sections in the Act. That is not literally true, but it all turns not only on the construction of the whole Act, but on the 7th section as modified by the rest of the Act. The right the plaintiffs claim is a statutory preferable right, available over three classes of stands, and if, as they say, rights are ignored, I cannot see why the question should not be raised in one action instead of three. If the learned judge had thought it was inconvenient to mix up one class of stands with the others, and had said so, I do not suppose we should have interfered; but there is nothing that I know of in law and nothing that I know of in this case on the question of convenience which would be gained by saying that there must be three actions—one confined to casual cart stands, one confined to yearly cart stands, and one confined to yearly pitching stands. It strikes me it is eminently a case where, having regard to the scope of the Act, one action properly constituted may be maintained in respect of all three.

Another objection is, that if that is so, they cannot sue for the return of the overpayments which they allege they have made. I do not suppose that is material. It would not warrant striking out and setting aside the writ and all the proceedings under it. It might lead to an amendment or to a dismissal of so much of the action as related to that; but I do not go into that question at all. Looking at it as a mere matter of procedure, I doubt whether, after *Beeching* v. *Lloyd*, there is anything so radically wrong in it that the writ ought to be struck out. I am not prepared to go that length. Whether it will ultimately succeed or not I do not say.

Then as to paragraph 19 of the statement of claim, which I do not quite understand, I should have thought that was better out than in, but I will not discuss it now. We are not drafting or framing the action, we are discussing the question whether this action is so badly constituted that it ought to be summarily stopped. In my opinion it is not. I have given my reasons for saying that I do not think an action by the Attorney-General, in the absence of someone representing the growers, would be a proper form of procedure to raise the controversy which these growers want raised. The Attorney-General would represent the public, including the growers, but if you come to a question between classes of the public, I do not think he could; and Romer, J., felt that, and said the difficulty could be got over by having the Attorney-General to represent one class of the public, and the Solicitor-General to represent another class. I do not say it could not be done in that way. I doubt it; and I never heard of such a proceeding. According to my mind the proper mode of dealing with the difficulty is to make the Attorney-General a defendant to represent the public as against the alleged preferential rights of the smaller class—namely, the growers who allege rights separate and distinct from those of the public in general.

Then what is to be done? In my opinion the appeal must be allowed and the order below discharged, and the plaintiffs by their counsel undertaking to amend and make the Attorney-General a party as defendant give them leave to amend, and let the plaintiffs' costs both here and below be the plaintiffs' costs in the action. I think that will meet the justice of the case, because I am satisfied that there is a serious question to be tried. We cannot try it now, partly because the Attorney-General is not here, and partly because we have not the materials on which to decide it. As an academical question it appears to me that the plaintiffs are in the right, although the action is not properly constituted by reason of the absence of the Attorney-General.

RIGBY, L.J.—This is an action which in truth and form and substance is brought by six plaintiffs, all of them claiming to be growers within the meaning of the Act of 9 Geo. 4 on behalf of themselves and other growers, and it is brought against, as sole defendant, the Duke of Bedford, who is the lord of Covent Garden Market. The object of the action, as I view it, is to have discussed and determined the question whether any and what rights are given to the class which the six plaintiffs claim to represent under and by virtue of the Act of Geo. 4. Now, I propose to avoid giving an opinion upon any question of the construction of that Act of Parliament beyond this, that I have examined the Act sufficiently to satisfy myself that there are questions which ought to be determined—in which way I will not say—and that the action, therefore, cannot be looked upon as frivolous and vexatious, or an abuse of the practice of the court, or in any light which could authorize the court summarily to put an end to it. I think, therefore, the action ought to go on, and it appears to me that this class of growers which is created by the Act must be looked upon as a class which, as against the rest of the public, may have preferential rights under the Act. All questions of construction of the Act remain, and, though I have formed some opinion, I do not know how to indicate what it is at

all, because it would be wrong to do so for this, if for no other, reason, that the setting up of these rights against the public make the public important parties to the discussion, and the public are not at the present moment represented at all. I consider that it is a wrong view to take that these alleged preferential rights could be set up without the presence of the Attorney-General. The Duke of Bedford—the only defendant—does not represent the public, and as the action is now constituted, no one represents the public. Therefore it would be wrong (and on other grounds it would be inadvisable) to determine those important questions—for I agree they are important questions—on the construction of the Act against the public; at any rate it would be wrong to determine them against the public in any degree in the absence of the Attorney-General, who would represent them.

The six plaintiffs do not represent different classes of growers, and do not claim to represent them. They represent the whole class of growers, and on behalf of that class they point to the Act and they indicate that they claim certain privileges. The Act does not split up the class of growers, and it nowhere, so far as I can see, talks about this class of growers and that class of growers, but it gives privileges to the whole class, and I cannot see why this is not a good way, if it is not the best way, of raising the question. The only other way in which it seems to me the question could be raised would be by an information by the Attorney-General against the growers, and then the growers would have to be represented as defendants. What advantage there is in that I do not know. He could not take their part and set up as a champion of the growers, because he represents the public at large, and he cannot as the public at large represent any growers. It appears to me that this is the only way, and if it is not a question improper to be tried it ought to tried in this action. I agree with all the Master of the Rolls has said, that this doctrine of representative action has been a progressive and growing one—fortunately, I think—since the time of Lord Eldon; and therefore I do not think it necessary to go into cases. I will, however, say this, that I do not know any case in which a *bonâ fide* claim on behalf of a class has been summarily disposed of by saying that the members of that class did not represent the whole. Here we have no difficulty, such as might arise if we were construing a grant from the lord of the market. It might be possible to see that certain grants in favour of certain people improperly described or not sufficiently ascertained would be, on the face of it, void. We are dealing with an Act of Parliament which does create, or sufficiently indicate, a class of persons to whom, it is not unreasonably suggested, the Act gives preferential rights.

Now, that being my view of the case, it is not in the least important from my point of view to split up what I may call the claims of the plaintiffs and to say this one relates to one question and this to another. They do not. They represent all the classes, and representing the whole class they desire to have their rights ascertained and declared. The main object and the substance of the suit is that they wish to have the rights of growers under the Act of Parliament declared. I do not think Romer, J., if he had allowed that they could act representatively, would have said that this must be split up into different questions. What he decided, as I understand his judgment, and I think it sufficiently plain, is that this is not a case in which a representative action will lie at all, therefore each of these plaintiffs must be treated as an individual, some coming under one allegation and some under another; and as he was not going to allow a representative action, he treated the plaintiffs as split up in that way, and asked whether (treating them as individuals) they could join these causes of action. Now, that is not the case at all. They are seeking to act as representatives of the whole class, and I cannot entertain a doubt that the convenient and proper thing is when they raise one question about the class to raise them all and put their claims on any grounds that they think they can, according to the provisions of the Act, maintain. Then I do not think that the question under order 16 comes in at all. I say it is one action for one main purpose—namely, to ascertain the rights of the growers under the Act of Parliament and that it is not a question whether advantage could be asked or given of the provision of the new order which permits, in certain cases, different plaintiffs having certain causes of action to have their causes of action tried together in one action. This is not this case at all.

I do not think it necessary to add anything further. I do not consider that it is a proper case for a representative action for one or more of the growers. Here there are six. There is no harm in having six plaintiffs. It only means a better security for costs. One, according to my view, would have done to raise the whole question.

That being so I think it is wrong to prevent the question from being raised in this way, and in fact it appears to me that practically if that be permitted it never can effectively be raised in any way whatsoever.

VAUGHAN WILLIAMS, L.J.—I have arrived at a different conclusion. I think the judgment of Romer, J., was perfectly right.

I am somewhat embarrassed in giving judgment in in this case by the consideration that the judgment of the court is that this question, which is really a question on the construction of an Act of Parliament, must be tried hereafter. That being so, it is obviously not desirable that I should take the Act of Parliament and, upon this occasion, put a construction upon it, because it may be inconvenient having regard to the action which has to be tried that I should do so. But on the other hand it is not easy to avoid doing so to a certain extent, because in my judgment the ground upon which this action ought to be dealt with—as Romer, J., did deal with it—is that according to the true construction of the Act of Parliament the plaintiffs' action is altogether wrongly constituted, and in my judgment that being the only question really which at any time will have to be tried in this action, it is very unfortunate if that question cannot be disposed of now and an expensive litigation got rid of, because when the action does come to trial, if the view which was taken by Romer, J., and which I am now taking, is the right view, there would be an end of the action. It seems to me that it would be much more convenient if that question could be solved now once for all—that is, the question whether or not these persons can properly bring an action at all in respect of the matters that they are complaining of. According to my view the decision of Romer, J., apart from ord. 16, r. 1, which I agree is quite a subsidiary question, is based upon this, that this is a case in which the plaintiffs cannot bring a representative action because they, the plaintiffs, are not members of a class having a common right. Of course, if according to the true construction of the Act, the Act is an Act for the regulation of the market, and is an Act which confers no private rights whatever, but is only an Act affecting a public right, an Act therefore creating rights in respect of which, by an old and well-established series of decisions, no member of the public can bring an action

unless he is able to allege a particular injury to himself as distinguished from the other subjects of Her Majesty and bases his claim on the damage caused to him by that particular injury, as I have already pointed out, that being the ground upon which this action has been dealt with, it is extremely difficult to give the reasons for any decision without to a certain extent expressing my view as to the meaning of this Act of Parliament. On the other hand, I do not think it at all necessary for me to go through the Act of Parliament section by section to deal with the question whether one particular section or the whole of the sections, after they have separately been carefully regarded, create, or are intended to create, private rights. It will be sufficient for me to make the statement generally. I think perhaps the best mode for me to do this is for me to state what I consider to be the argument put forward on behalf of the defendant here, and then having done that in sufficient detail to make it clear what that argument is; to say that, in my judgment, that argument raises such a *primâ facie* case that we ought to dispose of it at once, and say whether, in our judgment, the action is or is not so improperly constituted that it ought not to be allowed to go on.

Before doing that I wish to make two observations which do not turn on any controverted question as to the construction of this Act. The first thing is this, and I am happy to see that I am in accord with the other members of the court when I express my opinions, that the questions raised in this action are so much questions of public right that it is perfectly impossible that the action should proceed without the presence of the Attorney-General as defendant or plaintiff. Speaking for myself, I have looked to see if I can find either at common law or in equity a single instance in which an individual member of the public has been allowed successfully to bring an action in respect of a matter which is so much a matter of public right that it cannot be disposed of without the presence of the Attorney-General without the plaintiff alleging particular damage to himself in that action. I can only say I find no such case. Then I want to make a further observation as to a matter in which I should have the greatest possible hesitation in entertaining any different opinion from that of the Master of the Rolls and Rigby, L.J., because it is on a subject on which it would be affectation on my part not to avow that their judgments must be much better than mine. That is this, that as their decision is to a certain extent based upon the equity practice of allowing one person to bring an action on behalf of himself and others, and it has been laid down by them that this is a case which falls within the principles which have governed that practice, if this was a mere question of what were the principles that govern that practice I really should not presume to arrive a different conclusion. But I do not think I have arrived at a different conclusion as to the principle. I have only arrived at a different conclusion as to the fact. I have looked at the case of *Beeching* v. *Lloyd* and also that of *Warrick* v. *Queen's College, Oxford*, and it seems to me that these cases entirely coincide with what I am now going to say, and indeed with what has been said by my brothers on this morning. The principle is that one may bring an action on behalf of himself and others where there is a community of interest, but I do not understand that any one of these cases decide that one may bring an action on behalf of himself and others where there is not some one interest in which all these persons have a common concern. In my view that is not true in the present case, because and according to the view I take of this case all the plaintiffs here are suing in respect of a private right, and inasmuch as they have not individually a private right irrespective of particular damage *a fortiori* they cannot have a community in some one private right.

Now I shall only say a word or two as to what I understand the defendant's argument to be, and in respect of which it is that I have come to the conclusion, not that that argument has been established, because if that argument were held to be established, there is an end of the action, and the court has decided that the action is to go on—but what I do say is that that argument does establish such a *primâ facie* proof of its truth that one ought now to go on and decide, one way or the other, as to the contentions raised thereby, so that in case the argument of the defendant is established there may be an end of this litigation; not, of course, an end of the rights of these people in so far as these people are interested in the public right. *Qua* the public right they can get the Attorney-General to bring his action, and an action in which it will be much more convenient to try these questions than in the present action, because it will be an action in which the non-growers (and I do not understand that even the plaintiffs' argument here suggested that one can treat the non-growers as a class separated from the public) will be represented, which certainly they will not be in the action as it is now constituted. Moreover, if any individual member of the public, whether grower or not, has sustained a particular injury, there is nothing for him in this action. Now, this is what I understand the contention of the defendant to be, and the contention in respect of which Romer, J., gave his decision. It is said by the defendant that the plaintiffs cannot avail themselves of ord. 16, r. 9, because the plaintiffs have not the same interest in any cause or matter. The interest alleged by the plaintiffs is an interest under an Act of Parliament for the improvement and good regulation of Covent Garden Market. That is the title of the Act. The plaintiffs allege that that Act gives them as growers, as a class, certain preferential rights constituting some sort of proprietary interest in them. They make no claim excepting under the Act of Parliament. The defendant contends that this Act of Parliament deals with public rights only, and creates no private rights whatever, and no rights in any section of the public, and derogates in no way from the rights of the defendant as they existed at the time of the commencement of the Act. The market, it is said, is a franchise, and could only be granted for the public good; the public must have free access to it subject only to a reasonable toll and to certain rights of stalling, &c., as shall not interfere with the enjoyment of the market; that order must be maintained in the market; that it is the duty and right of the lord to regulate the market; but that as questions had arisen as to the sufficiency of his power to regulate Covent Garden Market, this Act was passed for the regulation of the market; that the growers and the non-growers each of them had places assigned to them in the market, and that the growers had appropriated to them, or rather to their purposes, spaces in preference to non-growers, and that this is merely a regulation of the market and confers no right of property whatever, and that to say it does so is as though one should say that if an Act of Parliament or bye-law enacted that in the occupation of seats the rule *seniores priores* should apply, this would create a right of property in the *seniores*. It is further pointed out that this Act of Parliament is not like an Act of Parliament embodying a compact between persons or corporations capable of contracting; that the growers as such are not a sufficiently definite body to make a contract; that any member of the public may become a grower, and, as a member of the public, enjoy not

only access to the market, but the particular access to the market accorded by the Act of Parliament to growers. I do not propose to say anything more about the Act of Parliament or how far the sections of it support that argument which I have tried to summarize as being the argument of the defendant. I only say that in my judgment that argument is of such a character as to entitle the defendant to have it decided now, on this application, whether or not this action is properly constituted or whether it ought not at once to be stayed for its obvious defects. Nothing that I have said in my judgment is intended to be any judgment upon the meaning of the Act of Parliament or the validity of the argument which I have summarized. I have only stated it sufficiently to account for my conclusion that the judgment of Romer, J., was perfectly right.

Appeal allowed.

Solicitors, *H. B. Bell; Taylor, Son, & Humbert.*

From Q. B. Div.
(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) Feb. 10, 11.

In re FRANCES HANDFORD & CO. (*a.*)

Bankruptcy—Married woman trading separately from her husband in firm name—Non-compliance with bankruptcy notice — Act of bankruptcy — Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1 (5)—*R. S. C., ord.* 48a, *rr.* 4, 5, 8, 11.

Where a judgment has been obtained against a married woman trading separately from her husband in the name of a firm, even if in the form prescribed by Scott *v.* Morley, 36 *W. R.* 67, 20 *Q. B. D.* 120, *as applicable to married women, she is not liable to be made a bankrupt upon a bankruptcy notice founded on that judgment. The judgment is merely a judgment against her separate estate.*

Appeal from the registrar in bankruptcy.

In October, 1898, Messrs. Moore Bros. signed final judgment under order 14 for £52 4s. 10d. for goods supplied against the firm of Frances Handford & Co.

An appearance to the writ had been entered by Frances Handford, trading as Frances Handford & Co., but she did not appear to the proceedings under order 14.

After judgment the plaintiffs served Mrs. Handford with a bankruptcy notice, and on the 7th of December presented a petition in bankruptcy, when they discovered for the first time that Mrs. Handford was a married woman.

The petition was opposed on two grounds: (1) that Mrs. Handford was not trading separately from her husband, and (2) that having regard to the form of the judgment against a married woman in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120 (at p. 132), a receiving order could not properly be made on a bankruptcy petition founded on a judgment obtained against a married woman.

Mr. Registrar Hope made a receiving order, holding that Mrs. Handford was trading separately from her husband, and that having allowed judgment to go against her by default she was estopped from opposing the petition.

Mrs. Handford appealed.

F. Cooper-Willis, for the appellant, was stopped by the court.

Hansell, for the respondent.—*Dillon* v. *Cunningham*, L. R. 8 Ex. 23, 21 W. R. Dig. 90, was decided upon the words of section 5 of the Debtors Act, 1869; jurisdiction was given to order imprisonment or payment of the debt by instalments; such an order was held to apply to a married woman. [VAUGHAN WILLIAMS, L.J., referred to *Lovell & Christmas* v. *Beauchamp*, 43 W. R. 129, [1894] A. C. 607.] A married woman can be made bankrupt if she has committed an act of bankruptcy. He referred to the judgment of Bowen, L.J., in *Scott* v. *Morley; The Alliance Deposit and Investment Co.* v. *Gardiner*, 105 L. T. Journal 224; and *In re Gardiner, Ex parte Coulson*, 36 W. R. 142, 20 Q. B. D. 249.

LINDLEY, M.R.—This case raises a new and interesting point. The debtor is a married woman trading under the name or firm of Frances Handford & Co. Her husband was in trouble, and I shall assume for the purposes of this judgment that she carried on business separately from her husband within the legal meaning of those words. She appointed him her attorney to carry on the business in her name, and she gave him power to sign cheques *per. proc.* Some persons supplied the firm with goods in the ordinary way of business, and also I think in the ordinary way of business did not take the trouble to find out who were the persons constituting the firm with which they were dealing. That is common enough; then when you want payment you find out who owes you the money. The persons who supplied these goods did not even do that, but issued a writ under order 48*a* against the firm for the price of the goods. The lady entered an appearance under her own name, trading as Frances Handford & Co. The plaintiffs proceed quite regularly under order 14, and get judgment against Frances Handford & Co. What is the consequence of that? Upon that judgment they have issued a bankruptcy notice, and seek to have this lady made bankrupt. The view of the registrar was that she was trading separately from her husband, and that she was estopped by having allowed judgment in the name of the firm to go against her by default from saying that that was not a good personal judgment against her.

Upon the assumption on which I am proceeding, that this married woman was trading separately from her husband, it is plain that she was liable to be adjudicated a bankrupt under s. 1, sub-section 5, of the Married Women's Property Act, 1882. That section provides that "Every woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a *feme sole.*" The question is what is the legal effect of that. It has been decided that upon a judgment against a married woman in the form settled in *Scott* v. *Morley* she cannot be made a bankrupt, because there is no personal judgment on her to pay, but a judgment against her separate property not subject to restraint against anticipation. That form provides as follows: "It is adudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), not subject to any restriction against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction." Where a judgment has been obtained in that form, which is a proper judgment against a married woman, it has been decided more

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

than once that a married woman, though she may be made bankrupt for other causes, is not liable to be made a bankrupt upon a bankruptcy notice founded on that judgment. That brings us back to the question what is the legal effect of a judgment against a married woman in the name of the firm under which she is trading? Looking at ord. 48*a*, r. 11, coupled with rules 4, 5, and 8, I think it is not difficult to see what it is. The effect is that the form of the judgment conceals the truth, but does not alter it. When you have a rule which enables you for the sake of convenience to bring an action and to obtain judgment against a firm, you are in truth bringing an action against the persons who constitute the firm, and the judgment is really a judgment against the individuals. That is all that the rule means. Whether in enforcing that judgment in a case where the firm consists of a married woman you shall issue the ordinary *fi. fa.*, or a special *fi. fa.* in the form prescribed in *Scott* v. *Morley*, I must leave the creditors to determine. I cannot think that the judgment will have any effect except as a judgment against her separate estate. In my opinion a married woman cannot be made a bankrupt upon a judgment in this form.

The appeal will therefore be allowed, and the receiving order rescinded, but there will be no costs.

RIGBY, L.J., concurred.

VAUGHAN WILLIAMS, L.J.—I also agree with all the reasons which have been given. I want to add, speaking for myself, that the proceeding by bankruptcy notice which by the present Bankruptcy Act is substituted for the former proceeding by way of debtor's summons is a bankruptcy proceeding, and although you may, on filing the petition, be allowed to use for convenience the collective name or the trade name as the name in which the proceeding shall be instituted, it is perfectly plain that in bankruptcy you must drop the use of that name, and take care that your proceedings are personally against the person whom you seek to make bankrupt. The result is ultimately that the adjudication is an adjudication against the individual.

Appeal allowed.

Solicitors, *Trass & Enever; Burton, Yeates, & Hart*, for *Edge & Ellis*, Birmingham.

High Court of Justice.

Q. B. Div. (Lawrance and Channell, JJ.) — Jan. 25.

STAREY v. GRAHAM. (*a*.)

Patent agent—Registration—Conviction—Person practising prior to passing of Act—"Right acquired"—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 101—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 1, 27—*Register of Patent Agents Rules*, 1889—*Patent Rules*, 1890, *r.* 81—*Register of Patent Agents Rules*, 1891, *r.* 1.

Section 1 *of the Patents, Designs, and Trade-Marks Act*, 1889, *sub-section* 1, *enacts that no person shall be entitled to describe himself as a patent agent unless he is registered as a patent agent in pursuance of the Act. Section* 27 *provides that nothing in the Act shall affect the validity of any "right acquired" before the commencement of the Act.*

Held, that a person who had been practising as a patent agent and describing himself as such prior to the passing of the Act is not protected by section 27 *from the operation of section* 1, *nor from the liability to pay the fees imposed by the Register of Patent Agents Rules*, 1889, *made in pursuance of the Act.*

Held, also, that the Register of Patent Agents Rules, 1889, *are in force, because, assuming they were repealed by rule* 81 *of the Patent Rules*, 1890, *they were re-enacted by rule* 1 *of the Register of Patent Agents Rules*, 1891.

Case stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant under the Patents, Designs, and Trade-Marks Act, 1888, charging him with knowingly describing himself as a patent agent, he not being registered as such in pursuance of the Act.

It was proved that the appellant had since 1888 described himself as a patent agent and that he was not registered as such in the register of the Chartered Institute of Patent Agents.

It was further proved that for some years prior to 1888 the appellant had practised as a patent agent and had described himself as such. He held a certificate dated the 9th of October, 1894, issued by the Board of Trade, stating that he was entitled to be registered. He had also applied to be registered in pursuance of the Act, but as he did not pay the fee payable under rule 24 of the Register of Patent Agents Rules, 1889, his name was not entered on the register. The magistrate convicted the appellant.

The Patents, Designs, and Trade-Marks Act, 1883, s. 101, provides for the making of rules by the Board of Trade for, among other matters, regulating the practice of registration under that Act.

Sub-section 4 provides: "Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session in Parliament, and they shall be advertised twice in the official journal of the comptroller," and sub-section 5 provides that if within forty days either House of Parliament shall by resolution disapprove of such rules they shall be of no effect.

Section 1 of the Patents, Designs, and Trade-Marks Act, 1888, sub-section 1, provides that after the 1st of July, 1889, no person shall be entitled to describe himself as a patent agent unless he is registered as a patent agent in pursuance of the Act. Sub-section 2 provides that the Board of Trade may, from time to time, make rules for the purpose of giving effect to the section, and that the provisions of section 101 of the Act of 1883 shall apply as to rules so made as if they were made in pursuance of that Act.

Sub-section 3 provides that "every person who proves to the satisfaction of the Board of Trade that prior to the passing of this Act he had been *bonâ fide* practising as a patent agent, shall be entitled to be registered as a patent agent in pursuance of this Act." Sub-section 4 imposes the penalty.

Section 27 provides as follows: "The principal Act shall, as from the commencement of this Act, take effect subject to the additions, omissions, and substitutions required by this Act, but nothing in this Act shall affect the validity of any act done, right acquired, or liability incurred before the commencement of this Act."

Rule 5 of the Register of Patent Agents Rules, 1889, made pursuant to the Act of 1888, provides that a person who is desirous of being registered as a

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

patent agent on the ground that prior to the passing of the Act he had been *bonâ fide* practising as a patent agent shall produce to the Board of Trade a statutory declaration in the form therein provided, and that upon that being done, or upon further evidence if they shall require it, the Board of Trade shall issue a certificate that the person therein named is entitled to be registered, and the registrar shall on receipt of such certificate enter the name of such person in the register.

Rule 24 provides that a fee of five guineas shall be payable for the registration of the name of a patent agent who has been *bonâ fide* in practice prior to the passing of the Act.

Rule 81 of the Patent Rules, 1890, provides that "All general rules heretofore made by the Board of Trade under the Patents, Designs, and Trade-Marks Acts, 1883 to 1888, shall be and they are hereby repealed. . . ."

The Register of Patent Agents Rules, 1891, provides (rule 1) as follows: "From and after the commencement of these rules all the duties and powers of the Institute of Patent Agents under the Register of Patent Agents Rules, 1889, . . . shall be transferred to and vested in the Chartered Institute of Patent Agents, and the rules of 1889 shall, where applicable, and save so far as they are altered by the present rules, have effect. . . ."

There was no proof that, after the enactment of the rules of 1891, the requirements of section 101 of the Act of 1883 had been complied with in respect to the rules of 1889.

Muir Mackenzie (*Samuel Green* with him), for the appellant.—Registration by a person who has been practising before the passing of the Act is optional. Moreover, the appellant is protected by section 27 of the Act of 1888.—That section means that no rights acquired before the Act was passed are to be affected or taken away by the Act. The appellant had before the Act was passed acquired a right to describe himself as a patent agent without being registered and without the payment of a fee. That was one of the rights saved by section 27: *Hough* v. *Windus*, 32 W. R. 452, 12 Q. B. D. 224. The Legislature did not intend to impose upon patent agents the penalty of five guineas for doing that which they had been in the habit of doing before the Act was passed. It was not intended to affect the position of such persons, except for the better. The rules of 1889 were repealed by the rules of 1890, and are therefore no longer in force, so that the fee provided for in those rules is now no longer payable. The rules of 1891, without specifically re-enacting those of 1889, treats them as if they were in force. Rules cannot be re-enacted by a mere reference to them in a later body of rules as if they were in force. If it was intended to re-enact them, a new body of rules should have been framed embodying the old ones, and these should have been laid upon the tables of both Houses of Parliament as prescribed by section 101 of the Act of 1883. [CHANNELL, J.—It cannot be necessary to prove that in every case.] On these grounds the conviction cannot be sustained.

H. Sutton and *Corrie Grant*, for the respondent, were not called on.

LAWRANCE, J.—There are two questions in this case. The first is whether the appellant is entitled to describe himself as a patent agent without being registered as such and without having paid the fee required by rule 24 of the rules of 1889.

It is said that he is so entitled because having practised as a patent agent before the Act of 1888 came into force he had acquired the right to so describe himself, such right being preserved to him by virtue of section 27 of the Act.

Before the passing of the Act anyone could describe himself as a patent agent without having gone through any examination and without having got himself registered as a patent agent. I think the right reserved by section 27 is a right which rendered it unnecessary for persons who had practised as patent agents before the Act to undergo an examination, and the section does not reserve to such persons the right to continue describing themselves as patent agents without being registered and without payment of the fee provided by the rules of 1889.

The second point is that the rules of 1889 are no longer in force. These rules appear to have been repealed, by inadvertence, by rules enacted in 1890. The question is whether they were re-enacted by the rules of 1891. In my opinion the effect of the rules of 1891 was to re-enact those of 1889 with one or two alterations.

CHANNELL, J.—I am of the same opinion. There is only one point of importance. The Act of 1888 for the first time imposes restrictions upon persons practising as patent agents. Section 1 provides that no one is to describe himself as a patent agent unless he is registered as a patent agent pursuant to the Act and certain privileges are given to persons who have before the passing of the Act been *bonâ fide* practising as patent agents. That is a very ordinary form of legislation. The Act has, further, a saving clause, also of a very ordinary kind. That clause preserves certain "rights." It is suggested that a construction should be placed upon the words "right acquired" which would nullify the provisions of the Act altogether in the case of persons who had been practising as patent agents prior to its commencement.

"Right acquired" means some special right acquired by an individual, not a right in the sense that every man has a right to do that which the law has not forbidden him to do. A person does not acquire a right by doing that which he is not expressly forbidden to do. A person does not, for example, by wearing them acquire a right to wear spectacles. That is not a "right acquired," therefore the term "right acquired" does not apply to persons who had practised as patent agents before the commencement of the Act.

It is said that the rules of 1889 have been repealed, and words were certainly used in the rules of 1890 which are wide enough to raise the point. But it is unnecessary to decide it. For, assuming that the rules of 1890 did repeal those of 1889—and if they did it was clearly by inadvertence—it seems to me that the thing is cured by another accident. It became necessary in 1891 to provide something further, and the rules of 1891 were made.

For my own part I doubt whether the provisions of section 101 of the Act of 1883 are more than directory, and all that is said against the rules is that they were not laid before Parliament in 1891. The rules of 1891 expressly say that the rules of 1889 shall have effect with certain modifications, so that though the rules of 1891 were framed on the assumption that the rules of 1889 existed, yet sufficient is said to re-enact them.

The only question is whether there is power to impose fees upon patent agents who practised as such before the commencement of the Act of 1888. If that point was ever in doubt, it was cleared up by the decision in *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347.

Appeal dismissed.

Solicitors for the appellant, *Firth & Co.*

Solicitors for the respondent, *Radford & Franklin.*

Q. B. Div.
(Lawrance and Channell, JJ.) Jan. 24.

HUNTER (*Appellant*) *v.* CLARE (*Respondent*). (*a.*)

Medical practitioner — Licentiate of the Society of Apothecaries — Title of physician — Wilfully and falsely taking and using the same—Conviction by justices—Medical Act, 1858 (21 *&* 22 *Vict. c.* 90), *s.* 40—*Medical Act,* 1886 (49 *&* 50 *Vict. c.* 41), *s.* 6.

A licentiate of the Society of Apothecaries of London registered since the coming into operation of the Medical Act, 1886, *and therefore, by section* 6 *of that Act, entitled to practise medicine, surgery, and midwifery, is not entitled to describe himself as a physician.*

Special case stated by justices sitting at the Caxton Petty Sessions for the county of Cambridge.

The question of law raised by this appeal was whether a licentiate of the Society of Apothecaries of London, registered since the coming into operation of the Medical Act, 1886, and therefore, by virtue of section 6 of that Act, entitled to practise medicine, surgery, and midwifery, could properly describe himself as a "physician."

The case set out the facts and contentions substantially as follows:

The appellant, Mr. H. K. Hunter, was a duly registered medical practitioner, entitled under the Medical Act, 1886, to practise medicine, surgery, and midwifery. In December, 1897, the appellant attended one William Hawkins, and on the 28th of December and the 23rd of March, 1898, made use of the name and title of physician by causing to be printed and delivered to William Hawkins and to one Elizabeth Shatton certain bill-heads bearing the following words: "To Kingsley Hunter, physician and surgeon, for professional attendance, &c."

An information and complaint was preferred by the respondent against the appellant under section 40 of 21 & 22 Vict. c. 90, for that he did, and continued wilfully and falsely to, pretend to be and to take and use the name and title of physician contrary to the provisions of the statute.

The justices convicted the appellant of the alleged offence, and adjudged him to pay a fine of £5 and £3 for costs.

The appellant thereupon applied for a case to be stated.

On the part of the appellant it was contended: That, being in possession of a diploma granted by the Society of Apothecaries of London, dated the 19th of October, 1893, in pursuance of which he was admitted a licentiate of that society and registered as such, and which diploma stated that the appellant possessed the knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery, and that he being so registered, and by virtue of section 6 of the Medical Act, 1886, he, the appellant, was (*a*) entitled to take and use the titles of "physician" and "surgeon" if he thought fit to do so; and (*b*) that notwithstanding the use of the name or title of physician there was nothing to show that the appellant wilfully and falsely used the same —on the contrary, that he did so in good faith; further, that he was authorized and justified in so doing in consequence of the note which was produced and admitted as purporting to be issued by the Society of Apothecaries of London as follows:

"The L.S.A. (1886) can call himself by any title or titles which he prefers to adopt denoting his right to practise medicine, surgery, and midwifery, provided that he does not directly or indirectly assume a title conferred by another licensing body or university."

In support of the foregoing contentions *Ellis* v. *Kelly*, 9 W. R. 56, 6 H. & N. 222, 30 L. J. M. C. 35, was cited.

On the part of the respondent it was contended: That the case was in all respects similar to that of *Reg.* v. *Baker*, 8 Times L. R. 123, 56 J. P. 406, 40 W. R. Dig. 146. In that instance one S., a licensed and registered apothecary, used on his door after his name the letters M.D., also the words Physician and Surgeon, though he was not registered as a physician or surgeon under the Medical Act, and the court held he was rightly convicted under 21 & 22 Vict. c. 90, s. 40, of falsely pretending to be a physician, surgeon, and doctor respectively.

The questions of law upon which the case was stated were: (*a*) Whether or not the appellant holding the title of "L.S.A." and being registered as such, was authorized to take and use the title of physician in the manner the appellant so used it; and (*b*) whether on the facts the magistrates were right in finding that the appellant so described himself wilfully and falsely within the meaning of 21 & 22 Vict. c. 90, s. 40.

After the case had been stated the appellant died, but the Society of Apothecaries determined to go on with the matter, and it was stated in court that the real respondents to these proceedings were the General Medical Council.

Haldane, Q.C. (*Horace Condy* with him), for the Society of Apothecaries, in support of the appeal to quash the conviction, said the society was incorporated by charter granted by James I., and mentioned as a curious fact that by an unrepealed statute medical men could not legally practise in Great Britain without the permission of the bishop of the diocese. By an Act passed in 1815 an apothecary's right to prescribe became recognized by statute. A druggist compounded according to the prescription and sold drugs, but an apothecary prescribed and dispensed his own prescription. By the Act of 1886 a L.S.A. became entitled to practise medicine, surgery, and midwifery, and he submitted that it followed that such a person, having by examination shown that he possessed the knowledge and skill requisite to practise in those three branches of the medical profession was entitled to call himself a "physician," the meaning of the word being a person qualified to practise physic—*i.e.*, medicine, surgery, and midwifery. Before the Act of 1886 a man might have been prosecuted for calling himself a surgeon if he was only qualified as a physician, since before that date the titles were distinguishable and distinct. These titles, however, had ceased to be the particular properties of particular licensing bodies, and the medical Acts gave to no one licensing body the monopoly of the word "physician" to its members. [CHANNELL, J.—If the word "physician" in the section we are considering is used in a popular sense as equivalent merely to "doctor," then the conviction is wrong; but if in its technical sense as implying that the person using it holds a special qualification from a particular licensing body that entitles him to use the title of physician, then the conviction would stand.] No doubt otherwise that would be a test of whether the conviction should be quashed or stand if the title of physician was a registerable title. As a matter of fact no licensing body had power to grant the degree of "physician," and therefore the Society of Apothecaries resented the action of the General Medical Council, who desired to arrogate to themselves the exclusive use by members of the college of a word which was simply descriptive.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Muir Mackenzie, in support of the conviction, said that at one time apothecaries were a subordinate body to physicians, and quoted section 3 of 32 Hen. 8, c. 40, which contained a direct recognition that in 1540 the science of physic included the knowledge of surgery and embraced the general art of healing whether by drugs or surgery. At the close of the last century persons practising as physicians without the licence of the College of Physicians were prosecuted. There was a distinction between the practise of physic and the practise of medicine and contended that the former embraced the practise of surgery. The Act of 1886 contained no provisions which conferred on an L.S.A. the right to style himself physician.

During the argument the following cases were discussed: *The Attorney-General* v. *Royal College of Physicians*, 9 W. R. 590, 1 John. & Hem. 561; *Reg.* v. *Baker*, 66 L. T. Rep. 416, 40 W. R. Dig. 146 (also cited as *Reg.* v. *JJ. of Aston, Birmingham*, 8 Times L. R. 123); *Davis* v. *Makuna*, 33 W. R. 668, 29 Ch. D. 596; *College of Physicians* v. *Harrison*, Wilcock's Laws of the Medical Profession, p. 128; *Ellis* v. *Kelly*; *Andrews* v. *Styrap*, 26 L. T. Rep. 704, 20 W. R. Dig. 48; *Blogg* v. *Pinkers*, Ry. & Moo. 125; *Royal College of Physicians* v. *General Medical Council*, 68 L. T. Rep. 496, 41 W. R. Dig. 136; *College of Physicians* v. *Rose*, 3 Salk. 17, 6 Mod. 44.

THE COURT allowed the appeal.

LAWRANCE, J.—The question that we are called upon to decide in this case seems to me to be this: Whether a person who has a certificate from the Society of Apothecaries (by which certificate, I understand, at the present time he is entitled to practise both medicine and surgery, as well as act as an apothecary) is entitled to describe himself as a physician—in other words, whether in describing himself as a physician the appellant was contravening section 40 of the Act of 1858. In my judgment, if such a person was doing that falsely and wilfully, the justices would be quite right in convicting him. That is the short answer to the question.

As far as I understand the matter, up to 1886 the only certificate granted by the Society of Apothecaries was a certificate to practise as an apothecary, and after that the three bodies into which the medical profession was divided—namely, physicians, surgeons, and apothecaries, decided that nobody could have any certificate from any one of them who had not passed in surgery and medicine, and such an examination, if there is a separate examination, which may be required by the Society of Apothecaries.

Those were the state of matters in which the then defendant, the appellant in this case, considered he was entitled to describe himself first, I see, as "M.D." That was pointed out to him by some authority. I need not refer to it at greater length as being wrong. Then he modified that until he came at last to call himself a physician. The question is, in what way was the word "physician" used? Was it a mere general expression signifying the man was a medical man, a doctor, or was there a more definite meaning to be attached to it—namely, that he was a physician, which would import to most people that he was a doctor of medicine, and held a diploma entitling him to act as such? That, I think, was the real meaning of the word "physician" as used by him. And I have no doubt whatever that would be the meaning conveyed to the mind of anybody who saw on a brass plate "So-and-so, physician"; it would convey an idea to my mind, at all events, and I should think it would to the ordinary mind, that he was a doctor of medicine and a physician—something, in fact, which he really was not. Therefore I think he was contravening section 40 of the statute of 1858, and that his conviction was right upon that point.

Now, when we come to the other point—namely, whether he was doing it wilfully and falsely, I come to the conclusion after looking at the case of *Ellis* v. *Kelly*, in which Bramwell, B., gave judgment, and held that the defendant was not acting falsely and wilfully, and the case of *Andrews* v. *Styrap*, in which Martin, B., says: "There was ample evidence that this appellant wilfully (for he did it on purpose) and falsely (because he pretended thereby to be on an equal footing with any regular bred and registered physician or M.D. in England) took, assumed, and used the title of 'M.D.'" Of course that was a very much stronger case than the one we are now considering. Here from the evidence I think the appellant was determined to try his right. That is the position in which he placed himself. He said: "I have a certificate entitling me to practise both medicine and surgery, as well as whatever the certificate of the Apothecaries' Society may go to, and I have a right to say I am a doctor in the ordinary sense of the word—that is to say, I am a physician and I can practise medicine." I have already given my reasons for thinking he was wrong in that; but I think he was not doing it wilfully and falsely, but doing it in the assertion of a right for which I think there was no legal ratification at all.

I apprehend the object of those who have started these proceedings will be met by the judgment given upon the other part of the case. I think he was wrong there, and I think the magistrates were right in their law with regard to the first part of the case, but I think there is no evidence (which there must be before the conviction could be affirmed) that the appellant was doing what he did wilfully and falsely. The result is that in my judgment the conviction must be quashed, but the appellant not having succeeded upon the real point which came here for decision, the fair and proper thing to do would be that the conviction should be quashed, without costs.

CHANNELL, J.—I am, on the whole, of the same opinion. To begin with, I think—although I think it is a matter of some doubt—that this appellant falsely described himself as a physician. Counsel, during the argument, stated that they were, in fact, appearing for two societies, and that these societies desired to have the opinion of the court whether it be a true description now for a licentiate of the Society of Apothecaries to describe himself as a physician. It seems to me that depends entirely upon what is the sense in which the word "physician" is used in section 40 of the Act of 1858. If "physician" there means simply a person who is duly qualified in law to practise in physics, then it seems to me that this gentleman was a physician within that meaning of the word, because although it would not have been so at one time, he nevertheless, by being a licentiate of the Society of Apothecaries, became entitled to practise medicine and surgery. Now, if the word "physician" in section 40 is used in a popular sense, anyone would be bound to say that he was entitled to practise in physics, in a popular sense at anyrate; but even if there is any other sense—I am not quite sure I fully followed Mr. Muir Mackenzie's argument upon that point—but even if there is in any sense a distinction between "physic" and "medicine," I do not think there is any such distinction in the popular sense. It follows, therefore, that if "physician" in section 40 was merely a general word describing a person who is legally entitled to act as doctor—using again the word in its popular and not in its technical sense of doctor of medicine—if it means this, I think the gentleman, by

reason of his qualification, would be entitled to call himself a physician. Having, however, regard to the fact that prior to the passing of the Act physician was commonly used to designate the highest grade of medical practitioners, I think it was so used in the Act, and I think if you look through the Act generally you will find confirmation of that view. In that special sense I think the word physician is used in the section, and I do not think it is correct to say that the licentiate of the Society of Apothecaries is, in fact, a physician. He certainly was not so before the licensing Act of 1886, because physician in that sense, as Mr. Muir Mackenzie has shown, included practice, not only in medicine, but in surgery, and before 1886 the licentiateship of the Society of Apothecaries did not give that. Consequently, before 1886 it would not have been a correct expression, and as that is the case I think we have really no binding authority upon this question. The case of *Reg.* v. *Baker* appeared at first sight to be in point, but in that case there were three summonses alleging different offences, and I do not think so now for two reasons. The reasons are first of all that was a motion for a *certiorari*, and any jurisdiction to consider the matter at all on the part of the magistrates would have prevented the *certiorari* being granted; and secondly, because that gentleman's qualification, being before 1886, did not authorize him to practise in surgery, and therefore it did not authorize him to be a physician in the sense in which Mr. Muir Mackenzie has pointed out the word is used in the section—namely, that it included practise in surgery. The result is we have got no authority binding upon us upon this point, and, having considered it, I come on the whole to the conclusion, though not altogether without doubt, that "physician" in section 40 is used in a technical sense, in which technical sense it was not true this gentleman was a physician.

The next question is, although he falsely described himself, did he wilfully and falsely so describe himself? Now, on this point, as I read it, the case of *Ellis* v. *Kelly* seems to be a distinct authority. We have the case quoted to us, and it is said that Bramwell, B., afterwards recanted to a certain extent what he has said in that case of *Ellis* v *Kelly*. It does not quite appear how much of his opinion in *Ellis* v. *Kelly* he thought was wrong, and, whatever he thought was wrong, there remains the decision; and, so far as I understand the decision, it was this: that in that case the man was not really an M.D. in the sense in which the court understood section 40 to mean, but that he had reasonable grounds for thinking that he was, and, having reasonable grounds for thinking that he was, the court said he could not be said to have wilfully and falsely described himself as such. If that is the meaning of that case, it governs the present one. The difference between *Ellis* v. *Kelly* and *Andrews* v. *Styrap* appears to be this: that in *Ellis* v. *Kelly* the qualification that the gentleman had was a foreign qualification; but it was, as I may say, a genuine one, a real qualification. In *Andrews* v. *Styrap* it was what one might call a bogus qualification—that is to say, he had not been examined in any way, but had written out and got that qualification by correspondence merely for the purpose of representing himself here as an M.D. That is what Martin, B., meant when he said "he did it on purpose." There being that difference, I do not think that *Ellis* v. *Kelly* is overruled, and it is a binding decision and goes to the effect of saying, as we say in this case: Although we think this gentleman incorrectly described himself as a physician, yet he did not wilfully and falsely describe himself as a physician by reason of the interpretation of the words in *Ellis* v. *Kelly*.

On those grounds I agree that the conviction should be quashed, but without costs. I see there are two questions put to us—The first question (*a*) is "Whether or not the appellant is authorized to take and use the name and title of physician?" As to that we say that he was not, but as to the next question (*b*), "Whether on the facts herein stated the magistrates were right in finding that the appellant so described himself wilfully and falsely?" On that point we say they were wrong, and we quash the conviction on the ground that he had here some colour or title to use the description which he used, especially having regard to the directions issued by the Society of Apothecaries — that he had such a reason to think he might so describe himself that we cannot say he did it wilfully or falsely.

Conviction quashed.

Solicitors for the appellant, *Upton, Atkey, & Co.*

Solicitor for the respondent, *F. W. Farrer.*

Q. B. Div.
(Wills and Bruce, JJ.) } Dec. 14, 15.

LANCASHIRE INSURANCE CO. (*Appellants*) v. THE COMMISSIONERS OF INLAND REVENUE (*Respondents*).
VULCAN BOILER AND GENERAL INSURANCE CO. (*Appellants*) v. THE COMMISSIONERS OF INLAND REVENUE (*Respondents*). (*a*.)

Inland revenue — Stamp duty — Policy of insurance against accident—Employer's liability policy—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 98.

A policy of insurance by which an insurance company agrees to pay for and on behalf of the assured such sums as the assured shall become liable to pay in respect of personal injury caused in his business to workmen in his employment is not a "policy of insurance against accident" within the meaning of section 48 *of, and the schedule to, the Stamp Act,* 1891, *but requires to be stamped, if under seal, as a deed, and if under hand only, as an agreement.*

Cases stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891.

Instruments were presented under section 12 of that Act by the appellants to the commissioners for their opinion as to the stamp duty with which such instruments respectively were chargeable. The following is a copy of the instrument so presented by the Lancashire Insurance Co.:

"Employer's Liability Policy.

"First premium to the 9th of August, 1899, 9s. 6d. Employer's Insurance Policy against the full liability under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897, and also against the liability at common law.	"Estimated amount of wages, &c., on which the undermentioned sum paid in respect of premium has been calculated, £127 8s. Sum paid in respect of premium, 9s. 6d.

"Whereas Messrs. Uren Rogers & Co., of Smithfield-street, Birmingham, carrying on the business of iron and metal merchants and no other for the purpose of the risk under this policy (and who and whose personal representatives or successors in the business are hereinafter called 'the employer'), has

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

paid to the Lancashire Insurance Co. (hereinafter called 'the company') the sum mentioned above in respect of premium, and has delivered to the company a proposal in writing (which is hereby declared to be the basis of and to form part of this contract) for an indemnity against claims for compensation for personal injury sustained by workmen as hereinafter mentioned.

"Now these presents witness and it is hereby agreed as follows: The company shall pay for and on behalf of the employer such sums as the employer shall become liable to pay under or by virtue of the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or under or by virtue of the common law in respect of personal injury caused in the above-mentioned business during the continuance of this policy to any workmen in the employ of the employer, or of any sub-contractor for injury to whose workmen he may be answerable."

The instrument was under seal.

In the case of the Vulcan, &c., Co. the policy was under the hands of two directors; the operative words so far as material were as follows: "The company indemnifies the employer fully and completely against all liability under or by virtue of the Workmen's Compensation Act, 1897, the Employers' Liability Act, 1880, or the common law in respect of any injury which during the continuance of this policy shall happen to any workman whilst in his employ and engaged in the above-mentioned business."

The commissioners being of opinion in each case that the instrument was not "a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury," held that the instrument was not "a policy of insurance against accident" as defined in section 98 (1) of the Stamp Act, 1891, and was not chargeable by reference to the head of charge "Policy of insurance against accident and policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury" in the first schedule to the said Act. They consequently held that it was liable, in the case of the Lancashire Insurance Co., to the duty of 10s. as a deed, and in the case of the Vulcan, &c., Co., to the duty of sixpence as an agreement.

The appellants, being dissatisfied with the assessments of the commissioners, appealed, and cases were accordingly stated by the commissioners pursuant to section 13 of the Stamp Act, 1891.

Cohen, Q.C. (*F. L. Wright* with him), for th appellants the Lancashire Insurance Co., and *Jelf Q.C.* (*J. E. Bankes* with him), for the appellants the Vulcan Boiler, &c., Co.—These policies are policies of insurance against accident and are chargeable with a duty of one penny only. The definition of "policy of insurance against accident" in section 98 of the Stamp Act, 1891, is not confined to policies by which an accident to the assured himself only is insured against; under these policies the moneys can only become payable by the insurance companies upon the occurrence of a death otherwise than from a natural cause or personal injury, and this is sufficient to bring them within the definition if construed reasonably; and a statute must not be construed so as to impose a charge unless it does so in clear and unambiguous language: *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 17 W. R. H. L. Dig. 1; *Colquhoun* v. *Brooks*, 36 W. R. 657, 21 Q. B. D. 52, per Fry, L.J., at p. 62; *Oriental Bank Corporation* v. *Wright*, 5 App. Cas. 842, 29 W. R. Dig. 35.

Sir R. B. Finlay, S.G. (*Danckwerts* with him), for the Crown.—The event upon which the companies have agreed to pay money is the arising of a legal liability of the employer to compensate his workmen. Such a liability does not arise in the case of every accident; the policy does not, therefore, contain an agreement to make a payment upon the happening of a death or personal injury; it is an agreement to indemnify against a legal liability, and is not a policy of insurance against accident.

They cited *Dalby* v. *India and London Life Assurance Co.*, 3 W. R. 116, 15 C. B. 365; *Theobald* v. *Railway Passengers' Assurance Co.*, 2 W. R. 528, 10 Ex. 45; *Bradburn* v. *Great Western Railway Co.*, 23 W. R. 48, L. R. 10 Ex. 1; and *Darrell* v. *Tibbits*, 29 W. R. 66, 5 Q. B. D. 560.

BRUCE, J.—In these two cases the instruments are chargeable respectively with stamp duty in the one case as a deed, in the other case as an agreement, unless the instruments fall within the description of "policy of insurance against accident" given in section 98 of the Stamp Act, 1891. "Policy of insurance against accident" means, according to the section, a policy for any payment to be made upon the death of any person otherwise than from a natural cause, or as compensation for personal injury. In substance I think there is no distinction to be drawn between the two policies in point of form. But I will take the policy in the case of the Lancashire Insurance Co., the form of which is certainly quite as favourable to the appellants as the other policy. The proposal which is declared in the recital at the commencement of the policy to form the basis of the contract is described as a proposal for an indemnity against claims for compensation for personal injury sustained by workmen. [His lordship quoted the operative words of the policy, and continued:] It is quite clear upon the wording of the policy that the payment agreed to be made depends upon the liability of the assured to answer for the death of his workmen, or for the personal injury sustained by his workmen. The death of a workman in the employ of the assured might be caused by other than natural causes, or such workman might sustain personal injury, and yet no payment would become due under the policy unless the death were caused or the personal injury were caused in such circumstances as to render the assured liable to pay compensation. The payment, therefore, is not, I think, a payment agreed to be made upon the death of a person otherwise than from a natural cause, or as compensation for personal injury, but is a payment agreed to be made as an indemnity against claims for compensation for which the assured is answerable. Two things must happen. There must first be the death or personal injury of a workman; and secondly, there must be a liability on the part of the assured to make compensation for the death or personal injury.

It was argued by Mr. Cohen in the one case and by Mr. Jelf in the other that although the two conditions must exist before the policy could become operative, yet the payment stipulated for by the policy was not the less a payment to be made upon death or as compensation for personal injury merely because some other condition than death or personal injury must exist before the policy could be enforced. They instanced the case of life policies and accident policies which commonly contain various stipulations requiring certain notices to be given within a stipulated time of the happening of the death or accident, the strict observance of which is made a condition precedent to the right of action on the policy, and they contended that such policies did not cease to be life policies or accident policies by reason of the right of action on the policies depending upon

some event other than the death or accident. But the answer to that argument is, I think, this—that the conditions in such cases are incidental to the subject-matter of the insurance. The governing event in those cases is the death or accident, and the ordinary stipulations to which reference was made by the learned counsel are stipulations made with a view to fence and protect the rights of the assurer so as to enable him to require satisfactory evidence of or to make inquiry concerning the facts upon which his liability depends. They do not alter the character of the risk upon which the assurance depends. Such conditions grow out of and are subsidiary to the subject-matter of the insurance. But it seems to me in the present case that the liability of the assured to compensate his workmen lies at the very root of the contract. It is the cardinal event upon which the liability of the assurer to pay the money under the policy depends. It is in truth and substance a contract of indemnity, and although the indemnity is against liability arising from death or personal injury, and the death or personal injury is a *sine quâ non*, and is one of the conditions of the liability of the assured, yet it is not the condition upon which the liability of the assurer depends. It is not the condition upon which, by the terms of the instrument, the payment agreed to be made depends.

WILLS, J.—I agree. I will only add that even if the first portion of the definition were satisfied, and that the policy could be said to be a policy by which the insurers agreed to make a payment upon the death of a person from accident or violence or otherwise than from a natural cause, the latter portion would still remain. An agreement to pay any sum which the employer should become liable to pay to his workman as compensation for personal injury cannot by any stretch of language be held to be an agreement to pay as compensation for personal injury. That portion of the definition cannot be applied to the policy in the present case.

Judgment for the Crown.

Solicitors for the Lancashire Insurance Co., *Bower, Cotton, & Bower*, for *Janion & Hall*, Manchester.

Solicitors for the Vulcan Boiler, &c., Co., *Busk, Mellor, & Norris*, for *Payne, Galloway, & Payne*, Manchester.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Prob. Div. & Adm. Div. } Jan. 26.
Admiralty. }

"THE SNARK." (*a.*)

Ship—Damage—Collision caused by running foul of sunken barge—Negligence of owner of barge in not providing for proper lighting of wreck, where wreck not abandoned—Liability of owner of wreck if independent contractor employed to raise wreck for him.

The owner of a vessel sunk in the fairway of a navigable river who has not abandoned the wreck, but has agreed with an independent contractor to raise her for him, is answerable in damages for the loss sustained by the owners of another vessel running foul of the wreck without negligence, in consequence of the wreck being improperly lighted.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

This was an action of damage instituted on behalf of the owner of the steamship *Vesta* against the owners of the dumb-barge *Snark* to recover for the damage sustained by the former vessel in a collision with *The Snark* on the 3rd of August, 1897, in the fairway of the River Thames, when *The Vesta* came in contact with the submerged wreck of *The Snark* and thereby received the damages proceeded for in the circumstances stated in the judgment.

The fourth paragraph of the statement of claim was in terms as follows: The barge *Snark* was lying wholly submerged in a position obstructing the navigable channel, and the collision was caused by the neglect and default of the defendants or of their servants or agents, for which the defendants are liable in not taking proper and sufficient steps to indicate the position of the wreck or to warn passing vessels thereof, in placing and keeping the barge marking the wreck in an improper and misleading position, and failing to keep a proper watch on board such barge and leaving such barge untended without anybody on board her, and in neglecting to give proper or other warning from the said barge or otherwise to those on board *The Vesta* that *The Vesta* was approaching the wreck.

The defendants in their defence denied (*inter alia*) that the collision was caused by the negligence of the defendants or their servants or anyone for whose acts they were responsible, and after alleging that *The Vesta* improperly failed to keep clear of *The Snark*, pleaded in the alternative that *The Snark* sunk at about 2.15 a.m., 1st of August, 1897; that the defendants thereupon informed the Thames Conservancy and entered into a contract with William Forrest, an under-waterman and diving contractor, who verbally contracted to raise and remove the said sunken barge (*The Snark*) for a fixed sum; and that if there was any negligence in or about the lighting, marking, or watching of the said barge, such negligence was that of the said Forrest or his servants, and not that of the defendants or their servants.

Dec. 5 and 6.—On these days the action was heard before Barnes, J., assisted by two of the Elder Brethren of the Trinity House, and the court came to the conclusion that the collision had happened through the wreck of *The Snark* being insufficiently guarded, and that in consequence of this negligence *The Vesta*, whilst passing at a safe and proper distance from lights which had been placed by Forrest and persons employed by him to mark the position of the wreck, ran directly on to the wreck.

Dec. 13.—The question whether on the facts found by the court the defendants were to blame for the collision came on to be argued.

Carver, Q.C., and *Stubbs*, for the plaintiffs.—The owners of *The Snark* are liable for the damages arising out of the collision between the wreck of *The Snark* and *The Vesta*. The collision was solely caused by the wreck not having been properly guarded and lighted, and at the time of the collision the defendants had neither abandoned the wreck or transferred it to third parties. They wished for it to be raised so that they might use it again as a barge, and it is idle to suppose that by employing an independent contractor to raise the wreck for them they were able to shift their responsibility of guarding and lighting it away from themselves. There having been negligence in guarding and lighting the wreck, the defendants are equally liable whether or not they agreed that the guarding and lighting was to be attended to by the persons who were raising the barge: *The Utopia*, [1893] A. C. 482; *Hardaker* v. *Idle District*

Council, 44 W. R. 323, [1896] 1 Q. B. 335; *Tarry* v. *Ashton*, 24 W. R. 581, 1 Q. B. D. 314; *Pickard* v. *Smith*, 10 C. B. N. S. 470, 9 W. R. C. L. Dig. 59; *Penny* v. *Wimbledon Urban Council*, [1898] 2 Q. B. 212, 46 W. R. Dig. 138; *Dalton* v. *Angus*, 6 App. Cas. 740, 29 W. R. Dig. 75.

Pyke, Q.C., and *Batten*, for the defendants, the owners of *The Snark*.—This is not a suit *in rem*, and the negligence which caused the accident was not the negligence of the defendants, but the negligence of an independent contractor to whom the defendants had transferred the control and possession of the wreck: *R.* v. *Watts*, 2 Esp. 675; *White* v. *Crisp*, 2 W. R. 624, 10 Exch. 312; *Brown* v. *Mallett*, 5 C. B. 599; *Gray* v. *Pullen*, 13 W. R. 257, 5 B. & S. 970; *Ellis* v. *The Sheffield Gas Consumers' Co.*, 2 W. R. 19, 2 E. & B. 767. That contractor is therefore liable *in personam*—*Blake* v. *Woolf*, *ante* p. 8, [1898] 2 Q. B. 426—just as much as he would have been liable if he had agreed to manage and control *The Snark* when navigating the Thames and the collision had occurred before she had sunk: *Milligan* v. *Wedge*, 12 A. & E. 737; *The Castlegate*, 41 W. R. 349, [1893] A. C. 38; *The Tasmania*, 13 P. D. 110, 36 W. R. Dig. 184; *Hill* v. *The Tottenham Local Board*, 15 T. L. R. 53.

Cur. adv. vult.

Jan. 26.—BARNES, J.—This is a case in which the plaintiffs seek to recover from the defendants for damages sustained by the plaintiffs owing to their steamship *The Vesta* running upon the defendants' barge *The Snark*, which was sunk in the fairway off Cuckolds Point in the River Thames. *The Snark* had been sunk by a collision with another steamer on the 1st of August, 1897, and a man named Forrest had been employed by the defendants to raise her. Before he had succeeded in doing so the plaintiffs' steamship, in coming up the Thames on the early morning of the 3rd of August, whilst on a voyage from Hamburg to St. Katharine's Docks, London, ran upon the sunken barge and was seriously damaged.

The case was heard before me during last sittings, when the plaintiffs alleged that the accident happened owing to the negligence of those in charge of the salvage operations in not properly placing lights so as to warn persons navigating the river of the danger occasioned by the sunken barge, while on the other hand the defendants alleged that it arose from the improper navigation of the plaintiffs' steamship. I found that there was no default in the navigation of the steamer, but that although a barge called *The Rhoda* had been placed by Forrest and his men with lights upon it with the object of warning persons in charge of other vessels of the spot where the wreck lay, it had in fact been negligently and improperly placed in, or allowed before and at the time of the accident to swing into, a position at some distance across the stream from the wreck, so that it did not properly guard the wreck and in consequence thereof the plaintiffs' vessel while passing at a safe and proper distance from the warning lights ran directly on to the sunken barge.

The question then arose whether or not the defendants are personally liable for the negligence of the person in charge of the salvage operations.

The facts necessary to be stated in order to deal with this question are these. *The Snark* was sunk without negligence on the part of the defendants or their servants. Upon hearing of the sinking the defendants' foreman saw Forrest, who is an underwaterman, and had been frequently employed to raise sunken barges, and was a proper person to employ for such purpose. An arrangement was made between the foreman and Forrest that the latter should raise the barge for £20 if it proved an easy job, and £25 if it proved troublesome, and that the defendants should provide a barge for Forrest to work with. Nothing was said about lighting the wreck.

The defendants accordingly supplied Forrest with the barge *Rhoda*, and he and his men went down to the place where *The Snark* was sunk, and then fastened *The Rhoda*. Forrest and his men said that they had an anchor fast in the wound made by the steamer which sank *The Snark*, and two anchors out. There is no doubt that they found *The Snark*, and were in charge of her, but there was great confusion in the evidence as to the way in which *The Rhoda* was fastened, and for reasons which it is unnecessary to repeat to-day I found them guilty of the negligence aforesaid. The officials of the Thames Conservancy were told by Forrest of the sunken barge, and for a short time before Forrest brought *The Rhoda* to the spot a boat of the Thames Conservancy with a flag in it was made fast to *The Snark*. For this service the defendants paid the Thames Conservancy. When Forrest brought *The Rhoda* and took charge the conservancy boat was taken away, and Forrest and his men alone remained. Forrest was ashore at the time of the accident, and only one man was then aboard *The Rhoda*, though two others were in a small boat in which they had been ashore, and they said that on the way back they were looking after some buoys attached to the anchors. After the accident Forrest raised *The Snark*, and was paid £25 by the defendants.

The argument on this question of the defendants' liability took place before me a few days after the trial on the merits, when the case was ably argued by counsel, and shortly put the plaintiffs' point was that this is a case where the maxim *Respondeat superior* applies, whereas the defendants' point was that they were not liable for the default of an independent contractor. A number of authorities were cited, including *Brown* v. *Mallett*, *White* v. *Crisp*, *The Douglas*, 7 P. D. 151; *The Utopia*.

The exact case does not appear to have been decided, though the principles to be applied in these cases of negligence committed by persons employed by, but not servants of, the employer have been much discussed in the cases aforesaid, and in a very large number of cases cited by Mr. Beven in his work on Negligence, one of the latest being *Hardaker* v. *Idle District Council*, where the Master of the Rolls and A. L. Smith and Rigby, L.JJ., gave elaborate judgments on the subject.

After considering the matter upon principle, and with the assistance of the decided cases, I am of opinion that the defendants are personally liable in this action.

The result of the first three cases above mentioned was stated in the judgment of the Privy Council, delivered by Sir Francis Jeune in *The Utopia* as follows: "The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as and so far as possession, management, and control of the wreck be not abandoned or properly transferred there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shown: first, that in regard to the particular matters in which default is alleged, the control of the vessel is in them—that is, has not been abandoned or legitimately transferred;

and secondly, that they have, in discharge of their legal duty, been guilty of wilful misconduct or neglect." This statement of the law was relied on by both sides on the argument before me, but each took a different view as to meaning of the terms "abandonment" or "proper transfer" of the possession, management, and "control of the vessel."

This has to be considered. If a vessel has been sunk in a public navigable river, and becomes a dangerous obstruction to navigation, the wreck is a public nuisance. The owner in whose possession she was at the time of the sinking, and whether the sinking has occurred by his default or not (wilful misconduct, as stated in the above passage, probably giving rise to different considerations), may, however, abandon the wreck. He is not bound to remove it. As is pointed out in *Rex.* v. *Watts* and *Brown* v. *Mallett*, 5 C. B., at p. 619, to compel him to do so might involve him in an outlay wholly disproportionate to the benefit of the salved property to him. If he abandon, his liability ceases subject to a question which I need not enter upon as to whether or not he has a duty to give some public notice of the wreck.

If he does not abandon the vessel he either retains possession and control (by which I understand that he has and retains power by due care and exertion to remove the wreck altogether or to shift its position so as to prevent it from being a source of danger), or he is temporarily forced entirely away from the wreck. So long as he retains possession and exercises the dominion and control of an owner of the wreck he is under an obligation to use reasonable care to warn other vessels of her position and to remove the obstruction with reasonable diligence. If the owner be temporarily forced away from the vessel, but does not abandon and intends and has the power to salve the property, it would seem that his duty is the same though the circumstances will affect the manner of its discharge. *The Douglas* appears to have been a case of this kind, and to have been decided on the ground that in the circumstances the crew were unable to more than give notice to the harbour authorities, who had the powers conferred by the Removal of Wrecks Act, 1877, and obtain their undertaking to light the wreck in that case. See especially the judgment of Lord Coleridge, 7 P. D., at p. 158.

If actual possession and control be resumed the owners' obligation is of course the same as when he retains possession and control.

If the owner transfer the wreck to some other person who takes from him possession and control thereof, such person takes over the duties and liabilities: *White* v. *Crisp*. The owners' position is succinctly stated in Addison on Torts (6th ed.), at p. 618, and in Angel on Nuisances, p. 83. If, however, the owner having the possession and control in the sense above stated merely employ another person to raise and remove the wreck for him, there is no transfer of the wreck, and although the person employed may be placed in actual physical custody of the wreck the owner does not, in my opinion, discharge himself from the duty towards the public which rested upon him of using reasonable care to warn other vessels of the position of the wreck, which remains his property. Even if the other person be expressly employed on the terms that he shall light the wreck properly during the salvagé operations he is employed by the owner to discharge for the owner a duty which rested upon the latter. The owner does not get rid of his liability by employing someone to perform it for him. The case is not precisely the same but presents an analogy to the cases of which *Hardaker* v. *The Idle District Council* is one. The owner has a duty to perform—viz., to use reasonable care to warn other vessels of the position of the wreck, and cannot, in my judgment, escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor.

The case of *The Utopia*, rightly understood, appears to me to support these views, and not to detract from them. There a vessel was wrecked in Gibraltar Bay, and the port authorities took from the owners and assumed the task of protecting other vessels from the wreck, and neglected that duty. It was held that the owners of a vessel colliding with the wreck could not proceed against the wreck for their damages. The ground of the decision, as I pointed out in *The Ripon City*, [1897] P. 226, at p. 239, 45 W. R. Dig. 153, was that the authorities had taken action within the apparent scope of their powers as port authority, and that the owners could not therefore be made liable, nor the wreck proceeded against for their default. It was in fact a case of *vis major*, and not a case where another person was voluntarily employed by the owners to perform their duty for them. The greater part of the reasoning of the judgment would have been unnecessary if the Judicial Committee of the Privy Council had thought that the owners could get rid of their liability by delegating their duty to an independent person. The argument forcibly addressed to me by Mr. Batten, that there is no difference between the case of an owner of a wreck sunk in and obstructing a navigable river and that of an owner who employs a contractor to navigate her in ordinary circumstances from one place to another as regards his duty to the public appears to me to be fallacious.

In the one case the wreck is a dangerous nuisance, and the owners' rights and liabilities are such as I have already stated. In the other case there is only an employment by the owner of a contractor to do work about which there is no danger if properly performed, and not an employment to discharge a duty which rests upon the owner: see the judgment in *Hardaker* v. *The Idle District Council*.

In the present case the defendants' men were temporarily driven off *The Snark* by her sinking, but the defendants afterwards employed Forrest to raise the wreck, and placed him in possession and control for that purpose.

Forrest neglected to discharge the defendants' duty to use reasonable care to warn other vessels, one of which was the plaintiffs', of the position of the wreck, and for this negligence the defendants are, in my opinion, liable.

Moreover, it is to be noticed that the defendants did not instruct Forrest to light the wreck. Nothing whatever was expressly arranged about this at any time. It was merely left to him to do what he considered necessary to raise and remove the wreck.

In conclusion, I desire to note that, as this is an action *in personam*, I have not entered upon any questions as to the right of the plaintiff against the *res*.

My judgment is for the plaintiff against the defendants for an amount of damages to be assessed by the registrar and merchants, and costs.

Solicitors for plaintiffs, *Stokes & Stokes*.

Solicitors for defendants, *J. A. & H. E. Fairfield*.

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 7, 8.

In re MOORE BROTHERS & CO. (LIMITED). (*a*.)

Company—Prospectus—Directors—Shares—Statement in prospectus that directors would take shares—Liability to take shares—List of contributories.

A prospectus of a company, approved by the directors at their first meeting, stated that the whole of the ordinary shares not taken by the vendors to the company would be taken by the directors. The register of shareholders did not contain the names of any of the directors, nor were any shares allotted to them. In the winding up of the company the liquidator applied for a balance-order against B., one of the directors, in respect of 367 unallotted ordinary shares.

Held, by the Court of Appeal (*reversing* Wright, J.), *that there was no evidence of an agreement by B. to take any definite number of shares, and that therefore he was not liable to be put on the list of contributories.*

Appeal from Wright, J.

The articles of association of the above-named company included the following articles:

"77. Until otherwise determined by a general meeting the number of the directors shall not be less than three nor more than six. The following gentlemen shall be the first directors of the company—viz., Alfred Watson, James Moore, William Moore, Henry Blatch Wells, Milton Bartholomew, Robert Colman.

"78. The qualification of every director shall be the holding of shares or stock of the company of the nominal value of £500."

At the first meeting of the directors, held on the 28th of October, 1893, and attended by all the directors, the following minute was passed: "The draft prospectus was approved and settled, and the secretary was instructed to place same in the printer's hands." The prospectus as printed gave the names and addresses of the six directors, and contained the following statements: The capital of the company was "1,500 ordinary shares of £20 each (the whole of which will be taken by the directors), 750 £6 per cent. preference shares of £20 each, and 300 £5 per cent. debentures of £50 each."

"The vendors, after discharging every liability up to the date of purchase, will reinvest the whole of the purchase-money in the company, principally in the ordinary stock, on which they will receive no dividend until the £5 per cent. interest on the debentures and the £6 per cent. dividend on the preference shares have been paid. Seeing that—with the other directors—they take the whole of the ordinary shares, investors have the best possible assurance that every effort will be made to ensure the prosperity of the company's business."

Applications from the public were invited for the preference shares and the debentures. Three of the directors, Messrs. Watson, Wells, and Colman, having been placed on the list of contributories in respect of ordinary shares by Romer, J., a question was afterwards raised in the liquidation of the company, on an application for a balance-order against Mr. Bartholomew, another director, whether he was liable, on the faith of the statements in the prospectus, to be placed on the list of ordinary shareholders. It appeared that none of the four directors named had ever had any shares allotted to them, nor had their names been placed on the register of members. The liquidator of the company applied to make Mr. Bartholomew liable for 367 ordinary shares, being the balance remaining after the vendors and others had taken up their shares.

Wright, J., held that the statement in the prospectus was evidence of an agreement by the directors to take all the ordinary shares not taken by the vendors, and that the four directors were jointly and severally liable for the 367 shares.

There had been no appeal from the decision of Romer, J., placing Messrs. Watson, Wells, and Colman on the list of contributories.

Mr. Bartholomew appealed.

Haldane, Q.C., and *Gore Browne*, for the appellant.—There is no express contract here by the directors to take shares. Even if there were an express contract, the company made it impossible for the directors to fulfil their contract by the allotment of shares to other applicants, and the company never regarded the directors as bound by their contract. [They were stopped by the court.]

Grosvenor Woods, Q.C., and *Sheldon*, for the liquidator.—The only case with a representation in the prospectus at all similar to this is *In re Wood's Ships Woodite Protection Co.*, 2 Meg. 164, 38 W. R. Dig. 36. The meaning is that the directors will take all the ordinary shares other than those which by arrangement with the company the vendors will take. The directors are bound as between themselves and the company to take the shares. It certainly amounted to a contract by the directors to take the shares.

They referred to *Isaacs' case*, 40 W. R. 518, [1892] 2 Ch. 158; *In re Hercynia Copper Co.*, 42 W. R. 593, [1894] 2 Ch. 403; and to *Moore and De La Torre's case*, 22 W. R. 873, L. R. 18 Eq. 661.

Whinney, for Mr. Watson.

T. L. Wilkinson, for Messrs. Wells and Colman.

LINDLEY, M.R.—It is not from any desire to get Mr. Bartholomew off any obligation which he may have contracted that I fail to agree with Wright, J., because one would like to put this director on the list of contributories if one could. That is my own personal view, but I feel we cannot do it unless we invent a contract, and we have no business to invent a contract in order to do what we think would be fair.

Mr. Bartholomew complains of an order which has put him on the list of contributories and made him pay calls on 367 shares in this company. We are told that he was one of the original directors of the company and one of the promoters. Before the company was wound up, and whilst the company was a going company, he was never registered in respect of any shares, and there is no trace of any agreement whatever between him and the company that he would take any definite number of shares, or that the company would give him any definite number of shares. Nor was there in truth any agreement at all between him and the company that he should have, or that the company should give him, any definite number of shares at all. But there is a very important document, to which I will allude presently, from which it is said that we must infer that there was an agreement between him and the company that he should have 367 shares. That document is the prospectus. The company was registered on the 4th of October, 1893, and Mr. Whinney has stated that the prospectus was framed before that, and was sent by Mr. Bartholomew to Mr. Watson and approved of by Mr. Watson as the prospectus for the then unformed company as early as September, 1893. Now, I pause there for a moment. What did the language of the prospectus

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

mean, then, in September, 1893, when Mr. Bartholomew approved it? It meant this, that the directors would take the 1,500 ordinary shares of £20 each. You cannot turn that by any possibility into anything like an agreement with the company. At the outset it is an expression of an intention. "When the company is formed we will enter into an agreement with the company to take those shares." That is the very outside. Now, when the company was registered Mr. Bartholomew became a director, and he does not dispute that he did become a director. There may be some question hereafter whether he became liable to take his qualification shares. We have not considered that, and I say nothing more about it. I refer only to his obligation to take 367 shares. On the 28th of October, 1893, the directors met, and Mr. Bartholomew was present, and at that meeting the draft prospectus was approved and settled, and the secretary was instructed to place the same in the printer's hands. This was the prospectus which Mr. Bartholomew previously sent to Mr. Watson in September, 1893. It is headed "Moore Bros. & Co. (Limited)." "Capital 1,500 ordinary shares of £20 each, the whole of which will be taken by the directors." That comes to £30,000. Then we have a statement about the vendors, and there is this paragraph: "Seeing that with the other directors they"—the vendors—"take the whole of the ordinary shares, investors have the best possible assurance that every effort will be made to ensure the prosperity of the company's business." If we had to consider what effect that prospectus had upon any complaint made by a person who took shares in this company on the faith of that statement we might possibly come to some conclusion which would be advantageous to the person bringing such an action; but we have not to consider anything of the sort. We have to consider the question whether this statement in the prospectus amounts to satisfactory proof, not merely whether the document is admissible as evidence, but whether it is satisfactory proof that there was an agreement between Mr. Bartholomew and the company that he would take and that the company would allot to him 367 shares, that being the total amount of ordinary shares not allotted. Wright, J., has come to the conclusion that upon the true construction of this prospectus, and upon the fact that it was issued by the directors at that meeting on the 28th of October, 1893, all the directors are jointly liable for these 367 shares; that is to say, he treats it not only as evidence of an agreement, but as satisfactory proof of an agreement between them and the company that they were all of them bound to take these 367 shares. I cannot come to that conclusion at all. It appears to me, in the first place, that if it is evidence of any agreement between the directors and the company, the true construction is not that at all. I cannot possibly get out of this language a contract that all the directors shall take jointly all the shares which are unallotted. The true meaning of it, as I apprehend, is the same as the meaning before the company was formed, that is to say, that some arrangement will be made with the company by which, if other people do not take these shares, they, the directors, will take them in some proportions which they will settle amongst themselves. There is nothing definite about it at all. So far from its being an agreement with the company it is, at the very outside, evidence of an intention on the part of the directors that some agreement shall be entered into, which agreement has to be considered afterwards. One director might apply for some shares, and another director for others, but to spell out of this an agreement between the company and the directors that the company will allot, and that the directors will take jointly 367 shares—or in Mr. Bartholomew's case that he will take 367 shares—is in my judgment not to infer an agreement in conformity with the intention of the parties, but to invent an agreement in order to catch a man who is considered to have behaved shabbily. I cannot go that length.

I think that the agreement, which alone will justify us in putting Mr. Bartholomew on the list of contributories, or making a call upon him for the 367 shares, cannot be got at fairly from these materials. I think therefore that the appeal must be allowed with costs.

RIGBY, L.J.—I am of the same opinion. The contention must be carried to this extent—that the company were bound to allot these shares to the directors. I can find no evidence of that at all. We know, as a matter of fact, that outside this prospectus there was no agreement. When we are construing the prospectus it must be shown that the company is bound. I do not see any evidence of the company being bound. I agree in the construction that must be put upon it—that it is not an agreement that they will take all the shares. It is only a statement that the shares will be taken up by some or other of the directors. And you cannot fix them all with the whole 367 shares.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. Two learned judges, Romer, J., and Wright, J., having apparently arrived at a conclusion that there is a liability on these directors to be placed upon the list of contributories, I think it is perhaps better for me to express my own reasons for a contrary view.

In my opinion it is plain that there is no membership by these directors of this company in respect of these shares. Indeed, it is not suggested that there is. I think that it is also plain that there is no contract by these directors to take these shares. What is said is, that a contract may somehow or other be spelt out of this prospectus. Now, the statements in the prospectus on which reliance is placed are these: "Capital 1,500 ordinary shares of £20 each, the whole of which will be taken by the directors." That is a passage in the statement of the items of the capital. Then the prospectus goes on to say that the vendors, after discharging every liability up to the date of purchase, will reinvest the whole of the purchase-money in the company, principally in the ordinary stock, on which they will receive no dividend until the £5 per cent. interest on the debentures and the £6 per cent. interest on the preference shares has been paid. It continues: "Seeing that, with the other directors, they" (which I suppose means the vendors) "take the whole of the ordinary shares, investors have the best possible assurance that every effort will be made to ensure the prosperity of the company's business."

Now, the first contention was, that you can find a contract there upon the principle of an estoppel. I can only say that I entirely agree with Wright, J., when he says that he cannot see how any contract can possibly be found here upon the principle of an estoppel. If there were an estoppel at all it would have to be an estoppel between the directors and the company, whose prospectus this was.

Then it is said, even if you cannot find a contract by estoppel, this statement in this prospectus is evidence of an agreement between these directors and the company. According to my understanding, it cannot be evidence of anything.

As I understand, the judgment of Wright, J., is based merely upon an application of the principle on which *Isaacs' case* was decided. But in *Isaacs' case* there was an offer by the company to persons who should become directors. There was a statement of

the terms upon which persons could become directors, and the persons with those terms before them afterwards chose to become directors, and the decision only is that by becoming directors they accepted those terms, and therefore contracted to take the shares in accordance with those terms. There is nothing of the sort here, because there is no offer of any sort or kind by the company which could be said to be accepted by the directors by their becoming directors, because they were already directors at the moment when this prospectus was issued. I rather understand Wright, J., to suggest that the issuing of the prospectus itself is evidence of an offer by the company of these shares, and an acceptance by the directors of them *uno flatu* at the moment when the prospectus was issued on behalf of the company by these directors. It seems to me to be impossible to say that, because that involves saying really that the company on the one hand were bound to allot these shares, and that the directors on the other hand were bound to accept them. It was not even suggested to us in argument that that state of things existed. It was not and could not be suggested that the result of the issue of this prospectus was that the company ceased to be at liberty to deal with these shares. That being so, the suggestion made was, not that there was an immediate contract to take the shares, so that from that moment the directors either became shareholders or became compelled to take the shares, but that there was a contract by the issue of this prospectus that the directors would at some future time take so many of the shares as should remain unallotted after the vendors had taken as many of them as they chose to take—and that they were intended to take some is plain from the prospectus itself—and after the company had allotted as many of these shares to the outside public as they might think fit so to allot. I cannot find any evidence of any such contract from the words of this prospectus, nor have I any hesitation in coming to the conclusion that there is no evidence of such contract. But if I had any hesitation in the matter, it would go far to remove any such hesitation to find that you have a document here which is so obviously vague and uncertain that no court ought to set itself to try and see whether a contract can be spelt out it.

In my judgment Mr. Bartholomew is not liable to remain on the list of contributories; I think that he incurred no liability by reason of any estoppel; and I think there is no evidence whatsoever that he made any contract to take any number of shares.

Appeal allowed.

Solicitors, *Ranger, Burton, & Frost; G. A. King; Taylor, Hoare, & Pilcher*, for *Nodder & Trethowan*, Salisbury; *Long & Gardiner*, for *Arthur Whitehead*, Salisbury.

From Q. B. Div.
(Earl of Halsbury, L.C., and A. L. Smith and Collins, L.JJ.) — Jan. 25.

AGIUS v. GREAT WESTERN COLLIERY CO. (LIMITED). (a.)

Damages, Measure of—Contract for sale of coals to ship—Sub-contract by vendor with colliery owner—Costs of reasonably defending action by shipowner—Solicitor and client costs.

The plaintiff, a coal merchant, entered into a contract with a shipowner for the supply of bunker coals to ships over a certain period, and, in order to carry out this contract, the plaintiff entered into a contract with the defendants, who carried on business in the same place, for the supply of coals to the ships for the same period. The defendants having made default in the supply of coals, one of the ships was detained in dock, and the shipowner brought an action against the plaintiff to recover damages for the detention arising from the breach of contract. The plaintiff gave notice of the claim to the defendants, who repudiated liability. The plaintiff accordingly defended the action and paid a sum of money into court. At the trial it was held that the amount paid into court was sufficient to satisfy the shipowner's claim, and judgment was entered for the shipowner for the amount so paid into court, with costs up to the time of the payment into court, the plaintiff to have the costs of the action subsequent to that time. The plaintiff thereupon sued the defendants for breach of contract, claiming as damages (1) *the sum recovered by the shipowner in the former action,* (2) *the costs paid to the shipowner, and* (3) *the difference between the plaintiff's costs of the action, taxed as between solicitor and client, and the party and party costs subsequent to the time of the payment into court which he had recovered from the shipowner.*

Held, that, as the plaintiff had, in these circumstances, acted reasonably in defending the former action, he was entitled to recover, in addition to items (1) *and* (2), *the difference between the solicitor and client costs of the action, taxed upon the footing that another person was going to pay them, and the party and party costs subsequent to the payment into court.*

Hammond *v.* Bussey, 20 *Q. B. D.* 79, 36 *W. R. Dig.* 65, *followed.*

Baxendale *v.* London, Chatham, and Dover Railway Co., 23 *W. R.* 167, *L. R.* 10 *Ex.* 35, *discussed.*

Appeal from the judgment of Channell, J., in favour of the plaintiff at the trial without a jury of an action to recover damages for breach of a contract for the sale of bunker coals.

The plaintiff was a coal merchant at Cardiff, and the defendants were the owners of a colliery in the neighbourhood. In May, 1896, the plaintiff entered into a contract with a firm of shipowners for the supply of a quantity of bunker coals for their steamers f.o.b. Cardiff, shipment there till the end of 1896. The plaintiff, in order to carry out this contract, on the same day made a contract with the defendants for the supply of a quantity of bunker coals f.o.b. Cardiff, for the shipowners' steamers, as required till the end of 1896. The defendants made default in the supply of coals to one of the steamers as required, and in consequence thereof the ship was detained in dock at Cardiff, and in respect of this breach of contract the shipowners made a claim against the present plaintiff for £150 damages for the detention of the ship. The plaintiff thereupon informed the present defendants of the claim against him, when the present defendants said that the claim was preposterous, and repudiated any liability. The shipowners then commenced an action against the plaintiff, and the latter paid £20 into court. At the trial before Bruce, J., it was held that the £20 was sufficient to satisfy the claim, and judgment was accordingly entered for the shipowners for that amount with costs up to the time of payment into court, the present plaintiff recovering from the shipowners his costs of the action subsequent to the payment into court.

The plaintiff then brought this action against the defendants to recover, as damages for their breach of contract, (1) the above-mentioned sum of £20, (2) the taxed costs which he had to pay to the shipowners, up to the time of payment into court, and (3) the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

difference between the plaintiff's costs of the action taxed as between solicitor and client, and the party and party costs which he had recovered from the shipowners.

At the trial Channell, J., held that the plaintiff had acted reasonably in defending the former action and paying the £20 into court, and he gave judgment for the plaintiff for the first two items; and as regards the third item, he directed that the plaintiff's costs of the former action should be taxed as between solicitor and client upon the footing that another person was going to pay them, according to the scale of taxation recognized for that purpose, and that the amount so ascertained by taxation, less the party and party costs received from the shipowners, should be paid by the defendants.

The defendants appealed.

S. T. Evans, for the defendants.—There having been a breach of contract the plaintiff is entitled to recover the £20. But the costs of the former action are not recoverable. Where there are two separate and independent contracts, in order that the costs may be recoverable there must be a contract of indemnity express or implied: *Baxendale* v. *London, Chatham, and Dover Railway Co.*, 23 W. R. 167, L. R. 10 Ex. 35; *Fisher* v. *Val de Travers Asphalte Co.*, 1 C. P. D. 511, 24 W. R. Dig. 72. Such costs are not damages which may reasonably be supposed to have been in the contemplation of the parties when they made the contract within the rule in *Hadley* v. *Baxendale*, 2 W. R. 302, 9 Ex. 341. This is so even though the plaintiff may have reasonably defended the former action. The contracts being independent, the damages in each case are different. In *Hammond* v. *Bussey*, 20 Q. B. D. 79, 36 W. R. Dig. 65, the former cases are discussed, but they are still law. [He also referred to *Mors le Blanch* v. *Wilson*, 21 W. R. 109, L. R. 8 C. P. 227; *Grébert Borgnis* v. *Nugent*, 15 Q. B. D. 85, 33 W. R. Dig. 70.] Secondly, if the costs are recoverable, costs as between party and party, and not as between solicitor and client, are alone recoverable, there being no contract of indemnity: Mayne on Damages (5th ed.), pp. 84-86.

Bailhache, for the plaintiff.—The plaintiff, in defending the action brought by the shipowners, acted reasonably, and therefore the costs of doing so are recoverable under the second branch of the rule in *Hadley* v. *Baxendale*. The plaintiff and defendants are in the habit of supplying coal to ships, and the defendants knew of the plaintiff's contract with the shipowners, and it must have been in the contemplation of the parties that if the contract was broken the ship would be detained, and an action involving costs might arise. *Fisher* v. *Val de Travers Asphalte Co.* was decided upon a wrong view of *Baxendale* v. *London, Chatham, and Dover Railway Co.* —see *Hammond* v. *Bussey*, 20 Q. B. D., at p. 92—the decision in *Baxendale's case* being based upon the fact that the costs were unreasonably incurred. If that was not the ground of the decision, *Hammond* v. *Bussey* is inconsistent with it, and being later in date should be followed. Therefore all reasonable costs of defending the action and ascertaining the damages, and not merely party and party costs, are recoverable.

Lord HALSBURY, L.C.—In my opinion this appeal should be dismissed. The questions argued may be disposed of shortly. There was ample evidence of the breach of contract, and indeed this was very faintly contested at the trial. The breach being proved, the only question is as to the amount of the damages caused by that breach. The question to be determined is whether the costs of defending the former action can be recovered. Certainly in the circumstances of this case, if the plaintiff cannot recover those costs from the defendants, it would be a most unreasonable state of the law, because he succeeded in the former action in reducing the damages claimed, £150, and recovered from the shipowners the taxed costs of the action subsequent to the payment into court. Therefore his defending that action enured to the benefit of the present defendants. Nevertheless, the defendants now contend that they are not liable for the loss which the plaintiff has thus sustained by reason of the breach of contract on their part. I am glad to say that such is not the law. The principle laid down in *Hadley* v. *Baxendale* has been always treated as the guiding principle upon the question of the measure of damages—namely, that if the particular damages are such as may be fairly and reasonably considered as arising naturally from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it, then those damages can be recovered. We must apply that principle to the present case. The parties live in the same place and are familiar with the coal business, both of them being in the habit of supplying coals to steamships in a tidal harbour. It was clear to both that a breach of the contract might give rise to a claim in the nature of damages. If a claim was made it would be reasonable for the party sued to take steps to show either that a breach of contract had not been committed or that the damages claimed were extravagant; and indeed he would be guilty of bad conduct towards the other if he did not take steps to prove that extravagant damages should not be awarded. Then the question arises, can he recover the costs of doing so as being reasonably incident to the breach of contract? But for the case of *Baxendale* v. *London, Chatham, and Dover Railway Co.*, I should have thought that it was reasonable that he should recover those costs. I can see no distinction in such a case between the costs reasonably incurred in reducing the damages and ascertaining their amount, and the expenses of a surgeon attending upon a person who has been injured by a negligent act. Undoubtedly the case of *Baxendale* v. *London, Chatham, and Dover Railway Co.* raises a difficulty. The facts in that case raise no question of difficulty, because the defence in the former action was unsuccessful and was held to be unreasonable. That case shows that the costs of defending such an action are not recoverable. But unfortunately the judges thought it right, in dealing with the case of *Mors-le-Blanch* v. *Wilson*, to use certain expressions with which I feel a certain difficulty in agreeing. But there is a later judgment in *Hammond* v. *Bussey* in which those expressions are commented upon, and, as it seems to me, the judges felt some difficulty in understanding them or agreeing with them. I prefer the last decision, which I think right, and the earlier decision can be well supported on the first ground upon which it was decided. In my opinion the judgment of Channell, J., was right and must be affirmed.

A. L. SMITH, L.J.—I am of the same opinion. The plaintiff entered into a contract with certain shipowners to supply bunker coal to a ship, and not having the coal himself he entered into a contract with the defendants that they should supply the coal. It is clear that the defendants knew of the contract with the shipowners. What was in the contemplation of the parties at the time they made the contract as the probable result of a breach of it? The principle is laid down in *Hadley* v. *Baxendale*. Obviously the defendants knew that the plaintiff wanted the coal for the ship's bunkers, and they knew that the shipowners would have a claim

against the plaintiff if he broke his contract, and that that claim would have to be defended or admitted. The plaintiff in fact broke his contract with the shipowners, and the shipowners, brought an action against him for not having supplied the coal in time. The plaintiff went to the defendants and told them that an action had been brought against him owing to their breach of contract with him. The defendants said that the action was preposterous and that the shipowners had not a leg to stand upon. The meaning of that was that the plaintiff was not to sit down under the action. The learned judge held that he had acted reasonably in defending the action. He paid £20 into court, which was held sufficient to satisfy the shipowners' claim against him. The present defendants now admit that they must pay those damages, but they contend that they are not liable to pay the costs which he necessarily incurred in ease of the defendants. I cannot see the dividing line. I cannot see why the defendants should not pay them. In *Baxendale* v. *London, Chatham, and Dover Railway Co.* the court came to the conclusion that the defence was an unreasonable one, and upon that basis the decision was clearly right, whatever other reasons the court may have given. Then came the decision in *Fisher* v. *Val de Travers Asphalte Co.*, which merely followed what the court supposed was the decision in *Baxendale* v. *London, Chatham, and Dover Railway Co.* Lastly, those cases were discussed in *Hammond* v. *Bussey*. Bowen, L.J., at anyrate felt a difficulty in understanding the other grounds, if they were grounds, for the decision in *Baxendale* v. *London, Chatham, and Dover Railway Co.* The case of *Hammond* v. *Bussey*, in my opinion, covers this case entirely, and the law is now placed upon a proper footing by the judgments delivered in that case.

CHITTY, L.J.—I am of the same opinion. According to the second branch of the rule in *Hadley* v. *Baxendale* the damages recoverable must be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. The plaintiff and the defendants lived in the same place. Upon the face of the contract the coal was sold to be put on board particular steamers. Therefore the defendants knew that the coal was intended for certain ships. In my opinion the case as regards the damages falls within the rule laid down in *Hadley* v. *Baxendale*. Then as regards the costs. The course the plaintiff pursued in contesting the shipowners' claim was reasonable, and resulted in benefit to the defendants in the present action, because the claim was for £150 damages, and the sum actually did not exceed £20, and as he had paid £20 into court he got the costs of the action subsequent thereto. Therefore the action was defended, not simply for the benefit of the present plaintiff, but for the benefit of the present defendants also. As regards the authorities, I need only say this, that the decision in *Hammond* v. *Bussey* is well founded, and whatever difference there may be between it and the other cases, we must follow *Hammond* v. *Bussey*. It was contended that the plaintiff was only entitled to recover party and party costs. I think that the decision of Channell, J., was right. He has given the plaintiff the costs reasonably incurred by him; not all the costs he has had to pay his own solicitor, but such costs as would reasonably have been paid by another person.

Appeal dismissed.

Solicitors for plaintiff, *Williamson, Hill, & Co.*, for *Ingledew & Sons*, Cardiff.

Solicitors for defendants, *Downing, Bolam, & Co.*, for *Downing & Handcock*, Cardiff.

High Court of Justice.

Chan. Div. North, J. } Jan. 19.

ATTORNEY-GENERAL v. RUFFORD & Co. (a.)

Local government — "New street" — Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 63— —*Public Health Act*, 1875, *s.* 157.

The decisions under section 157 *of the Public Health Act*, 1875, *as to what is a new street apply in considering what constitutes a "new street" in section* 63 *of the Towns Improvement Clauses Act*, 1847.

Elements constituting a "street" considered.

Motion.

The plaintiff, the Attorney-General, on the relation of the Urban District Council of Stourbridge, claimed an injunction to restrain the defendants from erecting any buildings adjoining or abutting on Brick Kiln-lane so as to make or lay out that lane as a new street less than 30 ft. wide. Brick Kiln-lane was a highway repairable by the inhabitants at large and varied in width from 19 ft. to 29 ft.

On one side of the lane there already stood the defendants' factory, which covered some 480 ft. out of the total length of the lane of 580 ft. There were two small cottages on the same side but lower down the lane; on the other side of the lane there were also two cottages, but no other buildings, and the defendants proposed to erect there, opposite their factory, a building some 240 ft. in length. The lane was bounded by hedges except in front of the cottages and the plaintiff's factory.

The proceedings were taken under section 63 of the Towns Improvement Clauses Act, 1847, which applied to Stourbridge by incorporation in a local Act. That section enacts: "It shall not be lawful to make or lay out any new street unless the same be of the prescribed width, or, where no width is prescribed, unless the same, being a carriage road, be at least 30 ft. wide, or, not being a carriage road, be at least 20 ft. wide."

Farwell, Q.C., and *R. Cunningham Glen*, for plaintiff. —There is no case under section 63 of the Towns Clauses Act, 1847, as to what is a street within the meaning of that section, but we submit that the decisions on the Public Health Act, 1875, s. 157, apply, and this is a new street within those decisions: see *Robinson* v. *Barton Local Board*, 32 W. R. 249, 8 App. Cas. 798; *Hendon Local Board* v. *Pounce*, 33 W. R. 377, 42 Ch. D. 602.

Neville, Q.C., and *R. E. Moore*, for the defendants.— This is not "street" and the cases cannot make it so; it is a question of fact, and here there is no continuity of buildings, but merely isolated buildings.

NORTH, J.—I think I must hold that this is a new street within the meaning of the decisions on the Public Health Act, 1875. There is a difficulty no doubt in saying when some country lane has become a street, as is pointed out by the Master of the Rolls in *Robinson* v. *Barton Local Board*, when he says: "Now, there are two ways in which a street may come into existence where there was no street before. A person may take a grass field or a country lane (for in my opinion it makes no difference whether or not there was a public highway or lane or a footpath existing before which is thrown into the street and is utilized, or whether there was nothing but a mere plot of grass land out of which a new highway is made), he may take it and build continuous lines of houses so as to

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

form what is commonly known as a street. When I say continuous lines, I do not mean that there are to be no breaks or intervals, but there must be a certain degree of continuity." Then he points out another way in which a street may arise and says that is, "where it is not from the first laid out as a street in a formal manner but may be considered to grow up, so to say, of itself. This often happens when there is an existing highway and people build houses along the sides of the highway, so that without any intention of laying out a street, the street grows. When does it become a street? This question cannot be answered until you know the locality." No doubt there may be great difficulty in saying in such a case as the latter when it does become a street. He points out that when you have continuous lines of buildings on both sides, that is one way in which the property becomes a street. He also points put that a new street does not mean necessarily a street between continuous lines of houses without any break or interval but that there must be a certain degree of continuity.

In this case, there being buildings extending on the one side for 400 ft., it is now proposed to put up a building which will extend about 230 ft. or 240 ft. along the other side opposite to them. Suppose that, instead of putting up a continuous building there, a row of cottages of that length had been put up—perhaps twelve to twenty cottages—could it be said that that was not a new street? Counsel for the defendants did not suggest that that would not be so, but he said there was a difference between that case and this. In a certain sense there is. What they are doing here is defining the line of the road—I do not use that in a technical sense, but a general sense—defining the road on which people are to pass by fixing walls and by altering the state of things so that there will be walls on each side limiting the road to that particular space. I must say I think that what will be the line of road between those walls will be a new street within the meaning of the Act. I think that I am justified in coming to that conclusion, not only by the views expressed by Lord Selborne in the case cited (*Robinson* v. *Barton Local Board*, but also because I am conforming to the views of Sir George Jessel in the same case.

Solicitors, *Smiles & Co.*, for *W. W. Goddard*, Stourbridge; *Church, Rendall, Todd, & Co.*, for *C. H. Collis*, Stourbridge.

Chan. Div. North, J. } Dec. 15.

In re BENNETT.
CLARKE *v.* WHITE. (*a.*)

Mortgage—Public-house—Goodwill—Locke King's Act, 1854 (17 & 18 *Vict. c.* 113).

On a mortgage of a public-house the goodwill is not included unless expressly mentioned.

The plaintiff in this case was entitled to the proceeds of the sale of the goodwill of the testator's business, and the defendants were entitled to the proceeds of sale of the freehold where such business had been carried on.

The testator in 1871 mortgaged the public-house the "Buck's Head," at which he carried on the business of licensed victualler. The testator was then the freeholder of the "Buck's Head," having previously been in as lessee. The mortgage was a mortgage in fee, and nothing was said about the goodwill. The testator died in 1873, having by his will bequeathed, *inter alia*, the goodwill of his business to his trustees on trust for sale, and in the events which happened the plaintiff became absolutely entitled to the proceeds of the sale of the same. The testator also devised his real estate to his trustees on trust for sale and conversion, and the defendants were now entitled to the proceeds of the sale of the said real estate. The trustees of the will had paid off the mortgage debt, and taken a reconveyance of the "Buck's Head" to the uses of the will. The mortgagees had never entered into possession. The "Buck's Head" had been sold by the trustees for £11,550, including the goodwill.

In some earlier proceedings relating to the testator's estate an order had been made by consent admitting that the value of the goodwill of the business of the testator, as distinct from the value of the freehold, ought to be paid to the plaintiff in this action, and referring it to a valuer to assess the same. The valuer had found the value of the goodwill to be £2,617. The question now was whether the goodwill, as represented by the sum of £2,617, ought to bear any portion of the mortgage debt, or whether the mortgage debt ought to fall entirely on the sum realized on the sale of the "Buck's Head," deduction being made of the value of the goodwill.

Methold and *Rowden*, for plaintiff.—The goodwill did not pass to the mortgagees: *Whitley* v. *Challis*, 40 W. R. 291, [1892] 1 Ch. 64. The goodwill of a public-house is separable from the building: *West London Syndicate* v. *Inland Revenue Commissioners*, *ante* p. 125, [1898] 1 Q. B. 226, [1898] 2 Q. B. 507. The mortgage debt must be paid out of the value of the freehold alone.

W. M. Cann, for defendants.—The mortgage included the goodwill which attaches to the public-house; such a goodwill is not a personal goodwill. The mortgagees would have been entitled to the goodwill on taking possession: *Booth* v. *Curtis*, 17 W. R. 393; *King* v. *Midland Railway Co.*, 17 W. R. 113; *Pile* v. *Pile*, 24 W. R. 100, 3 Ch. D. 36; *Ex parte Punnett*, 29 W. R. 129, 16 Ch. D. 226; *Cooper* v. *Metropolitan Board of Works*, 32 W. R. 709, 25 Ch. D. 472; and see *West London Syndicate* v. *Inland Revenue Commissioners*.

Rowden in reply.

NORTH, J.—I think in this case the mortgage does not include the goodwill. Bennett, down to the time of his death had been in possession of the property. The mortgagees were never in possession. After Bennett died the property was from time to time let by the tenant for life, and ultimately by the trustee to a person for a term which expired only when the tenant for life died in April, 1897. During the whole of that time down to April, 1897, the mortgagees were never in possession of the property at all; they never had any goodwill conveyed to them in terms, and they never had any *de facto* goodwill from being in actual enjoyment of the property and being known to be carrying on business on those premises. In May, 1897, the mortgage debt of £1,500 was paid off by the trustee out of the estate of Bennett, and the property was sold. The property was sold for £11,500, and a question then arose between the devisees of the property itself and the legatee of the goodwill as to what their interests were in the purchase-money. That they settled for themselves by means of an order which was made by consent.

But then a point is raised which I quite admit is not precluded by the order made in the former pro-

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

ceedings. That order settles that the assessed value of the goodwill is the plaintiff's; but the question is left open in what way the money paid out of the personal estate by the trustee to pay off the mortgage, is to be made good. It is to be made good out of the property mortgaged, but then the question is whether it was the house only that was comprised in the mortgage, or the goodwill also. Now, there has never been any reference to goodwill as property conveyed by the mortgage, and there has never been anything in the shape of *de facto* acquisition of goodwill by occupation by the mortgagees. They never entered into possession; the possession was first of all in the mortgagor, and after his death in the persons who claimed under him. In those circumstances I do not find anything to show that in this case the goodwill ever did pass to the mortgagee. In those circumstances the cases that have been cited and relied upon by the persons interested in the real estate do not seem to me to apply. The mortgage debt must be borne by the property comprised in the mortgage, and there must be a declaration that the plaintiff is entitled to receive so much of the proceeds of sale as represents the value the goodwill without any deduction therefrom on account of the mortgage debt.

Solicitors, *Peacock & Goddard*, for *Rowland & Hutchinson*, Croydon; *F. G. Evan Jones*.

Chan. Div.
Kekewich, J. } Feb. 21, 22, 24.

In re CLEMENT ET CIE.'S TRADE-MARK. (*a*.)

Trade-mark — Registration — "St. Raphael" — Geographical name—Descriptive name—Fancy word—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (1) (c) (2), 74 (a).

The company had registered under the Patents, Designs, and Trade-Marks Act, 1883, *as their trade-mark a label upon which the words "St. Raphael" appeared several times. On the application by a rival company to have this mark removed from the register unless a disclaimer of the said words was entered,*

Held, that, upon the evidence, the words were not "geographical words"; and that no disclaimer was required; and, further, that the words, being contained in a distinctive label, registered as a whole under the Act of 1883, *need not be disclaimed under section* 74, *inasmuch as they formed a part of the label, and were not additions to it.*

The applicants, the Societé Anonyme du St. Raphaël Quinquina, dealers in a specially prepared tonic wine sold under the name of "St. Raphaël-Quinquina," had applied for the registration in the United Kingdom of a trade-mark consisting of a label bearing the said name prominently and variously printed. The comptroller replied that the mark was incapable of registration owing to the existence on the register of the trade-mark No. 76,176 of the respondents, registered in the class in which the applicants sought to have their mark registered, for "Saint-Raphael Tannin Wine," the words "St. Raphael" also appearing four times on the two parts of the label so registered. The respondents appeared to have applied for the registration of their mark on the 11th of May, 1888. The name and French address of the firm, "Compagnie du Vin de St. Raphael, Valence, Drôme, France," appeared twice on the label as registered. Their firm traded as Clement et Cie. Before 1872 no wine had been sold under the name of St. Raphael. In that year the respondents began to sell their wine at Valence in the Drôme (which has always been their central place of business) under the name of "Vin de Baynals St. Raphael," Baynals or Banyuls (in the Pyrénées Orientales) being the place where their wine has always been grown. About 1873 the insertion of the name "Baynals" was discontinued, and the wine continued to be commonly known as "Vin de St. Raphael" or "St. Raphael's Wine." The evidence was conflicting as to the possible association of the respondents' wine with any place of the name of "St. Raphael." The applicants allege that, besides a town of 5,000 inhabitants near Toulon called St. Raphael, that name belonged to places, at or near each of which there were vineyards, in the several departments of the Alpes Maritimes, Drôme, and the Gironde, and they therefore contended that the name used by the respondents was a geographical name. The respondents, on the other hand, denied that the existence of any place with the name was known to their firm when their wine was named, and further alleged that there was no place with the name in the department either of the Drôme or of the Pyrénées Orientales, nor any place with the name which had a reputation for wine. The applicants asked for the rectification of the register of trade-marks by the removal of the respondents' trade-mark, or alternatively, by adding thereto a disclaimer as to the words "St. Raphael." The question was whether the words were capable of being on the register on the 11th of May, 1888 (date of respondents' application), without a disclaimer, and had therefore to be dealt with under the Act of 1883.

T. R. Warrington, Q.C. (*G. F. Hart* with him), for the applicants.—At that date "St. Raphael" was not a word which could form an essential part of the trade-mark under section 74, and should only have appeared on the register by way of disclaimer under section 64. It should only appear on the register under section 64 if it was a fancy word having no connection with the goods sold under it and not being geographical: *In re Laing*, L. Jour. N. of Cas. (1887), p. 102 ("Glengowrie"); *In re Van Duzer's Trade-mark*, 35 W. R. 294, 34 Ch. D. 623 ("Melrose"); *Great Tower Street Tea Co.* v. *Smith*, 6 Rep. Pat. Cas. 165 ("Tower Tea"). It is submitted, that the name of a mythical person, or even that of an archangel, is no more a fancy word than "Romulus," "Britannia," or "John Bull." Again, "St. Raphael" was common to the trade in the sense of being "open to the trade," according to the applicants' evidence; it was distinctive and was not a word by which "any ordinary person would understand that the name could not be intended to designate the place where this was produced." *In re Magnolia Metal Co.'s Trade-Marks*, 45 W. R. 406, [1897] 2 Ch. 371 (under the 1888 Act), is distinguishable because, Magnolia not being primarily a geographical term, its genesis was ascertained as representing the flower, which itself had been previously a trade-mark: *Burland & Co.* v. *Broxburn Oil Co.* (*Limited*), 38 W. R. 89, 42 Ch. D. 274 ("Washerine"); *In re Sir Titus Salt, Bart., Sons, & Co.'s Application*, 42 W. R. 666 [1894] 3 Ch. 166 ("Eboline"). Not being a fancy word not in common use, it can only appear on the register under section 64—*i.e.*, with a disclaimer.

Ingle Joyce, for the comptroller, awaited the decision of the court.

L. B. Sebastian, for the respondents, said that the case was really covered by the opening words of

(*a*.) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

Lindley, L.J., in *In re Trade-Mark No.* 58,405, '*Bovril*," 45 W. R. 150, [1896] 2 Ch. 600, at p. 604. The case must be looked at as at date of registration, and with reference to this country and Englishmen. In May, 1888, when respondents' business was old-established and was, as always, utterly unconnected with any place St. Raphael, their mark was rightly registered as it stood. No Englishmen knew of the Baynals part of the name. The word "de" was in the name of the company. The *onus* of proof of geographical name was not discharged by the applicants. In the *Magnolia case* there were three or four people in this country who said they were aware of the existence of a place of that name. *In re Van Duzer* it may also be distinguished. The words "St. Raphael" are an integral part of the trade-mark itself, and not an addition. There was no need of a disclaimer, the name of the healing saint having been chosen as an attractive fancy name, with no geographical reference: *In re Smokeless Powder Co.'s Trade-Mark*, 40 W. R. 507, [1892] 1 Ch. 590, 9 Rep. Pat. Cas. 109, *In re Heaton's Trade-mark*, 32 W. R. 951, 27 Ch. D. 570.

T. R. Warrington, Q.C., in reply.—"Distinctive" means "distinguishing the goods of a particular trader from the goods of any other trader," and in cases like the present must be *primâ facie* distinctive. Even if "St. Raphael" is not geographical, then it is not a "fancy" word of its own inherent strength, but is the name of a person, either historical or mythical: *In re Thompson's Trade-Mark*, 13 Rep. Pat. Cas. 35 ("Roadster").

KEKEWICH, J.—So much was made by Mr. Warrington of the distinctive character of the words "St. Raphael" on the respondents' label that I thought it right again to study the evidence which was read in the opening of the case, and before, perhaps, I had appreciated the full weight intended to be given to it. A further perusal of the affidavits has confirmed the impression that the applicants do not establish the geographical character of the words. I do not think that on a comparison of the applicants' and the respondents' affidavits it can properly be held that the respondents adopted those words as intending to refer to any one of the French towns called St. Raphael, and my opinion is that they adopted them for a different reason. It by no means follows that they are not distinctive words, and inasmuch as they were common—that is, open to the trade on the 11th of May, 1888, the date of the respondents' application, it may be held that the provision for the disclaimer extends to them on that ground. I have found great difficulty in ascertaining any rule by which the court is guided in deciding what is a fancy word within the meaning of the 64th section of the Act, 1883, sub-section 1 (*c*). And if the words "St. Raphael" are not fancy words, then the applicants' argument based on the settled construction of the section and sub-section just mentioned deserves much consideration. I do not propose to say more on that point. The respondents take the point that these words St. Raphael, which occur twice on their registered trade-mark, are not added words within the meaning of the 64th section of the Act of 1883, sub-section 2. The Act allows the addition of any letters, words, or figures to the distinctive device, mark, brand, heading, or label sanctioned by the preceding part of the section. And it is obvious that in order thoroughly to understand what is a permitted addition you must first understand the meaning of the language describing the thing to which the addition may be made. Notwithstanding the many cases which have been discussed and decided on this part of the Act, I have not succeeded in discovering any rule laid down for my guidance on this point. I doubt whether there can be found, and I certainly have not found, any explanatory definition by which I could bring to the test a proposed device or label, or an addition thereto, and say whether what is proposed falls within the meaning of the Act. The nearest approach to a guide is to be in the judgment of Chitty, J., in the *Smokeless Powder Co.'s case*, or perhaps I should more properly say in the judgments of Fry, L.J., and Lord Esher, which he there quotes. When studying the respondents' registered trade-mark, and of course it has been my duty to do this with some curiosity, I asked myself which is the device or label and what are the added words. It seems to me that if I strike out the words "St. Raphael" I alter the whole character of the label, and it becomes something quite different from what it is now. Or, to use the language of Lord Esher quoted by Mr. Justice Chitty, the truth is that the label does not consist of each particular part of it, but consists of the combination of them all including the words "St. Raphael." It is noticeable that on the upper part of the label the respondents describe themselves as "Compagnie du Vin de St. Raphael," to which words the applicant does not seek to extend the disclaimer for which they ask. It would be a strange result if the respondents were compelled to disclaim the exclusive use of the words written across the label or standing as a signature on the lower part of it and yet were allowed to retain as part of their trade-mark their description above noticed, and it is also difficult, to my mind, to say why these latter words are not an addition to the distinctive device or label if the words "St. Raphael" standing alone fall within that category.

In my opinion the respondents are entitled to the judgment of the court on this ground, and the summons must be refused with costs.

Solicitors, *Chappell, Griffith, & Broadbent; Frere, Cholmeley, & Co.; Solicitors for the Board of Trade.*

Chan. Div.
Kekewich, J. } Jan. 11, 12.

In re THE SECOND EAST DULWICH 745TH STARR-BOWKETT BUILDING SOCIETY.
MIALL *v.* PEARCE AND STREETER. (*a.*)

Trustee—Building society—Dissolution deed—Absconding trustee—Liability of the inactive co-trustee—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

P., the active trustee of the two trustees of the dissolution deed of a building society, who had been required to give an account of moneys received and expended by them, had absconded. Where the cestuis que trustent *asked, by summons, for the payment by the remaining trustee of the costs of the action which had ensued,*

Held, that S., the remaining trustee, had acted dishonestly—within the meaning of section 3 *of the Judicial Trustees Act*, 1896 — *in permitting his co-trustee to manage the affairs without check or inquiry, and was therefore liable to pay all the costs of the action.*

Summons.

The facts are largely set out in the judgment.

T. Eustace Smith, for the plaintiff G. C. Miall, who, on behalf of himself and all other *cestuis que trustent* under a deed of dissolution dated the 1st of May, 1891, asked by summons that the defendant Streeter should be ordered to pay the costs of the action. On the 11th of November, 1898, an order had been made

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

against Streeter to pay the sum of £391 16s. 4d. found due from Pearce as trustee of the deed of dissolution, of which Streeter was co-trustee. Streeter paid the money into court. He was a small tradesman and trusted entirely to Pearce, who was experienced in the affairs of building societies. Pearce absconded, and it was now contended that Streeter was liable to pay all costs.

T. H. Carson, for the defendant, contended that Streeter, who had been pressed to accept this charitable trusteeship but had left the management entirely in the hands of Pearce, ought not to be made to pay the costs, which no misconduct of his had incurred, and liability for which, would mean his bankruptcy.

Cur. adv. vult.

Jan. 12.—KEKEWICH, J.—It is with the utmost reluctance that the court orders a trustee of this kind to pay costs not only because it is settled practice, but because of the natural and proper sympathy with a trustee who gratuitously undertakes duties in a charitable trust which are often very irksome, so that no one desires to judge his conduct by too rigid lines. Therefore, when I was pressed to make the defendant Streeter pay the costs of the action, I desired an opportunity for reflection, all the more because, although the order would go against both defendants, the burden would fall upon Streeter. Having taken that opportunity, I will now give my decision, and will first go into the history of the case so far as is necessary. This action was commenced so long ago as 1893 by an originating summons, dated the 7th of November in that year. The defendants Pearce and Streeter were the trustees of a deed of dissolution winding-up the affairs of the Second East Dulwich 745th Starr-Bowkett Building Society. The summons merely asked for an account of the moneys received and expended by them under the deed. One would have expected that a common order would be made, so that the matter might be worked out in chambers, but on the 11th of December it was ordered that an account should be taken of all moneys received and expended by the defendants as trustees under the deed of dissolution, and, further, that the rest of the application, so far as it asked that all moneys in the hands of Pearce and Streeter as trustees of the deed be paid into court, and that a receiver might be appointed, should stand over, and the costs were reserved. The certificate reached me in reasonable time on the 4th of June, 1894, the defendant Pearce attending in person; but Streeter not having appeared in the action, judgment went against him by default, the certificate having been made on a joint affidavit. A balance of £100 10s. 2d. was then found due from the trustees and a further order was made. A summons was issued to vary the certificate by surcharging the defendants' account, and by an order dated the 19th of November, 1894, it was ordered that the following inquiries be made—namely, an inquiry what are the consolidated shares of the defendants Pearce and Streeter, and how, when, and under what circumstances such consolidated shares were taken by the defendants, and what became of the shares. The history of the consolidated shares is important. Then there was a further inquiry, What assets are now in the hands or under the control of the defendants Pearce and Streeter as trustees of the deed of dissolution? and it was ordered that the account directed by the order of the 11th of December, 1893, be continued, and the rest of the summons was adjourned. That order was made on the 19th of November, 1894, and the inquiries were much longer. The certificate was not made until the 26th of June, 1896, eighteen months after. That certificate was extremely important; the master had to go into the question of the consolidated shares, and pointed out that large sums were due in respect thereof, and that the dealings in the shares were irregular. A considerable sum was found due from them in respect of those shares, together with a balance of £98 11s. 6d. due on the general account irrespective of those shares. Upon the further consideration in court on the 11th of December, 1895, when Pearce still defended in person, and Streeter appeared before the court by his solicitor, it was ordered that the trustees should pay these sums due on the general account into court; Streeter, by consent, to pay by instalments as arranged. £391 16s. 4d. was the total amount (I will observe that this is about four times the amount originally found due). A receiver was appointed, and the costs were reserved. After all this time the trustees, who ought to have had their accounts ready, are found to be liable for about £400. By a further order of the 20th of December, 1897, inquiries were directed as to the parties entitled, but that does not touch the matter now in hand. The certificate was made, and Pearce has absconded. Now, what is Streeter's own account of himself? He was a director of the society, and on the dissolution, urged by his co-directors, he joined with Pearce in the trusteeship of the deed of dissolution. He undertook to be trustee and by his own confession he has not performed those duties in any respect. He has discharged his duty by paying the £391 16s. 4d., but on his own confession he has not performed his duty as trustee. In his affidavit, dated the 8th of January, 1896, he states that, being co-trustee with Pearce, he knew nothing of the books, he trusted to Pearce and never inquired how matters went on. He signed document after document without inquiry as Pearce told him, and swore an affidavit which he did not understand. The Legislature has passed the Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35), excusing trustees for certain breaches of trust, but that Act does not apply here. Under section 3, sub-section 1 of that Act, conduct to excuse a trustee must be "honest and reasonable." The word "honest" is used in many senses. A trustee is honest if he has not done anything dishonest. Now, there is nothing against Streeter, there is no suggestion that he has done anything dishonest; he has paid the £391 16s. 4d. which was found to be due to the society from Pearce, and is so far acquitted of dishonesty in the usual sense of the word. But in another sense he is not honest. It seems to me that a man who accepts such a trusteeship and does nothing, swallows wholesale what is said by his co-trustee, and never asks for explanation, and accepts flimsy explanations, is dishonest. He poses here before me as a poor man, the victim of his co-trustee. No doubt Pearce imposed upon him, but he suffered himself to be imposed upon. He brought himself into the difficulty, and I could not allow him to have costs that would diminish the sum recovered. But should I make him pay the costs? If I did, then the fund in court would be intact for those entitled to it; if I allowed him costs, the costs would come out of the fund, costs incurred by Streeter's own conduct. He ought to have insisted on accounts being filed in a reasonable time after the order, and it was quite unnecessary to pursue the inquiries and incur all these costs. If Streeter does not pay the costs, then the parties entitled will get less than they ought. So, having regard to Streeter's conduct, I should not be doing justice to the plaintiffs if I did not make him pay the costs. It is hard on the trustee, but I must consider the parties entitled. If I decided in favour of Streeter, the parties would suffer. Of course Streeter is entitled as trustee to his costs, charges, and expenses out of the

fund properly incurred by him as trustee other than the costs of the action, which he must pay as between party and party down to the present time.

Solicitors, *Saw & Son; J. S. Phillips.*

Q. B. Div.
(Lawrance and Channell, JJ.) } Feb. 13.

REG. v. JUSTICES OF MANCHESTER. (a.)

Licensing Law—Licence to sell beer—Certificate of residence and occupation—Jurisdiction of justices— Certiorari—Mandamus—*Beerhouse Act,* 1840 (3 & 4 *Vict. c.* 61), *s.* 1.

The licensing justices have no power to grant a certificate, under section 2 *of the Beerhouse Act,* 1840, *for a licence to sell beer or cider by retail, unless the applicant sleeps upon the premises in respect of which he applies to be licensed.*

Reg. *v.* Allmey, 35 *J. P.* 534, *approved.*

Though certiorari *will not lie against the licensing justices who grant the certificate, it will lie against the justices at the general annual licensing meeting, or an adjournment thereof, who confirm it.*

A mandamus *was granted also to hear and determine the application for a certificate according to law.*

Rule *nisi* for a *certiorari* to quash a certificate for a licence to sell beer by retail, and a rule *nisi* for a *mandamus* to justices to hear and determine the application of John Robinson for such certificate according to law.

An application for a certificate under section 2 of the Beerhouse Act, 1840, was made to the licensing justices of Manchester by John Robinson to enable him to obtain a licence to sell beer by retail upon the premises, No. 60, Cannon-street, within the borough.

It was proved or admitted that John Robinson occupied the premises, No. 60, Cannon-street, but that he did not sleep there. He used them as a restaurant, and was present upon them from 8 a.m. to 8 p.m. on every day on which they were open, conducting and managing the business. At other times the premises were closed and uninhabited.

The licensing justices granted the certificate applied for, holding that sleeping upon the premises was not requisite to constitute the applicant the "real resident holder and occupier" of the premises within section 1 of the Beerhouse Act, 1840. The certificate was confirmed by the whole body of the justices of the borough at an adjourned meeting of the general licensing meeting.

Section 1 of the Beerhouse Act, 1840, provides that "no licence to sell beer or cider by retail," under the Beerhouse Act, "shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed." Section 2 provides that persons applying for a licence to sell beer or cider by retail shall produce to the excise officer a certificate from an overseer of the township, parish, or place in which he resides certifying that he is the real resident holder and occupier of the house.

The Wine and Beerhouses Act, 1869, s. 5, substitutes for the overseer the licensing justices assembled at the general annual licensing meeting or some adjournment of the same.

Section 43 of the Licensing Act, 1872, provides: "Any person who appears before the licensing justices and opposes the grant of a new licence, and no other person, may appear and oppose the confirmation of such grant by the confirming authority in counties or boroughs; and the confirming authority may award such costs as they shall deem just to the party who shall succeed in the proceedings before them. . . ."

Travers Humphreys (*C. W. Mathews* with him) showed cause.—*Certiorari* does not lie, because the justices sitting to grant licences are not a court: *Boulter* v. *Justices of Kent,* 46 W. R. 114, [1897] A. C. 556; *Reg.* v. *Cotham,* 46 W. R. 512, [1898] 1 Q. B. 808; and *Reg.* v. *Sharman,* 46 W. R. 367, [1898] 1 Q. B. 578. Assuming that the justices are a court, there is no power to quash a certificate granted by them as distinguished from a licence. The certificate having been granted, there can be no *mandamus* to hear and determine.

Avory (*Llewelyn Williams* with him), in support of the rule.—If there is no remedy either by *certiorari* or by *mandamus* there is no remedy at all, for there is none by special case or by appeal. [CHANNELL, J.—The holder of the certificate could be prosecuted, and his certificate, being void, would not protect him.] That would not be a convenient mode of testing the validity of the certificate. The justices, in this instance, have resolved to grant these certificates to persons who personally conduct the business during the day, notwithstanding they do not reside on the premises. That is a usurpation of jurisdiction on their part. The applicant here did not sleep on the premises. He did not, therefore, reside there. Assuming that *certiorari* does not lie against the licensing justices, it lies, at anyrate, against the confirming authority, for section 43 of the Licensing Act, 1872, gives that authority power to award costs and to hear "parties." Those circumstances give a judicial character to the proceedings which make *certiorari* applicable. *Mandamus* also lies because, though the justices have heard and determined the application, they have not done so according to law: *Reg.* v. *De Rutzen,* 24 W. R. 343, 1 Q. B. D. 55.

LAWRANCE, J.—Both rules must be made absolute. The statute is imperative that the person who seeks for a licence to sell beer or cider under 3 & 4 Vict. c. 61 must be the real resident holder and occupier of the dwelling-house, and, according to the case of *Reg.* v. *Allmey,* 35 J. P. 534, he must also sleep upon the premises. It is obvious that the respondent did not do that.

It is not clear what the object of the provision was, but whatever it was it seems to have disappeared at the present time. Although it is useless to talk of convenience in the face of the words of a statute, yet there is a great deal in what the magistrates say with regard to carrying on of businesses of this class in towns like Manchester.

CHANNELL, J.—I am of the same opinion. The first question is whether or not Robinson was, in the circumstances, a person who was entitled to have a licence to sell beer and cider. For that purpose he must be the resident occupier of the dwelling-house in respect of which he solicits the licence. Now, for some time I was inclined to think that the words "resident occupier" meant that the applicant must be the person who, if any, was the resident occupier; that is to say, that he must not be the servant or any one of that sort where there is a master, but that he must be the person who out of several was the resident occupier. If that view were the correct one, this applicant might come within the term resident occupier; for if you assume that the house was a dwelling-house there certainly was no one else who was the resident occupier. He was there as much as anybody else, and after business was over the place

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

was shut up and nobody slept there, so that it might appear that he came within the provisions of the Act, and if the magistrates had decided that, there would have been a good deal of doubt as to how far they could have been interfered with. But when one looks further, and especially when one considers the case of *Reg.* v. *Allmey*, it appears that the premises in respect of which the licence is sought must be a dwelling-house, and that has been interpreted to mean a place where somebody sleeps. Thus the expression "resident occupier of a dwelling-house" gets a slightly different meaning.

It is obvious, therefore, as it seems to me, that a person who does not sleep on the premises is not a person entitled to have a licence, always assuming that *Reg.* v. *Allmey* is good law, and there is no reason to suppose that it is not, as it has stood for a considerable period and has been quoted as an authority. That being so, it seems to me that Robinson was not a person who could have a licence.

Now, the magistrates considered Robinson's application and they came to the conclusion that they would grant him a certificate. What were their powers? It seems to me quite clear that they had to consider whether or not he was a person who was qualified to hold the licence, and that they had no jurisdiction to give a certificate to anybody who was not qualified to hold the licence. In giving the certificate, therefore, they exceeded their jurisdiction, and even assuming there was a question of fact which they decided in the applicant's favour, it is clear that a tribunal cannot give itself jurisdiction which it has not got by an erroneous decision of fact, and I suppose it is equally clear that they cannot give themselves jurisdiction by an erroneous decision of law. That being so, it is a matter of course to bring up the certificate upon *certiorari* unless it is a matter in which *certiorari* will not lie—that is to say, if it is not a judicial proceeding or a *quasi*-judicial proceeding. It is obviously most convenient that licences should be brought up upon *certiorari*, because that is a convenient way of ascertaining whether the grant of them is within the jurisdiction of the authority granting them.

If these licences cannot be brought up in any way it seems to me to follow inevitably that the person who acts under one of them is, or may be, liable to a penalty all the time he is acting under it. If the matter is one which can be brought up upon *certiorari*, until it is so brought up it might be an answer to proceedings for a penalty—I do not say it would be—to say that the licence is effective and valid until it is set aside. Therefore it is most convenient that these licences should be tested by *certiorari*. Of course we are bound not only by *Boulter* v. *Justices of Kent*, but also by the case of *Reg.* v. *Sharman*, and if the matter were analogous to those two cases we could not grant a *certiorari*, because it would not be a judicial proceeding. But I think Mr. Avory has pointed out a section which sufficiently alters the matter. The real point in *Boulter* v. *Justices of Kent* was that there was no *lis* and no controversy *inter partes*. Lord Herschell says ([1897] A. C.), at p. 569: "It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object, would they all then become 'the other party'? There is in truth no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless indeed the entire public are regarded as the other party." By section 43 of the Licensing Act, 1872, which deals with the powers of the confirming authority, the objector below is expressly made a party, the case is treated as being one *inter partes*, and there is an express power to give costs.

It seems to me that that is sufficient to enable us to hold that this is a proceeding in which we may grant a *certiorari*, and, accordingly, I think it is right to make the rule for a *certiorari* absolute.

Then as to the rule for a *mandamus*, I personally have very considerable difficulty about it, which has not been altogether removed. It seems to me that to grant the rule is practically to *mandamus* the justices to refuse the application, and except in the case of *Reg.* v. *Cotham* I do not know of a case in which that has been done. That case proceeded very much upon *Reg.* v. *De Rutzen*, which to my mind is entirely different. Having given our decision upon the other point, as this point of the *mandamus* is not seriously opposed, I grant it upon the authority of *Reg.* v. *Cotham*; otherwise I should have had considerable doubt whether we ought to grant it.

Rules for certiorari *and* mandamus *made absolute.*

Solicitors showing cause, *Bower, Cotton, & Bower* for *J. H. Boardman*, Manchester.

Solicitors in support of the rule, *Lloyd-George, Roberts, & Co.*, for *Batty, Ford, & Buckley*, Manchester.

Q. B. Div.
(Lawrance and Channell, JJ.) Feb. 2.

LYNES v. SNAITH. (a.)

Landlord and tenant—Tenant at will—Determination of tenancy—Entry by landlord in order to repair—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 7—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

Where a tenant at will remains in possession of a house rent-free for more than twelve years after the expiration of the first year of the tenancy, the fact that the landlord enters from time to time in order to effect repairs, if it is not against the will of the tenant, does not operate as a taking possession so as to determine the tenancy at will, and therefore the tenant acquires a statutory title to the house by virtue of section 7 *of the Real Property Limitation Act*, 1833, *and section* 1 *of the Real Property Limitation Act*, 1874.

Per Channell, J.—*After a final judgment has been delivered, but before it has been entered, new plaintiffs may be added by the judge under ord.* 16, *rr.* 2, 11.

Appeal by the defendant from the County Court of Leicester.

The action was one of ejectment against the defendant Mary Ann Snaith, who had been tenant at will of a house, 27, Walnut-street, Leicester, for more than twelve years. The defendant entered into possession of the said house, of which John Snaith, her father-in-law, was owner in fee, on the 19th of April, 1884, by the leave and license of the said John Snaith. There was no agreement in writing. The defendant remained in continuous possession rent free. She was rated as occupier. She paid the poor rate and district rate, and at her own expense caused several internal repairs to be done to the premises. John Snaith, who was also the owner of the adjoining houses, did the external repairs to No. 27 at the same time that he repaired the other houses, and for this purpose he on several dates entered by his agent on the premises with the knowledge of the defendant. On one occasion he also did some internal repairs. There was no evidence that on any of these occasions

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the defendant's consent was asked, or that the repairs were done against her will. He also paid the water rates, the property tax, and the water premiums.

On the 30th of July, 1897, the said John Snaith died, leaving by his will his houses in Walnut-street to trustees in trust for the plaintiff, his step-daughter, for life, with remainders over. The trustees applied to the defendant for rent in respect of No. 27, which she refused to pay.

The plaintiff thereupon brought the present action. The defendant pleaded a statutory title to the premises. The learned county court judge found as follows:

(1) That the relation of landlord and tenant did not exist between John Snaith and the defendant; that John Snaith was at times in actual and at all other times in constructive possession of the house throughout the period in question, and that the defendant's occupation was not exclusive, and was that of a licensee and not of a tenant; that the fact that she was rated as being the person in apparent occupation and paid the occupier's rates was not conclusive that she occupied as tenant, and that the present case was in principle similar to that of *Peakin* v. *Peakin*, [1895] 2 Ir. Rep. 359, 43 W. R. Dig. 99.

(2) That, assuming that the defendant occupied the house as tenant at will, such tenancy was determined every time the landlord entered the premises to do repairs, as he was not under any contract to repair and did not ask or obtain permission from the defendant to enter the premises for the purpose, but entered by his agents and workmen of his own motion and in exercise of his right to resume possession whenever he thought proper; that sending workmen on to the premises and doing repairs thereon was more than a "mere entry," such as is referred to in section 10 of the Act of Will. 4. That during the occupation by the landlord's workmen the defendant had no exclusive possession; and that on each withdrawal of the landlord's agents a new tenancy at will or on sufferance commenced by implied grant.

(3) That the defendant, by allowing John Snaith to enter and lay out money on the premises as his property without protest, and by requesting him (on at least one occasion) to do repairs to the house as owner thereof, is estopped from setting up that at those times the Statute of Limitations was running in her favour.

The learned judge therefore gave judgment for the plaintiff for possession and mesne profits.

After judgment had been given, but before it was entered, the judge, upon application by the plaintiff, amended the parties by adding the trustees of John Snaith's will, in whom was vested the legal estate in the premises, as plaintiffs, under ord. 16, rr. 2, 11, of the Rules of the Supreme Court.

The defendant appealed.

The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), provides as follows:

Section 7.—"Where any person shall be in possession . . . of any land . . . as tenant at will, the right of the person entitled subject thereto or of the person through whom he claims . . . to bring an action to recover such land . . . shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined."

Section 10.—"No person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon."

By section 1 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), the entry must be made, or the action brought, within twelve years after the right first accrues.

Montague Lush, for the appellant.—The learned county court judge was wrong. The case of *Peakin* v. *Peakin*, on which he relied, is not on all fours with this case. The defendant here has acquired a statutory title under section 7 of the Real Property Limitation Act, 1833. *Doe d. Dayman* v. *Moore*, 9 Q. B. 555, which was similar to the present case, is an authority on this point. In order to prevent the statute from operating the landlord must enter, asserting his right to enter: *Turner* v. *Bennett*, 9 M. & W. 643; in the present case he entered for the benefit of the occupier and with her license. She has here become by the operation of the Real Property Limitation Acts of 1833 and 1874 the owner of the premises. As to the question raised upon the joining of the trustees as plaintiffs after judgment had been delivered the learned judge was wrong. He had no longer jurisdiction to do so under ord. 16, r. 11, as the judgment was final and the matter had become *res judicata*: *The Duke of Buccleuch*, 40 W. R. 455, [1892] P. 201.

Corner, for the respondent.—The decision of the learned judge was right. His findings are conclusive. There was no evidence that the occupier was in exclusive possession. She was not a tenant of the house; she was there as a guest. There was no such possession as to justify the setting up of the statute. If she was a tenant she was only a tenant at will, and that tenancy was determined whenever the landlord entered. He took possession when he so entered: *Kingston Race Stand* v. *Kingston Corporation*, [1897] A. C. 509, 46 W. R. Dig. 36. As to the other question, the case of *The Duke of Buccleuch* is in favour of the contention that the learned judge here acted within his jurisdiction in adding the trustees as plaintiffs. Fry, L.J., in that case says, at p. 212: "It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case." That was the case here, as judgment had not been entered.

Lush replied.

LAWRANCE, J.—The question in this case is whether the defendant was a tenant at will. The facts of the case show that she was allowed by the testator, her father-in-law, to take possession of this house, and that she remained there for more than twelve years. During that period she paid no rent. She, however, paid the rates and did the internal repairs. The house in question is one of a row of houses, and when outside repairs were required to be done to them the defendant's house was repaired by the testator together with the others. He also rendered her assistance in other ways. An action is now brought to recover possession of this house, and the question raised is whether the plaintiff's right to recover is statute-barred. What must we infer from the evidence? I think the proper inference to draw is that the testator allowed the defendant to live rent free, that he gave her assistance, and that he effected repairs to this house as he did to the other premises. What condition, then, was the defendant in? I am of opinion that she was a tenant at will. The testator could have terminated the tenancy at any time. It has been argued that when the testator entered in order to do repairs he terminated the tenancy. I do not think such entry in any way determined the tenancy. The entry was not contrary to the defendant's wish, nor was it effected in such a way that the testator could have been sued as a trespasser. He entered, not in order to take possession, but in order

to do a kindness to the defendant. There is no evidence to support the finding of the learned judge, and I think he was wrong and that the appeal must be allowed.

CHANNELL, J.—I am of the same opinion. On the merits of the case I think judgment should have been given for the defendant. Therefore it is not necessary to decide the point as to the amendment of the parties. My opinion, however, is that the amendment was not made too late. The case was not disposed of until judgment was entered, and in the words of Fry, L.J., there was still something to do. The other point is clear when the Real Property Limitation Act of 1833 is looked at. There was an actual possession by the occupier, and not a constructive possession by the owner. Probably under the old law the defendant's possession would have been held to be not adverse, but the doctrine of non-adverse possession has been swept away by the Act of 1833. In that Act there is an express provision as to tenancies at will—namely, in section 7, where it is provided that the tenancy shall begin to run in favour of the tenant at the expiration of the first year of the tenancy. The facts of this case show that there clearly was a tenancy at will. There was an actual possession, and the possession was that of the occupier and not of the owner. That being so, the county court judge was wrong upon that point.

In an action of ejectment the burden of proof is on the plaintiff. Therefore the burden lies on the plaintiff to prove here that the testator when he did the repairs took possession of the premises. There is, however, no proof that his entry in order to do the repairs was against the will of the tenant in possession. In fact no objection was made. The doing of the outside repairs by the testator is quite consistent with the continuation of the defendant's tenancy. In the case of *Turner* v. *Bennett* there was an actual objection, and therein lies the difference between that case and the present one.

If it could have been shown that the defendant did the internal repairs under an obligation to the owner I think the case would probably be taken out of the statute, as that obligation might be held to be equivalent to paying rent. But that is not so here. I do not think *Peakin* v. *Peakin* is in point.

Appeal allowed.

Solicitors for the appellant, *Metcalfe & Sharpe*, for *Stretton & Aysom*, Leicester.

Solicitors for the respondent, *Warwick Webb*, for *H. Bray*, Leicester.

Q. B. Div.
(Lawrance and Channell, JJ.) } Jan. 26.

RITCHIE (*Appellant*) *v.* LARSEN (*Respondent*). (*a.*)

Ship—Seaman—Agreement with the crew—Foreign port where there is a British consular officer—Advance note for more than one month's wages—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 113-115, 124, 140.

When a seaman is engaged abroad before a British consular officer, as provided by section 124 *of the Merchant Shipping Act,* 1894, *the provisions enacted by section* 140 *relative to agreements with the crew and the restrictions as to advance notes do not apply.*

Special case stated by justices for county borough of Swansea.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

On the 27th of July, 1898, a complaint was made to the said justices that the respondent having entered into an agreement in writing at Talcahuano to serve as a seaman on board the British ship "Melville Island" (of which ship the appellant was the master) on her voyage from Talcahuano to Swansea at the wages of £3 per month, and having duly performed the services required by the agreement, the sum of £2 6s. 8d. was due to the respondent as and for a balance of wages, and that the appellant had neglected to pay him that sum.

The facts may shortly be stated thus: The respondent joined the British ship "Melville Island" as an A.B. at Talcahuano, a nitrate port in Peru, and signed articles there before the British consul. He received no money at Talcahuano, but an advance note dated Talcahuano, the 30th of March, 1898, was given him by the appellant and was as follows:

"I promise to pay to the order of Ingerval Larsen, seaman, shipped in the British ship *Melville Island*, of Glasgow, the sum of four pounds ten shillings twenty-four hours after the sailing of the said vessel from this port, providing said man proceeds to sea as per agreement.—G. L. RITCHIE, Master."

The master also paid 16s. 8d. on the sailor's account and under his authority in writing.

On the termination of the voyage at Swansea the appellant claimed to deduct these two sums (*i.e.*, the sum of £1 10s. being the excess over the month's wages of £3, and the sum of 16s. 4d.) from what was due to the respondent, who objected to this being done on the ground that, by the combined operation of sections 124 and 140 of the Merchant Shipping Act, 1894, the appellant was precluded from relying on that advance except to the extent of £3, the amount of one month's wages.

The justices were of opinion that the sums of £1 10s. and 16s. 8d., making together the sum of £2 6s. 8d., should forthwith be paid by the appellant to the respondent, together with the respondent's costs.

On the application of the master (the appellant) a case was stated for the opinion of the High Court.

J. A. Hamilton, in support of the appeal.—Section 140 restricts the amount of advance notes, but that section only applies to seamen engaged in and going to sea from any port in the United Kingdom. It does not apply to the engagement of seamen in colonial and foreign ports, and section 124 ought not to be read with section 140. The master can therefore deduct the full amount advanced to the seaman.

Montague Lush, for the respondent.—The Justices were right. The seaman having been engaged abroad at a port at which there was a British consular officer, before whom the respondent entered into this agreement, the provisions of section 124 applied, and the engagement, although made abroad, must be treated as one made with the crew in the United Kingdom and subject to the same restrictions as to advances as provided by section 1, sub-section (*a*) of section 140. By sub-section 2 of that section any other agreement "by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman conditionally on his going to sea from any port in the United Kingdom shall be void, and any money in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages. . . ." The advance to the sailor above the amount of one month's wages could not be recovered under the advance note.

CHANNELL, J.—In this case I have been asked to deliver the judgment of the court and I do not hesitate to do so, having formed a very clear opinion

of the construction that ought to be put upon the material sections of this Act for the purpose of deciding the present argument. I think that apart from any considerations as to the probable intention of the Legislature, and looking only at the language of the Act itself, the construction adopted by the magistrates is clearly wrong. The material sections are section 113-115, 124, and 140, and I will refer to them in that order.

Section 113 refers to agreements with the crew, and enacts that "the master of every ship, except ships" of a class which I will call small coasting vessels, "shall enter into an agreement with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom." By section 114 (*i.*) an agreement with the crew shall be in a form approved by the Board of Trade, and by sub-section 3 of that section the agreement with the crew shall be so framed as to admit of such stipulations to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law. To my mind section 115 is very important; it commences as follows: "The following provisions shall have effect with respect to the agreements with the crew made in the United Kingdom in the case of foreign-going ships registered either within or without the United Kingdom." And goes on to provide for the agreement being made in the presence of a person called the superintendent, and contains a considerable number of other provisions, all on the face of them applying to agreements made in the United Kingdom, and incapable without modification of being applied to agreements made elsewhere because they must be made before a person who is only an officer in the United Kingdom.

The next section to be considered is section 124, which says that with respect to the engagement of seamen abroad the following provisions shall have effect: "Where the master of a ship engages a seaman in any British possession other than that in which the ship is registered, or at a port in which there is a British consular officer, the provisions of this Act respecting engagements with the crew made in the United Kingdom shall apply, subject to the following modifications:" Now, it is quite clear that the agreements referred to there relate to agreements made in the United Kingdom, and primarily this section was intended to be read with section 115, which begins by saying that its provisions shall have effect with respect to agreements with the crew made in the United Kingdom. You find, moreover, that the modifications introduced by section 124 are necessary modifications clearly relating to the provisions of section 115 when the circumstances are so changed that a modification is necessary. While, as I have said, the applying of section 115 to agreements made abroad was the main object section 124 was to effect, I do not say that it was the exclusive object. The effect of it is that agreements are to be made on the engagement of seamen in a British possession other than that in which the ship is registered or at a port in which there is a British consular officer, in the same way as in the case of agreements made in the United Kingdom, with the necessary modifications.

Then we have to consider section 140, upon which the present case mainly turns. The first part of the section is in these words: "Where an agreement with the crew is required to be made in a form approved by the Board of Trade, the agreement may contain a stipulation for payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement." Mr. Lush argued that this restriction on advance notes was not restricted to agreements with the crew made in the United Kingdom, but its provisions applied to certain British possessions and foreign ports where there was a British consular officer. So they do; but only two specified cases: "Save as aforesaid," the section in sub-section 2 continues, "an agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman conditionally on his going to sea from any port in the United Kingdom shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages. And a person shall not have any right of action, suit, or set-off against the seaman or his assignee in respect of any money so paid or purporting to have been so paid." It does not say that any other agreement for a conditional advance to a seaman is void. If there were no provision following the enabling enactment, expressly prohibiting advances of larger amount it would probably be right when construing this section to read into it an implied prohibition against larger advances. But if you find, as here, a clause following forbidding advances in certain cases, that, in my judgment, negatives there being any implied prohibition in other cases not referred to in the section. In the case we are now considering the only thing prohibited is what is expressly prohibited. That is contained in the sub-section (2) which I have just read, commencing "Save as aforesaid." I do not think it is necessary to read the prohibiting clause as co-extensive with the enabling clause. This sub-section 2 does not extend to cases where the seaman is going to sea from any port not in the United Kingdom. I think Mr. Lush was wrong when he argued that section 124 made it apply; and whether it applied to the case of small coasting vessels, as he would have us read the section, appears to me to be a question not before us now, and therefore one that we need not decide. If it had been intended so to apply it a modification of the words "in the United Kingdom" would have been necessary. There is nothing unreasonable about that. On the contrary it seems to me it is a reasonable meaning to place on the language used. If the other meaning is to be applied, then, as Mr. Hamilton pointed out, a clause (c) might be necessary. But there is no clause whatever which limits the modification to ships from the ports of the United Kingdom. There is no implied forbidding clause. It is perfectly clear that this case is not covered by this section, and if you go outside the words of the section and say that the intention of the Legislature ought to be considered, and say that it is perfectly clear that it was the intention of the Legislature in this way to carry out the forbidding of advance notes above one month's wages, whether given to a member of the crew in a ship sailing from the United Kingdom or to a sailor shipped at a foreign consular port, all I can say is that the words, in my judgment, do not admit of that construction.

Therefore, if the words of the sections in point are alone looked at, it is clear that the decision of the magistrates is wrong. I think, moreover, that consideration of the probable intention of the Legislature really supports the view I have just expressed, because a seaman might otherwise be detained in a foreign port for a debt incurred exceeding one month's wages, and therefore if the Act is to be read as prohibiting the advance of more than a month's pay, he might never be able to get away from a foreign port at all. There is no doubt that these restrictions as to advance notes were intended to deal with the practices of a class of persons known as "crimps,"

who infest the sea-ports of the United Kingdom. It was said that the Legislature having taken so much care to protect the seaman against "crimps," would certainly intend to afford him the same protection at least when stranded at some foreign port. But the same considerations obviously do not apply to sailors engaged at foreign ports, because the Legislature has not the same power to enforce regulations in a foreign country as in England or her dependencies. For the reasons I have given I feel no doubt whatever that is the proper construction to place upon the statute. The order of the justices must therefore be quashed, and the appeal allowed with costs both here and below.

LAWRANCE, J.—I merely desire to say I concur in the judgment that has been delivered.

Appeal allowed; leave to appeal granted.

Solicitors for the appellant, *W. A. Crump & Son.*

Solicitor for the respondent, *Richard White.*

Q. B. Div.
(Wills and Bruce, JJ.) } Dec. 15.

KNIGHTS DEEP (LIMITED) (*Appellants*) *v.* THE COMMISSIONERS OF INLAND REVENUE (*Respondents*). (*a.*)

Inland Revenue—Stamp duty — Debenture — Right to redeem debenture on paying a premium—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Schedule I.*

A limited company issued a series of debentures of £100 each, and each debenture stated that the company would, at certain specified dates, pay to the registered holder the sum of £100, with interest at £5 10s. per cent., and one of the conditions indorsed on the debentures was that the company might, after the 1st of July, 1900, *on giving six months' notice to the registered holder, redeem any debenture at £103, before the time fixed for payment. The debentures were marketable securities not transferable by delivery within the meaning of Schedule I. of the Stamp Act,* 1891.

Held, that each debenture was a security for £103, and not for £100 only, and ought, therefore, to be stamped as a mortgage for £103, as required by Schedule I. of the Stamp Act, 1891.

Case stated by Commissioners of Inland Revenue.

A debenture was presented on behalf of the issuers thereof- the Knights Deep (Limited). the appellants —to the Commissioners of Inland Revenue for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument in question was a first debenture for £100 issued by the Knights Deep (Limited), incorporated under the laws of the South African Republic. The share capital was £550,000 divided into 550,000 shares of £1 each, and there was an issue of £400,000 debentures in 4,000 debentures of £100 each, carrying interest at the rate of £5 10s. per cent. per annum, all ranking equally in security.

The debenture stated that "for valuable consideration already received the Knights Deep (Limited) (herein called the company) will, as and when the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to the Simmer and Jack Proprietary Mines (Limited), of 8, Old Jewry, E.C., or other the registered holder for the time being hereof, the sum of £100. The company will in the meantime until such payment pay interest thereon at the rate of £5 10s. per cent. per annum by half-yearly payments on every 1st day of July and 1st day of January. This debenture is subject to the conditions indorsed hereon which are to be deemed part of it."

The conditions indorsed on the debenture showed that the debenture was one of a series of debentures for securing principal sums amounting in the aggregate to £400,000, carrying interest at the rate of £5 10s., and that they were all to rank *pari passu* in point of charge without any preference or priority one over another; that debentures of the nominal value of £26,000 would be redeemed by the company on the 1st day of July, 1902, and on each succeeding 1st day of July up to and including the first day of July, 1917, when the balance then outstanding should be redeemed; that the debentures to be redeemed should be determined by annual drawings, which the company would cause to be made at its branch office in London or at such other place as the company should determine; and that such drawings should be made not less than twenty-one or more than sixty days before the respective yearly days on which the debentures were to be redeemed, and the principal moneys hereby secured should become payable on the 1st of July next after this debenture should have been drawn for redemption.

Condition No. 17 endorsed on the debenture provided:

"The company may at any time after the 1st of July, 1900, redeem this debenture at £103 on giving six calender months' previous notice in writing so to do to the registered holder, and upon the expiration of such notice the said sum of £103 shall become payable as if the same was the amount of the principal moneys secured and shall thereupon cease to carry interest. Provided always that the company shall not without the consent of the registered holder be at liberty to give such notice unless concurrently it shall give due notice to redeem in like manner all the then outstanding debentures of the said series."

The appellants were a foreign company, and the debenture, which bore date the 8th of October, 1898, was made and issued by them in the United Kingdom and was capable of being sold in a stock market of the United Kingdom. In these circumstances it was admitted that the debenture fell within division (*b*) of the following head of charge in the first schedule of the Stamp Act, 1891—namely, "Marketable Security. (1) Marketable security (*a*) being a Colonial Government security, or (*b*) being a security not transferable by delivery, or (*c*) being a security transferable by delivery and bearing date or signed or offered for subscription before or on the 6th of August, 1885.

"For or in respect of the money thereby secured. } "The same *ad valorem* duty according to the nature of the security as upon a mortgage."

The commissioners were of opinion that the money thereby secured within the meaning of the said head of charge was the sum of £103, and accordingly assessed the instrument as liable to a duty of 3s. 9d., being the duty payable on a mortgage of that amount.

The appellants contended that the money thereby secured was £100 only, and that the duty under the said head of charge was 2s. 6d. only.

The questions for the opinion of the court were—(1) whether the instrument is chargeable with the duty of 3s. 9d. in accordance with the assessment of the commissioners; (2) if not, with what duty the instrument is chargeable.

Scrutton, for the appellants.—The money secured by the debenture was £100 only, and the proper stamp duty was 2s. 6d., as upon a mortgage securing £100. When this debenture was presented to the

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

commissioners for their opinion as to the duty payable thereon, the company had not, and could not have, exercised the option given by the 17th condition, so that at that time the debenture could not have been a security for £103. Condition No. 17 gave the company a right to redeem at an earlier date than they would otherwise have been entitled to redeem, and the £3 which was to be paid if the company exercised their right under the condition was a payment over and above the £100 expressed to be secured by the debenture in consideration of their right to redeem at an earlier date. The interest is just as much secured by the debenture as this £3, and therefore if the £3 is to come within the sum secured by the debenture, so also would the interest come within that sum; but the case of *Barker* v. *Smark*, 7 M. & W. 590, conclusively shows that interest does not come within the sum secured by the debenture for the purposes of the Stamp Acts, and therefore the £3 does not come within the sum "thereby secured."

He referred to *Rowell* v. *Commissioners of Inland Revenue*, [1897] 2 Q. B. 194, 45 W. R. Dig. 71.

Sir Robert Finlay, S.G. (*Danckwerts* with him), for the respondents.—The commissioners were right in requiring the debenture to be stamped as a mortgage for £103. As soon as the notice referred to in condition 17 is given the instrument becomes a security—not for £100 only, but for £103. The amount secured by or to be ultimately recoverable under the debenture is (excluding interest) limited to £103, and the debenture must be stamped on that amount according to section 88 (1) of the Act.

WILLS, J.—Upon the whole, though the case is not free from difficulty or doubt, I have come to the conclusion that the Crown are right. I wish, in the first place, to state my view as to what this instrument is. As far as the mortgage is concerned—that is to say, as far as that part of the instrument is concerned which pledges the assets of the company, the security did not extend to the extra £3, which was to be payable only in a certain event. That, however, does not settle the question. If we look at the parts of the schedule which deal with the words "bond, covenant or instrument," and also with the parts which deal with "mortgage, bond, debenture, covenant, and warrant of attorney," I think it is plain that "security," is used in a sense which embraces them all in each place, and therefore, unless there is some good reason to the contrary, I should suppose that when "security" is used in the expression "marketable security," it is meant to have the same wide and comprehensive meaning; and the fact that it is, as I think, in respect of the £3, merely a covenant to pay in certain events, does not prevent it being a security within the meaning of the schedule of this taxing Act. If so, it is, as I think, a security in certain events for £103, because there is undoubtedly a definite engagement, if a notice be given within six calendar months, to pay £103. That is an unqualified obligation when once the six months' notice has been given, and therefore in a certain contingency there is a covenant to pay £103. That would have been sufficient to settle the question but for a thing that has perplexed myself certainly—that is, that I was very much struck with the argument on behalf of the appellants, that there was just as much a covenant to pay the interest as there was to pay the principal. Undoubtedly there is, and there is no use in shrinking from that fact; but it is quite clear—looking at the definition of mortgage given in section 86 of the Act, and the definition in *Barker* v. *Smark*—that in the language of statutes of this kind a mortgage was supposed to represent the principal sum, and the money which is inserted in the schedule of the mortgage is supposed to represent only the principal sum secured by it. That was so held at a time when there was no possibility of curing a stamp objection, when it would here been fatal under the Act, and the unreasonable consequences of such a state of things must have had their operation upon the courts which from time to time had to decide the question. The result of the special expressions which are used in that part of the schedule which relates to "bond, covenant, or instrument," and in section 86, is that interest has been excluded from the computation for the purpose of taxation, and that the view which was entertained by the court in *Barker* v. *Smark* has received legislative sanction. The reasoning may have satisfied the court in that and in previous cases, but it does not satisfy me. So far as mere words are concerned I cannot see why a covenant to pay interest is not just as much a covenant to pay a sum of money as any covenant to pay the principal, and why the interest should not come in as well as the principal. But when once the contrary has been decided, and when that view of the court has been adopted by the Legislature, and sanctioned by these express enactments, it is no use going back to inquire whether the reasoning was satisfactory or not.

Nevertheless, I do not feel disposed to adopt that view and apply it to a subject-matter which seems to me to stand upon a very different footing—that is, this £3. If there had been no absolute undertaking on the part of the company to to pay that £3 in a certain event, the case would have been different from the present case, and there might have been much more ground for arguing that there was no kind of obligation imposed upon the company in any event to pay it, and if there were no kind of obligation imposed upon the company in any event to pay it, my present impression is that it could not have been brought under the words "covenant" or "security" for that sum of money. That, however, is not the case here, because upon the company giving the notice—that is to say, upon the happening of a contingency which is purely within their power to bring about—there is an absolute and positive promise to pay. It seems to me, therefore, that, according to the decision in *Rowell* v. *Commissioners of Inland Revenue*, it is a security within the meaning of the Stamp Act and the schedule to it, and if that be so, it follows that it is a security in a contingency for £103. If so, it must be subject to the higher rate of taxation.

BRUCE, J.—I am of the same opinion. The principal money secured is £100, but in a certain event the sum of £3 becomes payable in addition to the £100. If and when the £3 becomes payable, it is to be the same, according to the conditions, as if it were part of the principal sum. Therefore the £3, if the event happen, becomes secured in the sense that it is included in the covenant to pay. Then why is not duty payable on the £3 so secured? It is said that it is only subject to a condition, that it becomes payable. The fact that it is only on the happening of a certain event that it becomes payable makes no distinction in the case. Then it was said that interest is secured by the debenture, and yet duty is not payable upon interest. With reference to that, it has been established by a series of decisions that interest is not to be regarded as money secured by the instrument for the purpose of settling the amount of duty.

I do not see that we can say that this £3, that is to be payable by way of premium, is in the nature of interest. I think, therefore, we must hold that the

Crown are right in their contention and are entitled to the higher duty.

*Appeal dismissed.**

Solicitors for the appellants, *Julius & Thomas.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Romer, L.JJ.) — April 22.

PERRINS *v.* BELLAMY. (*a.*)

Trustee—Breach of trust—Sale of leaseholds—No power of sale—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

Where trustees of a settlement which did not contain a power of sale had, in the bonâ fide *belief that they possessed such a power, advantageously sold leaseholds which formed part of the trust estate,*

Held, that under section 3 *of the Judicial Trustees Act,* 1896, *they were entitled to be relieved from personal liability to make good the diminution of income sustained by the tenant for life in consequence of the sale.*

Decision of Kekewich, J., 46 *W. R.* 682, *affirmed.*

Appeal against a decision of Kekewich, J., 46 W. R. 682.

By an indenture of settlement dated the 23rd of October, 1879, Elijah Barnett assigned to trustees (*inter alia*) certain leasehold houses situated at Edgbaston for the respective residues then unexpired (which ranged from fifty-two to seventy-three years) of the several terms of years under which the premises were then held, upon trust after his death, to pay the income thereof to his wife Charlotte Barnett for her life, and after her death to his daughters, the defendant Eliza Barnett and the plaintiff Alice Mary Perrins, during their lives, in equal shares, and after the death of one of them to pay the income of her share to her children as therein directed until the death of the survivor of them, and in case there should be no child of the daughter first dying then upon trust to pay the whole income to the survivor of them for her life, and after the death of the survivor upon trust to stand possessed of the trust estate and the proceeds thereof for the children of his daughters as therein directed. The settlement contained no power to the trustees to sell the leasehold property.

Alice Mary Perrins was married to F. H. Perrins on the 9th of September, 1880, and there were two infant children of the marriage now living. The defendant Eliza Barnett was not married. Elijah Barnett died on the 10th of February, 1888, and Charlotte Barnett on the 26th of February, 1895. On the 10th of May, 1895, the trustees of the settlement offered for sale by public auction at Birmingham, in eleven lots, the whole of the leasehold premises comprised in the settlement. On hearing of the intended sale, Mrs. Perrins wrote to the trustees, objecting to it as a breach of trust. The purchasers of nine of the lots completed, but an objection was taken with regard to the remaining two lots that the trustees had no power of sale, and upon a vendor and purchaser summons Kekewich, J., upheld the objection. An action was then brought by Mrs. Perrins and her two infant children, by their father as next friend, as plaintiffs, against the trustees of the settlement and Eliza Barnett as defendants. By their statement of claim the plaintiffs alleged that the trustees had committed a breach of trust in selling the leasehold property when they had no power of sale; that the property was sold contrary to the expressed desire of the plaintiff Alice Mary Perrins; that the property was situate in a good position and let to good tenants at good rentals, and ought to have been retained in the interests of the trust estate; that the trustees had committed a breach of trust in not paying the proper amount of income to Mrs. Perrins, and that the trust estate had been reduced in value by the alleged breaches of trust, and the income of Mrs. Perrins greatly reduced thereby. The plaintiffs claimed (1) a declaration that the defendant trustees had been guilty of a breach of trust in selling the leasehold premises; (2) an inquiry as to the loss accrued to the trust estate and to Mrs. Perrins by reason of such breach; and (3) that the defendant trustees might be ordered to make good to the trust estate all such loss. The plaintiffs also asked for the removal of the trustees, and delivery of proper accounts, and the execution of the trusts of the settlement by the court so far as might be necessary.

In their defence the trustees admitted that they had no express power of sale under the settlement, but alleged that they had an implied power. They denied that the property was let at good rentals, that it should have been retained in the interest of the trust estate, and that they sold contrary to the desire of Mrs. Perrins. They further contended that if they had committed a breach of trust in selling the property they had acted honestly and reasonably, and ought fairly, under section 3 of the Judicial Trustees Act, 1896, to be excused.

Kekewich, J., held that the trustees had committed a breach of trust in selling, but were under the Act entitled to be relieved from liability.

The plaintiffs appealed.

Bramwell Davis, Q.C., and *G. E. Tyrrell,* for the appeal.

Warrington, Q.C., and *S. B. L. Druce,* for the trustees, were not called upon.

LINDLEY, M.R.—I do not think there is any ground whatever for differing from the view taken by the learned judge in the court below of the application to this case of the extremely beneficial enactment which is contained in section 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35). That there has been a breach of trust in this case is obvious to any lawyer who has gone through the documents and attended to the evidence. But what does it all really come to? You have a voluntary settlement of some leaseholds, which the settlor settled first on himself for his life, then on his wife for her life, and then on his two daughters for their lives, and afterwards gave to the children of those two daughters. That disposition is expanded in the settlement itself, of which I do not think it necessary to give the details, because nothing turns upon them. It contained no clause authorizing the settlor to revoke or vary the provisions then made, and it gave no power to the trustees to sell these leaseholds, although there is in it such language as upon a hasty glance might mislead

* In a second case—*The Knights Deep* (*Limited*) (*No.* 2) (*Appellants*) v. *The Commissioners of Inland Revenue* (*Respondents*)—where the conditions of the debenture were in all respects the same as in the previous case, except that the debenture was payable to "bearer," the court held that the same principle applied.

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

anyone into thinking that such a power of sale was given. The settlor himself afterwards found out that defect, and sought to remedy it, for in October, 1892, he executed a deed giving the trustees a power of sale. We know, of course, that, the settlement being what it was, he could not make that alteration; but it would not, perhaps, strike everybody as obvious that he had no power to do so. That, however, is undoubtedly the law. No breach of trust was committed so long as the settlor lived or so long as his widow lived. The widow died in February, 1895. Then a considerable sum for payment of estate duty had to be raised, and the question arose how best to raise it. That matter, very naturally, took the trustees to their solicitors, and having talked with the solicitors not only about the sum of £600 which had to be raised for payment of estate duty, but also about the trust property generally, they were advised that they had a power of sale over the leaseholds. That, I agree, was a mistake made by the solicitors, who at the moment took a wrong view as to the construction of the settlement, and as to the effect of the deed of October, 1892. The solicitors thought that by the joint operation of those two deeds a power of sale of the leaseholds was conferred on the trustees, and they told their clients so. The trustees then obtained a report on the property from a professional surveyor, and they got a report condemning the state of the property as very unsatisfactory; saying, in substance, that it was a very undesirable property for trustees to hold. Thereupon the solicitors advised a sale of the leaseholds, and a sale in lots took place accordingly. Ultimately, as it turned out, two of the purchasers took alarm about the vendors' power to sell, and objected to complete. A vendor and purchaser summons was taken out, and it was held—rightly or wrongly, I must presume rightly—that the vendors had no power to sell, and that those purchasers who objected could not be compelled to complete. A good many of the purchasers of lots, however, were prepared to take the risk, or were satisfied that there was a power of sale in the trustees. There certainly was power in the trustees to sell so much as was necessary for the purpose of raising the £600. But as to two or three of the houses the objection was taken that they had no power of sale.

It is important to bear in mind at present that Mrs. Perrins was quite aware of the advertisement of the property for sale, which was published on the 17th of March, 1895, and that she then objected to the sale as a breach of trust. The trustees gave her the answer in Mr. Bellamy's letter of the 17th of April, 1895, and the sale did not take place until the 10th of May, 1895. If Mrs. Perrins had wished to prevent this sale from going through, it was quite open to her to commence an action against the trustees to stop it; but no writ at all was issued by her until the 11th of May, 1897, when she seeks (now joining her husband and children as co-plaintiffs) to get rid of the trustees, and also to make them liable for the loss of income which she has suffered. She has in fact lost part of her income. Before the Act of 1896 I suppose she would have succeeded in making these unfortunate trustees liable for that loss. That was certainly a very hard state of the law; a state of the law which shocked one's sense of humanity and sense of fairness. That matter was brought to the attention of the Legislature, and Parliament relaxed—deliberately relaxed—the requirements of the law. [His lordship read section 3, and proceeded:] That is to say, the Act throws upon the court the extremely difficult and responsible task of saying that a trustee has committed a breach of trust, but that, at the same time, having regard to the fact that he has acted honestly and reasonably, it is not a case in which he ought to be held responsible to make good the loss which has been sustained. Now, in the present case the honesty of the trustees is plain; the reasonableness of their conduct, also, is absolutely plain when you consider the facts to which I have alluded. As to their not applying to the court for advice, the answer to the argument founded upon that, is obvious enough. It is said that they ought to have applied to the court, if not before, at all events when some of the purchasers raised the objection that the settlement conferred no power of sale. Suppose the trustees had so applied, what could the court have done for them? I do not see what they could have gained by such an application, except that they would probably have had the costs of it to pay. It is clear that they had got themselves into a scrape, and the court could not have got them out of that scrape. I do not see that the trustees did anything unreasonable in completing the purchases with those of the purchasers who were willing to take the title as it was. Of course they had to submit to the consequences of having entered into invalid contracts of sale with those purchasers who objected to the title and refused to complete.

If this is not a case to which the Act of 1896 applies, I cannot conceive one which would come within it. There is on the trustees' part honesty, reasonableness, prudence—everything which there could be in their favour, except, unfortunately, that they have committed a breach of trust; and it is a breach of trust which has no evil consequence. In fact, it was a most judicious breach of trust, if you look at the interests of the reversioners as well as those of the tenant for life. This appears to me to be precisely one of those cases in which we are bound by the Act of 1896 to say that the trustees are entitled to the protection given by section 3, and ought to be excused for their breach of trust. The appeal, therefore, must be dismissed with costs.

RIGBY, L.J.—I am entirely of the same opinion. I remember in my early days at the bar when an inadvertent breach of trust, involving no moral blame at all, still was visited upon the trustees. They were told that the Court of Chancery was always open to them, and that if they would incur the risk of acting without the direction of the court they must take the consequences. That was the only excuse given for the state of the law; and I can remember very very hard cases against trustees—cases which shocked the conscience. But now trustees are not entitled as of course to take the opinion of the court. They cannot now get rid of their liability by consulting the court, for they cannot now, except at the risk of having to pay the costs of the proceedings, approach the court at all; so that there is now no possible excuse left for those old decisions which were, in many cases, so hard upon trustees. In the Act of 1896, among other things against which trustees are to be protected, come the very words, "omitting to obtain the direction of the court."

When the defendants went to their solicitors they were advised that they had a power of sale. Whether the solicitors said in so many words, "We advise you that you have a power of sale," or simply allowed them to go on, on the assumption that they had such a power, makes, to my mind, no difference at all. The deed was of a nature to impress persons who had not very carefully considered it with the belief that there was a power of sale. The document of 1892 gave that power in so many words expressly and clearly, and I presume the people who drew that deed thought its provisions of importance. The trustees took all that into consideration, and thought that they had a power of sale. As regards the first proposal to pur-

chase five (I think it was) of the seventeen houses, the doubt does not appear to have entered the mind of anyone. The trustees' solicitors told them that they ought to get the opinion of a competent surveyor upon the property, and to act on that opinion.

I think this is certainly a case in which the trustees have acted reasonably, and ought fairly to be excused for their breach of trust; and that the appeal ought to be dismissed.

ROMER, L.J.—I agree, and cannot usefully add anything to what has been said.

Appeal dismissed.

Solicitors, *Tyrrell & Son*, for *J. B. Clarke & Son*, Birmingham; *Gamlen & Burdett*, for *Cottrell & Son*, Birmingham.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) March 22.

POWELL *v.* MARSHALL, PARKES, & CO. (*a.*)

Vendor and purchaser—Bankruptcy—Protected transaction—Notice of act of bankruptcy—Act of bankruptcy by vendor after contract and before date for completion—Payment after notice of act of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

The plaintiff entered into a contract to purchase a public-house, the purchase to be completed within four weeks, and paid a deposit. By the contract the deposit was to be forfeited in case of neglect or refusal on the part of the purchaser to perform his part of the contract, and to be returned in case of such neglect or refusal on the part of the vendor. Before the expiration of the four weeks the vendor committed an act of bankruptcy. The plaintiff thereupon gave notice refusing to complete the purchase and requiring the deposit to be returned. The vendor never in fact became bankrupt.

Held, that, as the plaintiff had at the date fixed for completion notice of an available act of bankruptcy, payment of the purchase-money to the vendor would not have been protected by section 49 of the Bankruptcy Act, 1883, *in the event of the vendor's bankruptcy upon a petition presented within three months of the act of bankruptcy, and the vendor was not in a position to complete the purchase by executing a conveyance and giving a good receipt for the purchase-money; and that the plaintiff was accordingly entitled to the return of the deposit.*

Appeal from the judgment of Wills, J., in favour of the plaintiff, at the trial of the action with a special jury.

The action was brought for the return of a deposit paid upon an agreement for the purchase of the lease of a licensed house.

By the agreement, which was dated the 17th of November, 1897, and made between the plaintiff as the purchaser, and the defendants acting on behalf of one Inman as the vendor, the latter agreed, in consideration of the sum of £500 paid by the purchaser to the defendants as stakeholders by way of deposit, and of the further sum of £6,250 to be paid to the vendor upon possession being given to the purchaser, to assign to the purchaser the lease of the licensed house and the goodwill thereof for the remainder of the term, and to deliver up possession on or before the 15th of December, 1897. It was further provided that the £500 deposit was to be forfeited in case the purchaser should neglect or refuse to perform his part of the agreement, but to be returned in case such neglect or refusal should arise on the part of the vendor.

On the 24th of November, 1897, a bankruptcy notice under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, was served on Inman, who failed to comply with the requirements thereof within the seven days and thereby committed an act of bankruptcy. The plaintiff, having heard of the act of bankruptcy, on the 9th of December gave notice that he refused to complete the purchase and that he required the return of the deposit; but this was refused. The plaintiff thereupon sued the defendants, as the stakeholders, to recover the deposit. Wills, J., held that the possibility of the vendor being adjudicated bankrupt upon a petition presented within three months of the act of bankruptcy prevented the vendor from completing, and that the plaintiff could therefore recover the deposit; and he directed judgment to be entered for the plaintiff.

The defendants appealed.

Robert Wallace, Q.C., and *J. W. S. Kay*, for the defendants.—The contract of the 17th of November was a contract entered into for valuable consideration before any act of bankruptcy was committed, and therefore was protected by section 49 (*d*) of the Bankruptcy Act, 1883. The contract being protected, it is valid to all intents and purposes, and any payment made thereunder or a conveyance executed in pursuance thereof is protected. If the contract cannot be carried out, it is the same as if it were invalid, and the protection afforded by section 49 (*d*) is useless. As James, L.J., said in *Ex parte Holthausen, In re Scheibler*, L. R. 9 Ch. App. 722, at p. 726, if a bankrupt, under circumstances which are not impeachable, enters into a contract with respect to his real estate for valuable consideration, that contract binds his trustee in bankruptcy as much as himself; and that learned judge went on to say that the trustee was bound to perform the contract in exactly the same way as the bankrupt was bound to perform it. That applies to this case, and if the vendor had been made bankrupt on a petition presented within three months of the act of bankruptcy, his trustee could not have claimed the purchase-money again if it had already been paid over. If, on the other hand, the vendor had tendered a conveyance it would have been no answer to an action for the price to say that the vendor had committed an act of bankruptcy: *Prickett* v. *Down*, 3 Camp. 131. There is no instance in the books of a plea to such an action that the vendor has committed an act of bankruptcy. The time to look at is the date of the contract, and the rest follows. The plaintiff relies upon *Ex parte Rabbidge, In re Pooley*, 26 W. R. 646, 8 Ch. D. 367, but that case has not affected *Ex parte Holthausen, In re Scheibler*. The contract therefore went off owing to the fault of the plaintiff, and he cannot recover the deposit.

W. Ellis Hill, for the plaintiff.—In *Ex parte Holthausen, In re Scheibler* the contract was sought to be enforced against the trustee in bankruptcy, who, of course, could be compelled to carry out the contract. No question of the vendor being able to give a receipt for the purchase-money arose. *Ex parte Rabbidge, In re Pooley* shows that, though the contract may be protected, a payment made under it after adjudication is not protected. It was there held that the purchaser, who had already paid the bankrupt the purchase-money, must pay it over again to the trustee. Similarly a payment made under a protected contract after notice of an act of bankruptcy is not protected. The contract therefore went off through the fault of the vendor, and the plaintiff can recover the deposit.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

He also referred to *In re Pollitt, Ex parte Minor*, 41 W. R. 276, [1893] 1 Q. B. 455.

Wallace, Q.C., replied.

A. L. SMITH, L.J.—This is an action by a vendor against stakeholders to recover the deposit paid upon an agreement dated the 17th of November, 1897, to purchase a public-house. By the terms of the contract the purchase was to be completed on the 15th of December, 1897, and it was agreed that the deposit was to be forfeited if the purchaser should neglect or refuse to carry out his part of the agreement, but it was to be returned if the vendor should so neglect or refuse. It is clear—and, indeed, it is admitted—that time is of the essence of the contract. What happened was this: On the 24th of November a bankruptcy notice was served upon the vendor, and he failed to comply with its requirements, and in consequence of such failure he committed an available act of bankruptcy on the 2nd of December. The plaintiff, having heard of this, gave notice on the 9th of December that he refused to complete the purchase, and that he required the return of his deposit, and on being refused the return of the deposit he brought this action against the stakeholders.

In my opinion the question comes to this, was the vendor in a position to complete the sale on the 15th of December, the date fixed for completion? I do not think he was. On the 15th of December the position of the vendor was this: The plaintiff would have to hand over the £6,250 to the vendor upon the latter executing the conveyance, giving up possession, and giving a valid receipt for the purchase-money. It was said that the vendor could have conveyed the property, because there was no bankruptcy. In my opinion if he had conveyed and bankruptcy had followed upon a petition presented within three months of the act of bankruptcy, inasmuch as the conveyance would in such a case have been taken with notice of an available act of bankruptcy, the trustee appointed subsequently could have intervened. It is sufficient, however, to deal with the purchase-money. If the purchase-money had been paid to the vendor with notice of an available act of bankruptcy, in my opinion the trustee in bankruptcy, if bankruptcy had followed within the three months, could have intervened and claimed the purchase-money over again. The vendor was therefore not in a position to give a discharge for the purchase-money, and was not in a position to complete. Reliance has been placed on section 49 of the Bankruptcy Act, 1883, which provides that nothing in this Act is to invalidate "(*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration"; provided that (sub-section 2) "the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction notice of any available act of bankruptcy committed by the bankrupt before that time." Though the contract was before the act of bankruptcy, it is impossible to say that the conveyance or payment would have been protected by this section, because the plaintiff would have had notice at the time of the conveyance or payment of an available act of bankruptcy. For these reasons I think that the appeal should be dismissed.

COLLINS, L.J.—I am of the same opinion. I was at first somewhat impressed in favour of the appellants by the decision in *Ex parte Holthausen, In re Scheibler*, and with the observation of James, L.J., in his judgment where he says: "If that is so, the debtors were personally bound by the contract at the moment when their liquidation commenced. They ought to have fulfilled it; and that a bill could have been filed against them in this country to have compelled them to fulfil that contract is beyond all question. In this country, in an English bankruptcy the trustee stands exactly in the same position as the bankrupt himself stands in, and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it." It is said that that case shows that the trustee in bankruptcy would be bound to convey the property upon the same terms as the vendor would have been bound to convey. But upon looking more closely at that case it becomes manifest that the Lord Justice was there dealing with the right of the purchaser to have a conveyance of the property, and it in no way conflicts with the decision in *Ex parte Rabbidge, In re Pooley*. The position in the present case is that the plaintiff, as a condition of getting a conveyance of the property, would have to pay the purchase-money to the vendor, and if he had done so he might have been compelled to pay it over again to the trustee. As James, L.J., said in this latter case, "it is the purchaser's misfortune that he has paid the money to a person who had then ceased to be the owner of the property. But that can give him no equity to take the property away from the real owner without paying him for it." The purchaser here was in this position: he might, in the event of the vendor's bankruptcy within the prescribed time, have insisted upon having a conveyance of the property upon paying the purchase-money to the trustee, or if he had already paid the vendor and got a conveyance, he might have been compelled to pay over again. Therefore the vendor was not in a position to convey as he could not give the plaintiff a good receipt for the purchase-money.

ROMER, L.J.—I am of the same opinion. Section 49 of the Bankruptcy Act, 1883, does not necessarily protect the conveyance or the payment executed or made in pursuance of a protected contract.

Appeal dismissed.

Solicitors for the plaintiff, *Gush, Phillips, Walters, & Williams.*

Solicitors for the defendants, *Browne & Co.*

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — March 14.

ELLIS AND ANOTHER v. WADESON & MALLESON. (a.)

Practice—Partnership—Action against firm in firm's name—Form of defence—Death of partner after action—Defence by sole surviving partner—Ord. 48a, r. 5.

Two partners were sued in the name of their firm. After appearance and before defence delivered one of the partners died, and the surviving partner, R. C. Nesbitt, delivered a defence headed with the title of the action, followed by the words "Defence of the defendant R. C. Nesbitt."

Held, that the defence was wrong in form, as it was not a defence of the firm, but of the surviving partner in his individual capacity, in which capacity he was not sued.

Appeal from an order of Ridley, J., at chambers.

The action was brought against two co-partners in the name of their firm to recover damages. One of the partners died after appearance entered and before

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

defence delivered, and the surviving partner, R. C. Nesbitt, thereupon delivered a defence headed with the title of the action, followed by the words, "Defence of the defendant, Robert Chancellor Nesbitt," and in the body of the defence it was stated that "this defendant" did not admit or denied, as the case might be, the allegations contained in the statement of claim.

The plaintiffs took out a summons for leave to sign interlocutory judgment upon the ground that default had been made in delivering a defence of the firm.

The judge, to whom the summons was referred by the master, offered to allow Nesbitt to amend the defence by making it the defence of the firm, and on Nesbitt refusing to amend, he made an order giving the plaintiffs leave to sign interlocutory judgment against the defendants for damages to be assessed unless the defendants delivered their defence in the action forthwith.

Nesbitt appealed.

English Harrison, Q.C., and *J. R. Atkin*, for the appellant.—The defence delivered by the appellant is a defence for the firm, and is perfectly regular. It is entitled in the action against the firm, and the proceedings are therefore continued in the name of the firm, as required by ord. 48*a*, r. 5. Partners are entitled to sever their defences, as they may not agree upon one common defence. The other partner having died, the appellant was entitled to head his defence as he did, provided it was a defence for the firm. So long as a partner delivers a defence for the firm he is entitled to deliver it in his own name. The appellant does not wish to prejudice the personal representatives of the deceased partner by putting in a defence on behalf of the deceased partner. The name of a firm is only a convenient method of denoting those persons who compose the firm, and a plaintiff who sues partners in the name of their firm in truth sues them individually just as much as if he had set out their names: per Lindley, L.J., in *Western National Bank of New York* v. *Perez, Triana, & Co.*, 39 W. R. 245, [1891] 1 Q. B. 304, adopted by Fry, L.J. in *Heinemann* v. *Hale & Co.*, 39 W. R. 485, [1891] 2 Q. B. 83; Lindley on Partnership (6th ed.), p. 120. The order was therefore wrong.

G. Spencer Bower, for the plaintiffs.—The plaintiffs are entitled to have a defence delivered for the firm. This defence is a personal defence on the part of Nesbitt. Nesbitt wishes to compel the plaintiffs to add the personal representatives of Malleson as defendants, whereas order 48*a* was framed for the purpose of allowing the plaintiff to ignore the individual partners and to do away with the necessity of finding out who are the partners until it becomes necessary to issue execution. The last part of rule 3 deals with the case of a dissolution of partnership to the knowledge of the plaintiff before action brought. In such a case the plaintiff must serve everyone within the jurisdiction sought to be made liable. Where a partner dies after action brought, the action continues against the firm. There is no provision in order 48*a* for adding the personal representatives of a deceased partner. The surviving partner has only to put in a defence for the firm, which he has authority to do: *Tomlinson* v. *Broadsmith*, 44 W. R. 471, [1896] 1 Q. B. 386.

ROMER, L.J., delivered the judgment of the court.—The point made on behalf of the plaintiff is not, so far as this case is concerned, a very important one, but certain questions have been raised which it is desirable that we should deal with, so as to afford some guide in future cases. I will first take a case where an action is brought against a firm in the firm name, the partnership consisting of several partners. The case may be one either where the partners are the same at the dates of the accrual of the partnership liability and of the issue of the writ of summons, or where the partnership has been dissolved between those two dates. In either case, there being a partnership liability, the plaintiff would be entitled to sue the firm in the firm name. As it is an action against the firm in the firm name, the partners may, if they can agree upon one common defence, deliver one defence on behalf of the firm. If they cannot so agree, then each partner, who has to appear individually, is entitled to put in a separate defence, and the defence so put in should be a defence of the firm, and in form it should be entitled a defence of the defendants by (naming the partner) one of the partners appearing in the action. That seems to us to be the proper form of defence in such a case.

It was said, what is a plaintiff to do if there is a series of inconsistent defences put in by the different partners? The answer is, that the plaintiff, in order to succeed, must satisfy the judge at the trial that none of the defences prevent him from recovering judgment against the firm. If only one partner appears to the writ of summons, he would be entitled to put in a defence for the firm, and he may, if he chooses, add the words, by (naming the partner) one of the partners appearing in the action. It would be the defence of the firm, and the action would go to trial on that defence, and judgment, if recovered, would be recovered against the firm. If the partner put in an improper defence, and thereby rendered the firm liable when otherwise they would not be, he might be committing a breach of duty towards his co-partners, and might be liable to them, but that would not affect the plaintiff, who would be entitled to judgment against the firm. Judgment being recovered against the firm, it could be enforced against the partnership assets and against the partner who had appeared, and against the other partners, as provided by ord. 48*a*, r. 8, provided that if an alleged partner, who has not been served with the writ of summons, has not admitted on the pleadings that he is a partner, and has not been adjudged to be a partner, leave ought not to be given to issue execution against him without giving him an opportunity of contesting his liability. An illustration of this is to be found in *Ex parte Young, In re Young*, 30 W. R. 330, 19 Ch. D. 124.

I now proceed to consider the case of the death of a partner after the cause of action has arisen. First, I will take the case of a partner dying before action brought, the action being against the firm in the firm name. The deceased man is no party to the action so far as his private property is concerned. A dead man cannot be sued; his personal representatives alone can be sued. The action is against the surviving partners only. At common law if a creditor had joint debtors and one died, he could only sue the survivors. But since the Judicature Act, in partnership cases a creditor may join in one action the surviving partners and the personal representatives of the deceased partner, provided that the maxim *actio personalis moritur cum persona* does not apply. But the personal representatives must be expressly added as defendants. If they are not so added, and judgment is recovered against the firm, execution can only be enforced against the surviving partners and the partnership assets. I may here mention that the reason why the partnership assets can be reached is that, notwithstanding the death, the surviving partners have authority to bind the deceased partner's share in the partnership assets, for their authority extends to winding up the partnership, to paying the partnership debts, and to defending claims made against the

partnership: see Lindley on Partnership (5th ed.), pp. 217, 218, 587. So far I have dealt with the case of the death of a partner before action.

I will now take the case of a partner dying after the writ is issued and before judgment. The judgment would, if recovered, be against the firm, and in that case execution could only be enforced against the surviving partners and the partnership assets: see upon this point *Phillips* v. *Homfray*, 32 W. R. 6, 24 Ch. D. 439; *In re Shephard*, 38 W. R. 133, at p. 135, 43 Ch. D. 131, at p. 136. It is clear that a partner dying after action brought and before judgment is not before the court, and judgment cannot be obtained against him. This seems to be clear. Suppose the firm consisted of two partners, and that both died before judgment, no judgment could be obtained against them.

Apply those considerations to the present case. Nesbitt is the surviving partner. The action is a good action against the firm. Nesbitt has to put in a defence for the firm. By so doing he does not make the deceased partner a party to the action. The form of the defence put in by him should be a defence of the firm, though he might, if he chose, add the words, by Nesbitt, the surviving partner. This is not a mere question of form, because if the plaintiffs recover judgment against the firm, they can issue execution against Nesbitt and against the partnership assets. Where we think the defence is wrong in substance is that Nesbitt, instead of putting in a defence of the firm denying the partnership liability, puts in a defence in his individual capacity, in which capacity he is not sued, heading it as his defence, and stating in it that "this defendant" does not admit or deny, as the case may be, the allegations in the statement of claim. He is not entitled to do that. It cannot be said that the defence he has put in is the defence of the firm. In our opinion, therefore, the judge was right in making the order appealed from. He offered to allow the defendant to amend the defence by making it a defence of the firm, and upon the defendant refusing to do so, he made the order. The appeal, therefore, fails. But we will now give the defendant leave to put in, within seven days, a defence on behalf of the firm, adding, if he likes, the words, by Nesbitt, the surviving partner.

Appeal dismissed.

Solicitor for plaintiffs, *Crosse & Sons.*

Solicitor for defendants, *N. Herbert Smith.*

From Q. B. Div.
(A. L. Smith, Collins, and Romer, L.JJ.) March 3, 8.

CAHN AND MAYER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET CO. (LIMITED). (*a.*)

Sale of goods—Documents of title—Buyer obtaining possession with consent of seller—Bill of exchange not accepted—Bill of lading indorsed to sub-purchaser—Title to goods—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 25, *sub-section* 2—*Factors Act,* 1889 (52 *&* 53 *Vict. c.* 45,) *s.* 2, *sub-section* 1.

The seller of copper forwarded to the buyer the bill of lading, under which the copper had been shipped, and a bill of exchange for the price for the buyer's acceptance. The buyer, when he received the document, was about to become bankrupt. He did not accept the bill of exchange, but indorsed the bill of lading to the plaintiffs, with whom he had previously entered into a contract for the sale of copper. The seller stopped the goods in transitu.

Held, that the buyer had obtained possession of the bill of lading with the consent of the seller within the meaning of section 25, *sub-section* 2, *of the Sale of Goods Act,* 1893, *and that the plaintiffs, who took the bill of lading in good faith and without notice, had a title to the goods which defeated the seller's right to stop the goods in transitu.*

Judgment of Mathew, J., [1898] 2 *Q. B.* 61, 46 *W. R. Dig.* 149, *reversed.*

Appeal of the plaintiffs from the judgment of Mathew, J., [1898] 2 Q. B. 61, 46 W. R. Dig. 149.

The facts were as follows:

On the 12th of July, 1897, Steinmann & Co., a firm carrying on business in Liverpool, contracted to sell to one Pintscher, of Altona, ten tons of copper, to be delivered at Rotterdam or Hamburg, payment to be by a thirty days' acceptance from the date of the bill of lading. The copper was shipped upon the defendants' steamship. On the 27th of August, 1897, the plaintiffs purchased ten tons of copper of Pintscher. On the 30th of August, Steinmann & Co., in fulfilment of their contract with Pintscher, forwarded to him the bill of lading for the goods, indorsed in blank, and a bill of exchange for his acceptance. When the documents arrived Pintscher was on the verge of bankruptcy. He did not accept the bill of exchange, but he indorsed the bill of lading to the plaintiffs, who took it in good faith, and without notice that Pintscher had no authority to deal with the bill of lading in that manner. Before the goods were delivered at Rotterdam, Steinmann & Co. stopped delivery of the goods, giving an indemnity to the defendants.

The plaintiffs in this action sought to recover damages for the non-delivery of the goods.

The Sale of Goods Act, 1893:

Section 19, sub-section 3.—"Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and the bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him."

Section 25, sub-section 2.—"Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods, or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery a transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Sub-section 3.—"In this section the term 'mercantile agent' has the same meaning as in the Factors Act."

The Factors Act, 1889:

Section 1, sub-section 2.—"A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody, or are held by any other person subject to his control or for him or on his behalf."

Section 2, sub-section 1.—"Where a mercantile agent is, with the consent of the owner, in possession

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business as a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Mathew, J., held that Pintscher held the bill of lading, as agent for Steinmann & Co., for safe custody until he should have accepted the draft, and that, therefore, he continued to have the custody only of the bill of lading, not possession of it, with the consent of the seller; that he had, therefore, no right to deal with the bill of lading by indorsing it to the plaintiffs, and could not, by so dealing with it, give the plaintiffs a title to the goods. The learned judge on these grounds gave judgment for the defendants.

The plaintiffs appealed.

Joseph Walton, Q.C., and *Chayter* (*J. A. Hamilton* with them), for the appellants.—Mathew, J., wrongly held that this case came within section 19, sub-section 3, of the Sale of Goods Act. That section has no application to a case such as this. It is admitted that Pintscher acquired no property in the goods, but the plaintiffs nevertheless obtained a good title by virtue of section 25, sub-section 2, of the Act, which is practically a re-enactment of section 9 of the Factors Act. Possession within section 25, sub-section 2, means actual custody—see the Factors Act, s. 1, sub-section 2—and Pintscher undoubtedly obtained the custody of the bill of lading with the consent of Steinmann & Co., and possession was none the less so obtained by reason of the giving of possession being coupled with a condition—viz., the acceptance of the bill of exchange, which Pintscher failed to perform. A subsequent determination of consent does not affect the question: see the Factors Act, s. 2, sub-section 2. Possession obtained by a trick would give rise to different considerations, and might prevent the case from coming within section 25, sub-section 2, but no fraud is alleged in this case. The defendants will probably rely on *Shepherd* v. *Harrison*, 20 W. R. 1, L. R. 5 H. L. 116. That case only deals with the question of the property in goods when the bill of exchange forwarded with the bill of lading is not accepted, and is no authority in this case. Assuming that the plaintiffs are within the protection afforded by section 25, sub-section 2, Steinmann & Co. lost their right to stop the goods *in transitu*.

They also referred to *Jenkyns* v. *Usborne*, 7 Man. & G. 678.

Cohen, Q.C., and *Parker Lowe*, for the respondents.—Steinmann & Co. were entitled to stop the goods *in transitu*. Apart from the provisions of the Sale of Goods Act and the Factors Act they clearly had that right, for they did not transfer the bill of lading to Pintscher as buyer. The Sale of Goods Act preserves the law merchant, which includes the right to stop goods *in transitu*, in so far as it is not inconsistent with the Act. Neither Act alters the law as to stoppage *in transitu*. The rights of a seller who retains possession of the goods or the documents of title are dealt with directly in the Sale of Goods Act by section 25, sub-section 1. The powers of the buyer, who obtains possession, are dealt with in section 25, sub-section 2, but only indirectly and by reference to the Factors Act, s 2, sub-section 1. That section only validates a disposition of the goods, and does not mention documents of title, the intention being that there should be no interference with the law merchant as to stoppage *in transitu* which is affected not by the passing of property in the goods, but by a lawful transfer of the documents of title. The only provisions in the Acts as to stoppage *in transitu* are those contained in section 10 of the former, and in section 47 of the latter. The effect of these sections is that where documents of title to goods have been lawfully transferred to any person, as buyer, a transfer of the documents to a third person, taking in good faith, defeats the right to stoppage *in transitu*. In this case there was no transfer of the bill of lading to Pintscher as buyer, with the intention that he should acquire property in the goods. There was only a conditional indorsement to him: *Gurney* v. *Behrend*, 2 W. R. 425, 3 E. & B. 622. Secondly, Pintscher did not obtain possession of the bill of lading with the consent of Steinmann & Co. If Pintscher did not intend to accept the bill of exchange, it was his duty at once to return the bill of lading, and not having done so his possession was wrongful *ab initio*: see the language of Lord Cairns in *Shepherd* v. *Harrison*, L. R. 5 H. L., at p. 133. Finally, the provisions of section 25, sub-section 2, of the Sale of Goods Act, and of section 2, sub-section 1, of the Factors Act, which must be read with it, only apply to cases where the assignment of the goods by the buyer to the third person was made after the buyer obtained possession of the documents of title, whereas Pintscher sold the copper to the plaintiffs before he had the bill of lading.

Walton, Q.C., replied.

Cur. adv. vult.

March 8.—A. L. SMITH, L.J., read the following judgment: The question raised in this case is whether, when a seller of goods sends to his buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, the buyer can keep the bill of lading, and refuse to accept the draft, and yet give a good title to the goods covered by the bill of lading to a sub-purchaser from him who takes in good faith and without notice of the want of authority of the buyer to deal with the bill of lading and the goods represented thereby. If the question be answered in the affirmative, a further question as to stoppage *in transitu* will arise, which I will deal with hereafter. Upon the 12th of July, 1897, Steinmann, of Liverpool, contracted to sell to Pintscher, of Altona, ten tons of copper to be delivered, cost, insurance, freight, at Rotterdam, payment to be made by Pintscher's acceptance at thirty days from date of bill of lading. On the 27th of August, 1897, the plaintiffs Cahn and Mayer purchased of Pintscher ten tons of copper. Upon the 30th of August, 1897, Steinmann, in fulfilment of his contract with Pintscher forwarded to him a bill of lading indorsed in blank for ten tons of copper, accompanied by a draft for his acceptance in the following letter: "Liverpool, August 30, 1897. Mr. M. D. Pintscher, Altona. Dear Sir,—We beg to confirm our respects of the 26th inst., and have the pleasure of handing you herewith bill of lading for ten tons R.T.C. ingots, shipped per ss. *Collier* to Rotterdam. We further hand you our invoice for these goods amounting to M.10,624.30, and our draft for the same amount, which be good enough to provide with your acceptance and return to us as soon as possible.—Yours truly, R. Steinmann & Co." The draft contained in this letter was by mistake drawn for £10 in excess of the contract price of the copper, but no point is made as to this. This letter, with its enclosures, reached Pintscher upon the 1st of September, 1897, and he thereupon retained the bill of lading and handed it to his banker to hand to the plaintiffs, and when they

paid against the bill of lading, the banker was to credit the proceeds to Pintscher's account which was then in debit. Pintscher never accepted the draft. The banker, on the 2nd of September, 1897, accordingly handed the bill of lading indorsed by Pintscher to the plaintiffs in fulfilment of their contract with Pintscher, and against this bill of lading the plaintiffs paid cash to the banker, taking it in good faith and without notice that Pintscher had no authority from Steinmann to deal with the bill of lading as he was doing. The banker credited the amount received from the plaintiffs to Pintscher's overdrawn account. Before the goods arrived at Rotterdam, Steinmann, being unpaid for his copper, and Pintscher having become insolvent, stopped the copper *in transitu*. In these circumstances are the plaintiffs entitled to the copper as against Steinmann, the unpaid vendor? This depends upon the Sale of Goods Act, 1893, coupled with the Factors Act, 1889, which clearly must be read together, for without these Acts there can be no doubt that the plaintiffs took no title to the goods. The learned judge has held that they did not, and the plaintiffs appeal.

That the Factors Acts, commencing as they do in the year 1823 (4 Geo. 3, c. 83), and finishing up with the Sale of Goods Act, 1893, were passed to afford protection to persons dealing in good faith and without notice with factors cannot be disputed, and that additional protection to persons so dealing, not only with factors, but also with buyers of goods, has by these Acts from time to time been afforded is equally clear; and the first question is whether the plaintiffs are within the protection of the last of these Acts—viz., the Sale of Goods Act, 1893—coupled with the Factors Act, 1889. I would point out that it is only in cases where an owner has in some way been deprived of his goods without his authority that the Factors Acts are required; for, if he is not so deprived, the Acts are not needed to protect *bonâ fide* transactions with agents and buyers. [His lordship read section 25, sub-sections 2 and 3, of the Sale of Goods Act, 1893, and section 1, sub-section 2, and section 2, sub-section 1, of the Factors Act, 1889.] It will be seen that in this case the first question comes to this, did Pintscher obtain the actual custody of the bill of lading with the consent of Steinmann? For, if so, the plaintiffs can make title to the bill of lading and the goods under the above-mentioned Acts. No point is made as to whether Pintscher acted in the ordinary course of business of a mercantile agent when he parted with the bill of lading as he did to his bankers. A point was made that when the plaintiffs contracted with Pintscher to buy ten tons of copper they did so before Pintscher had the custody of the bill of lading, and that the plaintiffs were, therefore, not protected by the Acts; for it was said that the sale was made by Pintscher to the plaintiffs before he was in possession of the document of title. But I think the answer to this argument is that section 25, sub-section 2, of the Sale of Goods Act, 1893, validates the delivery or transfer of a document of title, which took place in this case when Pintscher transferred the indorsed bill of lading through his banker to the plaintiffs, against which they paid their money. This point fails Steinmann. That the bill of lading was in the actual custody of Pintscher is clear, though I agree that this does not suffice, for the statute enacts that the actual custody of the document of title must be obtained by the mercantile agent or buyer with the consent of the seller. Now, the bill of lading was not obtained by Pintscher from Steinmann by any trick or device—in which case it could not, I think, be said that Pintscher had obtained the actual custody of it with Steinmann's consent—but, on the contrary, the bill of lading, accompanied by the draft, was voluntarily sent by Steinmann to Pintscher, and it was by this voluntary act of Steinmann, and by this alone, that the bill of lading was obtained by Pintscher from him, and thus got into his actual custody, which are the words of the Act. Why, then, was not the bill of lading obtained by Pintscher and in his actual custody with Steinmann's consent? The limitation of Pintscher's authority to deal with the bill of lading after he got it into his custody, before he accepted the draft, is not to the point, which as before stated is—Did Pintscher obtain the actual custody of it with the consent of Steinmann? In my judgment the words of the Act mean actual physical custody. After consideration, the only answer I can give to this question is that the bill of lading was obtained by Pintscher from Steinmann, and was in his actual custody with Steinmann's consent. It is, however, argued that what Lords Westbury and Cairns said in *Shepherd* v. *Harrison* shows that I am wrong, but I do not think so. What those noble and learned lords were dealing with was the passing of property in goods contained in a bill of lading to a purchaser, he not accepting the draft accompanying the bill of lading. We have nothing to do in this case with the passing of property to Pintscher. That no property passed to Pintscher in the copper cannot be doubted, but this is not the question. Lord Westbury said (L. R. 5 H. L., at p. 129): "I think no man, certainly no lawyer, would consider that the letter was written with any other conviction in the mind of the writer than this, that it would not be consistent with courtesy towards a house like that of Shepherd & Co. to say: 'Remember, you are not to possess yourself of the bill of lading until you have accepted the bill of exchange.' That is not said in terms, but it is indicated by the transaction"; and Lord Cairns said (at p. 132): "I do not believe there is a merchant in England that would have any doubt that the meaning" (of sending the bill of lading and draft together) "was, You shall have the bill of lading when you accept the bill of exchange. . . . I hold it to be perfectly clear that when a cargo comes in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and bill of exchange are transmitted in a letter either 'to approbate or to reprobate' entirely and completely then and there. . . . I therefore think that when one merchant in this country sends to another, in circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in enclosing these bills of lading and bills of exchange is that, before you use the bills of lading, you shall accept the bills of exchange." It seems to me that the noble and learned lords clearly state that before the draft is accepted the buyer is not to use the bill of lading, and, if he does so, it is a clear breach of his duty to his seller, and in such circumstances no property passes to the buyer. But this does not cover the present question, which is, did Pintscher obtain the actual custody of the bill of lading—that is, of the thing itself—with Steinmann's consent? The noble and learned lords were not dealing with the effect of the Factors Acts, which were not then before them, and with which they had nothing to do. I agree that it was Steinmann's intention that Pintscher was not to use the bill of lading unless and until he accepted the draft, but the bill of lading was none the less in Pintscher's actual custody with his (Steinmann's) consent before he had accepted the draft. The Legislature when it passed the Sale of Goods Act, 1893, by section 19, sub-

section 3, enacted what had been held by the House of Lords in *Shepherd* v. *Harrison*, and nothing more, the Act being an Act to codify the law.

I now come to the second question, raised in this court for the first time, for it was not made in the court below—that, supposing the plaintiffs had a good title to the bill of lading by virtue of the protection afforded to them by the conjoint operation of the Sale of Goods Act, 1893, and the Factors Act, 1889, Steinmann could, nevertheless, stop, as he did, the goods *in transitu* and thus defeat the plaintiffs' statutory title to the goods comprised in the bill of lading. I agree that this is an important point, for, if it be sound, the title to a bill of lading and the goods represented thereby, which a sub-purchaser in good faith takes from a buyer of the goods and obtains by reason of the provisions of the Act, will in many cases be invalidated. Now, what does section 2, sub-section 1, of the Factors Act, 1889, enact? It enacts that where a mercantile agent (which includes a buyer) is, with the consent of the owner, in the actual custody of goods or the documents of title to goods (which for this point must be taken to be the case), any disposition of the goods made by him shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same; in other words, as if the disposition had been made by the owner of the goods himself or by his lawfully-authorized agent. By section 10 of the same Act it is enacted that where a document of title to goods has been lawfully transferred to a person as a buyer (which was done in this case by Steinmann passing the indorsed bill of lading to Pintscher), and that person transfers the document to a person (the plaintiffs) who takes the document in good faith and for valuable consideration (as the plaintiffs did), the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as a transfer of a bill of lading has for defeating the right of stoppage *in transitu*. What avail, then, is it to call attention to section 61, sub-section 2, of the Sale of Goods Act, 1893, which enacts that the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts for the sale of goods? For, in my judgment, the provisions of section 2, sub-section 1, and section 10 of the Factors Act, 1889, which it is conceded must be read as part of the Act of 1893, expressly provide that, in circumstances such as exist in the present case, the right to stoppage *in transitu* is defeated. See also as to this the proviso to section 47 of the Act of 1893, the first part of which section leaves the right of stoppage *in transitu* precisely where it was before upon the mere sale of goods, when no transfer of the bill of lading by indorsement takes place, and re-enacts section 10 of the Factors Act, 1889. This second point, therefore, as to stoppage *in transitu*, also fails Steinmann. For these reasons I think that the appeal must be allowed with costs here and below.

COLLINS, L.J., read the following judgment: The crucial question in this case is, whether Pintscher, the buyer, obtained possession of the bill of lading with the consent of Steinmann, the seller. If he did, his transfer of it to Cahn, the sub-purchaser, for cash, who received the same in good faith and without notice of any lien or other right of Steinmann, was by section 25, sub-section 2, of the Sale of Goods Act, 1893, as effectual as if Pintscher had been a mercantile agent in possession of the bill of lading with the consent of the owner. Such a sale by a mercantile agent is by section 2, sub-section 1, of the Factors Act, 1889, as valid as if he was expressly authorized by the owner to make it. It is, therefore, immaterial whether the consent was afterwards withdrawn; when he has once got possession by consent, his subsequent disposition of the bill of lading, whether such consent still subsists or not, is made as effectual as if he were, in making the transfer, a mercantile agent in possession with the consent of the owner. A mercantile agent is himself placed in a similar position by section 2, sub-section 2, of the Factors Act. Where he has been in possession with consent, the determination of the consent does not, while he retains possession, defeat his disposition. Possession, by section 1, sub-section 2, of the Factors Act, means actual custody. The Factors Act, 1889, which is thus referred to, and, as to part of it, is in terms again enacted in the Sale of Goods Act, is the last of a series of statutes whereby the Legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to *bonâ fide* purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the *bonâ fide* purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it, in the person in possession at the time of the disposition, or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods or documents, or otherwise got possession of them without the consent of the owner. But if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent—see *Baines* v. *Swainson*, 11 W. R. 945, 4 B. & S 270; *Sheppard* v. *Union Bank*, 10 W. R. 299, 7 H. & N. 661—he is able to pass a good title to a *bonâ fide* purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser; see the distinction between possession obtained by a trick and possession under a contract voidable for fraud, noted by Blackburn, J., in *Cole* v. *North-Western Bank*, L. R. 10 C. P. 354, 23 W. R. Dig. 186.

These considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negatived a bailment. If he became criminally responsible for his subsequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. The circumstances of the obtaining possession would not have supported an indictment for larceny, and the subsequent abuse of his opportunity could not alter the character of the original taking. He might conceivably have fully intended to accept the draft and forward it by the first post. If he had disposed of the bill of lading while he remained in this attitude of mind, and subsequently accepted the draft and forwarded it and became insolvent before the *transitus* of the goods

was over, could Steinmann have stopped them effectually on the ground that Pintscher had not obtained possession of the bill of lading with his consent? If not it could only be because the original taking was with his consent. The possession—*i.e.*, the actual custody, was obtained once for all when the bill of lading was placed in Pintscher's hand, and no subsequent changes in his intention with regard to the draft could change the character of this completed act. It would, in my opinion, defeat the purpose of the Act, and work a public mischief, if a vendor, who had himself placed the bill of lading in the hands of his purchaser, were entitled, as against a *bonâ fide* sub-purchaser from the latter, to enter into nice questions as to the intention with which the original purchaser took the document of title into his possession. The Legislature has deliberately chosen to alter the common law which made a transfer of a bill of lading ineffectual, if the person transferring was not himself the owner of the goods. It has step by step enlarged the class of persons who, having possession, may give a better title than they had themselves, and has relaxed the conditions under which they may do so, and I think it would be a backward step to subject the title of the purchaser from such persons to speculations such as the argument for the defendants suggests. It is to be noted that section 25, on which the question turns, and which makes possession obtained by consent the only condition of the buyer's power to sell again, follows immediately upon a series of sections dealing with transfer by persons without title, in the last of which the distinction of possession obtained under circumstances amounting to larency from that obtained by fraud or other wrongful means not amounting to larency is made the basis of an enactment. Read in this context, the section itself at once suggests the test of larceny where the obtaining possession has been, as in this case, by the direct delivery by the owner to the buyer. In *Phillips* v. *Huth*, 6 M. & W. 572, at p. 597, decided upon the law as it stood after 5 & 6 Vict. c. 39, Parke, B., in delivering the judgment of the court, says: "If the Legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided; if they had, the innocent party dealing with him would have been protected, but the innocent owner would, in that case, have suffered if the document had been taken from him by felony or fraud. But by providing that a person should be intrusted, as well as in possession, the inconvenience is obviated." Though, as we have seen, the word "intrust" was afterwards held to be satisfied, although the intrusting was induced by fraud, I think the omission of this word in the present statute and the substitution of "obtain with consent" must have been still further to improve the position of the purchaser from the class of persons dealt with in the Act, and at least to exclude all consideration of the conditions upon, or purposes for, which actual possession was in fact voluntarily given to his vendor. In *Cole* v. *North-Western Bank*, L. R. 10 C. P. 354, at p. 372, Blackburn, J., in delivering the judgment of the Exchequer Chamber, says: "The Legislature seems to us to have wished to make it the law, that where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that Act to have misled anyone who *bonâ fide* deals with the agent, and makes a purchase from or advance to him without notice that he was not authorized to sell or procure the advance." In *Sanders* v. *Maclean*, 31 W. R. 698, 11 Q. B. D. 327, at p. 343, Bowen, L.J., in dealing with an objection that the usage there contended for would facilitate fraud, says: "The object of mercantile usages is to prevent the risk of insolvency, not of fraud; credit, not distrust, is the basis of commercial dealings." The later legislation is clearly an attempt to bring the law more nearly into line with mercantile opinion, and to extend the statutory implication of misleading to the case where persons, not agents at all, have been permitted by the owner to obtain possession of goods or documents of title. In short, the vendor who puts his purchaser in possession of the documents may be deemed to have misled the sub-purchaser who buys on the faith of that possession. The vendor from whom they have been stolen or taken against his will cannot. The common precaution of sending the bill of lading to his own agent, instead of to the buyer direct, would have avoided all difficulty, and I think the Legislature must have been well aware of the common practice in these cases, and left the seller to protect himself.

It is, however, contended by the respondents that section 19, sub-section 3, of the Sale of Goods Act, which enacts the law as laid down in *Shepherd* v. *Harrison*, concludes the case in their favour, and the learned judge below seems to have adopted this view. With the greatest respect for his opinion, I cannot think that section has any bearing on the point now under discussion. It is not addressed to the original obtaining possession at all. It is addressed to the duty of the recipient after he has got it and declares that, if he wrongfully retains it, the property in the goods does not pass. All this is wholly consistent with, and indeed assumes, custody with consent. His possession becomes wrongful only if he does not honour the bill of exchange; then and only then he is bound to return it. Even when, by electing not to accept the bill, he has come under a duty to return it, he is bailee of the bill for that purpose with the consent of the owner. But at what moment does his retention become wrongful. Suppose he *bonâ fide* intends to honour the bill, and lays both bill of lading and bill of exchange aside for an interval while he is attending to other matters, is his possession during this interval without consent? At what point of time does he obtain possession with consent in case he makes up his mind to accept the bill? Surely the obtaining possession with consent cannot depend on the fluctuations which his mind goes through during the period that the bill is in his custody. But when *Shepherd* v. *Harrison* itself is looked at it is clear that the point then decided was quite outside the question of the possession as distinguished from the *jus disponendi*. The whole point was whether the true owner had shown that he intended to reserve to himself the *jus disponendi* in the goods so as to negative the inference that the property in them had passed to the person to whom a bill of lading indorsed in blank had been handed by the owner's agent together with a bill of exchange for the price for acceptance. The handing over the bill of lading under such conditions clearly did not rebut the conclusive evidence from the transaction itself that the seller intended to preserve his *jus disponendi* until the acceptance of the bill of exchange, and that therefore no property in the goods passed to the plaintiffs by the delivery of the bill of lading. It was not a question what title the buyer, having no title himself, could pass to a *bonâ fide* purchaser, but whether he could make title against the seller himself, a point wholly outside the special legislation of these Acts, which are based, as I have shown, on a constructive misleading of third persons. The decision and the *dicta* are addressed to this point only. "I therefore think," says Lord

Cairns, L. R. 5 H. L., at p. 133, "that when one merchant in this country sends to another under circumstances like this a bill of exchange and a bill of lading, it is not necessary at all for him to say in words: 'We require you to take notice that our object in enclosing these bills of lading and bills of exchange is that before you use the bills of lading you shall accept the bills of exchange.'" This is what he means when he says earlier in his speech, "The meaning was, 'You shall have the bill of lading when you accept the bill of exchange.'" The same meaning must be attributed to Lord Westbury's paraphrase at p. 130: "Remember you are not to possess yourself of the bill of lading until you have accepted the bill of exchange." Property, control, not mere actual custody, is what their lordships are referring to. The statutory declaration of the buyer's duty, when he has got the bill of lading, could not, any more than a mandate actually given or implied by law out of the circumstances, undo or defeat the effect of possession given concurrently with the mandate. It is expressly provided by section 21, sub-section 2, that nothing in the Sale of Goods Act shall affect the provisions of the Factors Act, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof. If, therefore, there was possession with consent here under the Factors Act, this provision would not suffice to defeat it. But, for the reasons I have given, I think it leaves the law merely as it was, and has no bearing on the discussion. On the principal point in the case, therefore, I think the appellants are right.

It remains only to deal with Mr. Cohen's argument that, even on the assumption that Pintscher obtained possession of the bill of lading with the consent of Steinmann, his transfer of it to Cahn did not suffice to defeat the right of Steinmann to stop *in transitu*. He relied on section 61 of the Sale of Goods Act, which preserves the rules of the law merchant, save so far as they are inconsistent with the Act, and pointed out that, apart from the Factors Act, a transfer such as that made by Pintscher, having himself no property in the bill of lading, would not have defeated the unpaid vendor's right to stop. But that Mr. Cohen pressed this point upon us, I should have thought it unarguable. The law merchant has unquestionably been altered by this Act, which partly re-enacts and partly applies the existing Factors Act. Section 21, sub-section 2 (*a*), expressly enacts that nothing in this Act shall affect the provisions of the Factors Act, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner. The effect of this legislation, therefore, has been to enable a buyer, who has obtained possession of the bill of lading with the consent of the owner, to deal with it as effectually as he might have done before if he had had property as well as possession. By section 25, sub-section 2, his transfer is made as effectual as if he were a mercantile agent in possession of the goods or documents with the consent of the owner; and, by section 2, sub-section 1, a disposition of the goods by a mercantile agent, under such circumstances, "is as valid as if he were expressly authorized by the owner of the goods to make the same." I have no hesitation in holding that a transfer of the bill of lading is a disposition of the goods within the meaning of those words in this section. But Mr. Cohen then fell back on section 47 of the Sale of Goods Act which, he said, now defines the only terms under which a buyer may defeat the right to stop *in transitu* by a sub-sale, and that this case does not fall within them. But the opening words of this section would be sufficient to introduce the Factors Act legislation into this enactment, even if it had not been otherwise expressly preserved. They are, "subject to the provisions of this Act the unpaid seller's right of stoppage *in transitu* is not effected by any sale or other disposition of the goods, which the buyer may have made, unless the seller has assented thereto." It then provides that where a document of title to goods has been lawfully transferred to any person as buyer or owner, he may defeat the right to stop by a transfer of the document to a person who takes it in good faith, and for valuable consideration. Mr. Cohen contended that, in this case, the bill of lading had not been "lawfully transferred" to Pintscher as buyer, inasmuch as it was not intended that the property should pass. But by section 11 of the Factors Act, "the transfer of a document may be by indorsement, or where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery." Delivery by the Sale of Goods Act, s. 62, means "voluntary transfer of possession from one person to another." I think there can be no doubt whatever that the bill of lading, which was indorsed in blank, was in this case "lawfully transferred" to Pintscher as buyer. It would, indeed, be a strange result of this legislation if the transfer of a bill of lading by a buyer to a sub-purchaser under the statutory conditions were ineffectual to defeat the vendor's rights in the case where such transfers are most likely to take place—viz., while the goods are still in transit. The result is that all Mr. Cohen's points fail.

I have dealt with the case throughout upon the same footing as that upon which it was dealt with in the court below—viz., as though the transfer of the bill of lading was from Pintscher to Cahn direct. No point was made before us upon any other hypothesis.

As to the point that there had been a bargain made by Pintscher with Cahn before the former got possession of the bill of lading, the answer is that Cahn's title rests on the transfer of the bill of lading for cash, and not on the prior bargain.

I think the appellants are entitled to judgment.

ROMER, L.J., read the following judgment: Section 25, sub-section 2, of the Sale of Goods Act, 1893, applies if Pintscher obtained possession of the bill of lading with the consent of Steinmann & Co. Now, "possession" in that context means, I think, actual custody: see the definition of possession in the Factors Act, 1889, s. 1. The question, therefore, becomes narrowed to one of consent. On that question I have come to the conclusion that Steinmann & Co. did consent to Pintscher obtaining the custody of the bill of lading. No doubt Steinmann & Co. contemplated that Pintscher would on receipt of the bill of lading accept the bill of exchange drawn for the price of the goods; and when Pintscher declined to accept the bill of exchange he ought not to have dealt with the bill of lading; but I do not think this is a case where the owner of the bill of lading made it a condition precedent to its custody being obtained by Pintscher that the bill of exchange should be accepted, so that if the bill of exchange was not accepted it was not the intention of Steinmann & Co. that Pintscher should obtain the custody of the bill of lading. I think the circumstances negative that view. It appears to me that Steinmann & Co. did intend, and consent, that the bill of lading and the bill of exchange should both come into the actual custody of Pintscher, though after Pintscher obtained that custody he had certain duties to discharge as between him and Steinmann & Co. with regard to both documents. Steinmann & Co., in short, consented that Pintscher should obtain the custody of the bill of lading, though they did not consent that Pintscher

should use the bill of lading after it came into his custody before accepting the bill of exchange: see the observations of Lord Cairns in *Shepherd* v. *Harrison*. It follows that Pintscher was, for the purposes of this case, in the position of a mercantile agent having possession of the bill of lading with the consent of the owner; and accordingly section 2 of the Factors Act, 1889, applies, and the plaintiffs obtained a good title to the goods. For, in the circumstances of this case, it cannot in my opinion be successfully contended by Steinmann & Co. that the transaction between Pintscher and the plaintiffs was not a disposition of the goods within the meaning of that phrase as used in section 2, sub-section 1, of the last-named Act. With regard to the second point argued before us, which relates to the right of stoppage *in transitu*, I do not desire to add anything to what the Lords Justices have already said.

Appeal allowed.

Solicitor for the appellants, *Richard White*, for *E. M. Clason Dähne*, Swansea.

Solicitors for the respondents, *Woodcock, Ryland, & Parker*, for *Forshaw & Hawkins*, Liverpool.

From Q. B. Div.
(A. L. Smith, Collins, and Romer, L.JJ.) March 2.

ALLEN v. VESTRY OF FULHAM. (a.)

Metropolis management—Paving expenses—New street—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.

The word "street" in the expression "new street" in section 105 *of the Metropolis Management Act*, 1855, *is used in its popular sense—viz., of a road having buildings erected on the adjoining land.*

Judgment of the Queen's Bench Division (ante, *p.* 9) *affirmed.*

Appeal from the judgment (reported *ante*, p. 9) of a Divisional Court (Day and Ridley, JJ.), on a case stated by a metropolitan police magistrate.

The appellants were the owners of certain premises forming, bounding, and abutting on Wandsworth Bridge-road. The respondents, the Vestry of the Parish of Fulham, were the successors of the Fulham District Board of Works by virtue of section 3 of the Metropolis Management Amendment Act, 1885.

Wandsworth Bridge-road, which formed a means of approach to Wandsworth Bridge on the north side, was made by the Wandsworth Bridge Co. in 1873 in pursuance of an Act of Parliament passed in 1864, by which it was provided that the road when completed should be a public highway and one of the parish highways of Fulham, and repairable in like manner as any other highway of that parish from time to time should be repairable.

For some time the district board refused to take over the maintenance and repair of the road, on the ground that it was inefficiently made, but, after prolonged negotiations and litigation between the company and the district board, an agreement was arrived at in September, 1876, whereby the district board agreed, in consideration of the sum of £1,750 paid by the company to them, to put the road in repair and thenceforth undertake the liability of repairing it.

In 1877 the district board made up the carriage-way of the road with flints rolled in over a foundation of hard core. No channelling or kerbing was done, neither was anything done in the way of repairing the footways.

The magistrate found that except for the omitted channelling and kerbing the carriage-way was made up and repaired in a permanent manner, and in the same mode and to the same extent as new streets with a similar amount of traffic were dealt with at that period under section 105 of the Metropolis Management Act, 1855. There were no buildings upon the land adjoining the road until the year 1890. In that year houses were erected on the east side. In 1895 and 1896 houses were built on the west side.

In 1897 the vestry passed a resolution that the Wandsworth Bridge-road, being a new street, should be paved under the provisions of the Metropolis Management Acts, 1855 and 1862, and that the estimated expenses of the paving works should be apportioned upon the owners of the houses and lands abutting upon the street. The sums apportioned upon the appellants were sums of £554, £963, and £248. The appellants having made default in payment, summonses were taken out by the vestry.

The magistrate found that the road was not in 1877 a new street within the meaning of section 105 of the Metropolis Management Act, 1885, and section 77 of the Metropolis Management Act, 1862, and that it became a new street for the first time after the erection of houses therein, and was a new street within the meaning of the Acts when the resolution of the vestry was passed. He accordingly held that the appellants were liable to pay to the vestry the sums demanded.

The Divisional Court affirmed the decision of the magistrate (see *ante*, p. 9).

The appellants appealed.

Macmorran, Q.C., and *R. Cunningham Glen*, for the appellants.

Macaskie, for the respondents.

A. L. SMITH, L.J.—The appellants contend that this road was a "new street" within the meaning of the Act in 1877, though no house had then been built on either side of it. The vestry contend that it was then a highway, but not a street, and that it became a street for the first time when it was converted into what is popularly known as a street by the building of houses. The magistrate has found as a fact that it was not a street until the houses were built. The appellants say that that is wrong, because a road may be a street within the meaning of the Act, although not a single building has been erected on either side of it. But section 105 of the Metropolis Management Act, 1855, which is the charging section, clearly contemplates the existence of houses by the side of the road which is to constitute a new street. It begins by speaking of "the owners of the houses forming the greater part of any new street," and the persons who are to pay the expenses of paving the new street are described as "the owners of the houses forming such street." In my opinion the interpretation clause, section 250, which makes "street" include any highway except the carriage-way of a turnpike road, does not cut down the popular meaning of the word "street." In *Robinson* v. *Local Board of Barton-Eccles*, 32 W. R. 249, 8 App. Cas. 798, Lord Selborne, dealing with the similar interpretation of "street" in the Public Health Act, 1875, said: "An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

I look upon this portion of the interpretation clause as meaning neither more nor less than this, that the provisions contained in the Act as to streets, whether new streets or old streets, shall, unless there be something in the subject-matter and the context to the contrary, be read as applicable to these different things. It is perfectly consistent with that, that they should be read as applicable, and should be applied, to those things to which they in their natural sense apply, and which do not require any interpretation clause to bring them in; and in the natural and popular sense of the word 'street,' or the words 'new street,' I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must or may be continuous or discontinuous); and by 'new street' a place which before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it." But then the appellants rely on section 77 of the Metropolis Management Act, 1862, which brings in the owners of land abutting on a new street, and makes them liable to contribute to paving expenses as well as the owners of houses. I think the object of that was this: Before the Act of 1862, where a street became paveable which had houses alongside it, and also at intervals pieces of vacant land on which houses had not been built, the owners of the houses had to pay the whole of the expenses, and the owners of the vacant land paid nothing; and this section was passed to make them liable to contribute.

I entirely agree with what was said by Wright, J., in *Vestry of St. Mary, Battersea* v. *Palmer*, 45 W. R. 110, [1897] 1 Q. B. 220: "When section 105 is carefully looked at, it is obvious that it not merely begins by treating houses as the essence of what is a street for the purposes of the section, but later on it goes on to use this expression: 'And the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses.' Clearly when that section was passed the Legislature was thinking of a street composed wholly or partially of houses; and I should say that the question whether there was a sufficient number of houses to make a road a street for the purposes of that Act would be a question of fact for the magistrate."

I think the judgment of the Divisional Court is right. This road was not a new street in 1877, and the magistrate has found that it did not become a new street till houses were erected. The vestry, therefore, were entitled to pave it as a new street and charge the expenses on the frontagers.

COLLINS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellants, *Walter M. Willcocks.*

Solicitor for the respondents, *T. Blanco White.*

High Court of Justice.

Chan. Div. } Romer, J. } Dec. 9, 10; Feb. 3, 4.

DAVIES v. PARRY. (a.)

Administration—Creditor's action—Right of retainer—Decree for administration—Form of administration bond.

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

The form of a creditor's administration bond as now used still permits a creditor who has taken out letters of administration to retain his own debt, even out of assets come to his hands after a decree for administration obtained by other creditors.

Nunn v. Barlow (1824), 1 *Sim. & St.* 588, *followed.*

Jones v. Evans (1876), 24 *W. R* 778, 2 *Ch D.* 420, *distinguished.*

Adjourned summons.

The chief question in this summons was whether the present form of administration bond as now used, after the decision in *In the Goods of Brackenbury*, 25 W. R. 698, 2 P. D. 272, deprived an administrator of his right of retainer.

Thomas Parry, a solicitor, died intestate in November, 1862, and letters of administration to his estate were granted to his widow Mary Parry on the 11th of December, 1862.

On the 20th of December, 1862, the usual decree was made for the administration of the real and personal estate of Thomas Parry in this action, which was an administration suit brought by certain of his creditors.

In January, 1867, the chief clerk certified that a sum of £405 was owing to the estate of the deceased for taxed costs in a suit of *Tardrew* v. *Howell*, 9 W. R. 296, for payment of which there was no fund available until after the death of one Hannah Howell; and he also found that among other creditors of the deceased, one William Bonville was a simple creditor for £136

Thomas Parry's estate proved insufficient to pay all the debts, and William Bonville only received £58. William Bonville died in 1872, and his son, William Bonville the younger as sole executor, proved his will.

The widow Mary Parry died intestate in 1890, and in July, 1897, letters of administration *de bonis non* of the personal estate and effects of the said Thomas Parry were granted to the said William Bonville the younger as a creditor, and he executed the usual bond of a creditor on taking administration.

On the said Hannah Howell's death a sum of £257 was, by an order in *Tardrew* v. *Howell* made in February, 1898, directed to be paid to William Bonville the younger, as the legal personal representative of Thomas Parry, on account of the said debt of £405 for costs.

William Bonville alleged that with arrears of interest and the unpaid balance, the amount owing to his father's estate in respect of the said debt of £136 was £182, and he now applied by summons for a declaration that as administrator *de bonis non* of the personal estate of the intestate the said Thomas Parry deceased, he had a right to retain the said sum of £182 in discharge of the debt owing to him by the said deceased, out of the said sum £257, moneys come to his hands as legal personal representative of the said Thomas Parry deceased, with a further sum of £25 on account of costs, and that he might be at liberty to pay into court the balance of the said sum of £257 to the credit of this action.

Farwell, Q.C., and *Douglas*, for the administrator.—An administrator has the right to retain his own debt, and he cannot be said to be "unduly preferring his own debt" within the meaning of the words in the administration bond, when he retains it in the manner allowed by law. *Nunn* v. *Barlow*, 1 Sim. & St. 588, is precisely in point.

Neville, Q.C., and *Elgood, contrà.*—The case of *In the Goods of Brackenbury*, in consequence of which the administration bond was settled in its present form, shows that the bond is intended to exclude the administrator's right of retainer.

ROMER, J.—There is no doubt that the question raised here is a very important one; but I do not see how I can refuse to allow the right of retainer claimed by the administrator. It is settled law, by decisions which I cannot review, that an administrator has a right of retaining out of the legal assets a debt due to himself as trustee, although there may be other creditors, and the estate be insolvent. It is also settled that an administrator can do that, even though there has been a decree for administration, and even though the debt which he claims to retain has been proved in the administration action. I may refer, in support of that last proposition, to the case of *Nunn* v. *Barlow*, 1 Sim. & St. 588. That case having been decided so long ago, I certainly cannot review it. It was argued before me, or rather suggested, that the case of *Jones* v. *Evans*, 24 W. R. 778, 2 Ch. D. 420, threw doubt on that case, or showed that that case ought not to be followed. But the case of *Jones* v. *Evans*, which came before Hall, V.C., was perfectly distinct. There the executrix who claimed the right of retainer did not represent a dead creditor who had proved in the administration action against the testatrix's estate, but was a mere legatee under that creditors' will, and nothing more. Of course as legatee that executrix had no right to retain that debt, and it was so held. That case did not, in my opinion, differ from or throw doubt on *Nunn* v. *Barlow*, to which I have already referred. So far, therefore, as this court is concerned there would appear to be no answer to the claim of this administrator to retain this debt. What I desire to point out is that I wish the law was not so, but that being the law I must follow it.

That raises a very important question indeed as to the form of the bond which was entered into by the creditor when he obtained letters of administration *de bonis non;* it is said that this bond deprives him of his right of retainer, and it is said that I ought to construe that bond with reference to the special facts of this case—namely, that there had been an administration decree and a proof of debts in the administration. I cannot do that. This bond is in common form; there is nothing on the face of it to show that it was entered into with reference to this particular estate. How can I construe this bond with reference to the special circumstances of this case in one way, and when that same bond comes before me in another case say that I ought to place a different interpretation on it. I must put upon this bond the proper interpretation, regardless of the special circumstances of this case. When I look at it, it may well be that when the first bond was settled it may have been the object of those who framed it to exclude the right of retainer. I say that, having regard to the observation of Sir James Hannen in the case of *In the Goods of Brackenbury*, to which my attention has been called, whatever the intention was I can only look at the words of the bond, and unless I can gather that intention from the words of the bond, I cannot regard it.

Now I will look at the bond, and one of the conditions of the bond is that the administrator shall "well and truly administer according to law (that is to say) do pay all and singular the debts which he (the intestate) did owe at his decease in a due course of administration rateably and proportionably, and according to the priority required by law." I pause there before construing the following words to consider what that means. If the words I have read stood alone, it might well be that the administrator might find himself in this unpleasant position—he might have ample assets, and he might have an undoubted creditor of the intestate coming to him and saying, "Please pay my debt out of the assets you have in hand." The administrator might know nothing whatever of the existence of any other debts, and might have every reason to believe the estate solvent. Would it be right that, because of these words, he should be made liable for paying this debt out of the assets, in the event of subsequent debts of which he had no notice turning up? And again, ought he to be considered as having broken his bond because he did not pay all the debts rateably and in proportion?

That would be a strange position in which to place an administrator, and it would be curious to see what the liability was. If an administrator ought to be held entitled when he has ample assets, and knows of the existence of no other debts, to pay the debts he does know of, he ought to be allowed to do so; and, if he may pay other debts, why may he not pay his own. I do not think it was ever intended to place an administrator in this difficult position; but the bond might have been so construed if the words stopped at the place I broke off. But the words do not stop there. I think I have shown a very good reason why they should not; everything preceding is governed, in my opinion, by the following words: "And according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator as aforesaid." It is contemplated that there may be circumstances in a particular case which ought to be considered. Therefore very properly this bond gives him the power of preferring, so long as he does not do it unduly. What does "unduly" mean? How can I hold that an administrator has not a right in a proper case, out of the legal assets to retain a debt due to himself as a trustee. I cannot hold it. It is not "unduly preferring" this debt. Indeed, if as trustee he represents a creditor, he is compellable at the instance of his *cestui que trust* to enforce his rights. How can I hold that an administrator is unduly preferring his own debt when the law says that he may retain payment of it. I do not see my way so to hold, and for the reasons given I hold that the true construction of this bond still leaves it open to the administrator to retain his own debt so long as the law allows him this right of retainer, and so long as he is not in that respect acting unduly. For these reasons I hold that the administrator is entitled to retain his debt in accordance with this summons, and he will be at liberty to pay the balance into court. Both parties will be allowed their costs.

Solicitors, *Berkeley, Calcott, Holloway, & Tudor; Shirley Woolmer*, for *C. E. Morris*, Carmarthen.

Chan. Div.
Cozens-Hardy, J. } March 14, 15.

NUTT v. EASTON. (a.)

Mortgage—Power of sale—Duty of mortgagee exercising—Purchase of mortgaged property by solicitor of mortgagee—Private contract—Validity of sale.

The executrix of a mortgagee, some months after his death, sold the property, which was reversionary, under the power of sale in the mortgage, to E., who had acted as solicitor for the mortgagee in regard to the mortgage and in regard to certain negotiations for selling the property and in proving the mortgagee's will. Notice of the sale was given to N., the owner of the equity of redemption. N. thereupon asserted that he was entitled

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

to the property, but took no step until, more than nine years afterwards, the reversion fell into possession. He then brought an action against the executors of E. to redeem the mortgage and to have the property assigned to him on payment of what was due for principal, interest, and costs.

Held, that, the sale being bonâ fide *and a sufficient price having been paid, there was no ground for saying the transaction was null and void, and, assuming that it was voidable, there was no ground of which the plaintiff could avail himself for avoiding it.*

The rules for a mortgagee exercising his power of sale laid down in Farrar *v.* Farrars (Limited), 37 *W. R.* 196, 40 *Ch. D.* 395, *and in* Kennedy *v.* De Trafford, 45 *W. R.* 671, [1897] *A. C.* 180, *considered and applied.*

Action.

In this action it was sought to set aside a sale by a mortgagee of a contingent reversionary interest in stock (with a policy) under the power of sale contained in the mortgage deed, as against the plaintiff, who had purchased the mortgagor's equity of redemption; and to have it declared that an indenture dated the 24th of January, 1888, purporting to be the conveyance on sale of the said property, ought to stand as a security only for the amount of the mortgage principal with interest thereon from the 24th of January, 1888, and for the policy premiums.

By a deed of the 15th of May, 1884, made between W. E. Royou of the one part and R. H. Matthews of the other part, in consideration of £150 advanced by Matthews to Royou, Royou assigned to Matthews both a contingent reversionary legacy invested in stock subject to the life interests of Royou's father and mother and to the contingency of Royou's death in the lifetime of his father, and also a policy, subject, as to both the premises, to redemption on payment of £150 and interest thereon at 8 per cent. per annum; and the said deed contained an absolute power of sale of the premises and a purchaser's protection clause.

By deed of the 9th of October, 1886, made between Royou of the one part and the plaintiff of the other part, in consideration of £15 paid by the plaintiff to Royou, Royou assigned his equity of redemption of the said mortgaged property to the plaintiff absolutely, and notice in writing of this assignment was shortly afterwards given to Matthews.

Royou having made defaulr in payment of two quarters' interest, Matthews sued him and on the 25th of January, 1887, recovered judgment against him for the principal and two quarters' interest at 8 per cent. On the 14th of April, 1887, the mortgaged property was offered for sale on behalf of Matthews at the mart, but was not sold. On the 9th of August, 1887, Matthews died leaving his widow sole executrix.

Easton, who had acted as solicitor for Matthews in the mortgage, and action, and abortive sale at the mart, acted as solicitor for the executrix in proving his will. The plaintiff had been asked by Easton to take over the mortgage security in December, 1886, but took no step. Easton, being pressed by Mrs. Matthews to find a purchaser and being unable to do so, at last agreed to buy for £180, the amount due to the mortgagee for principal, interest, and costs. By deed, dated the 24th of January, 1888, between Mrs. Matthews of the one part and Easton of the other part, in consideration of £180 paid to her by Easton, Mrs. Matthews, in exercise of the power of sale contained in the mortgage of the 15th of May, 1884, assigned to Easton the mortgaged property, subject to the said life interests and contingency free from all equity of redemption; and notice in writing of this assignment was shortly afterwards given to the plaintiff, who wrote to Easton complaining of what had been done, and asserted that he was advised that he was entitled to the property, but took no step. On the 5th of February, 1895, Easton died.

On the 4th of April, 1897, the reversionary interest fell into possession on the death of the survivor of the life tenants. On the 17th of December, 1897, the plaintiff issued the writ in the above action.

Eve, Q.C., and *Johnston Edwards*, for the plaintiff — As against the mortgagor, in whose shoes Nutt stands, a purchase by the solicitor of the mortgagee cannot be sustained: *Martinson* v. *Clowes*, 30 W. R. 795, 21 Ch. D. 857, at p. 860; see also *Whitcomb* v. *Minchin*, 5 Madd. 91; *Downes* v. *Grazebrook*, 3 Mer. 200, at p. 207—[COZENS-HARDY, J.—The purchaser there was a mere nominee of the vendor.]; *Farrar* v. *Farrars (Limited)*, 37 W. R. 196, 40 Ch. D. 395. In *Lawrance* v. *Galsworthy*, 3 Jur. N. S. 1049, 6 W. R. Ch. Dig. 47, 55, the solicitor of the mortgagee vendor, who as such solicitor had the policy in his possession, bought at the sale by auction, and Stuart, V.C., treated the sale as wholly invalid, and where the sale is by private contract the same rule applies. [COZENS-HARDY, J., referred to the *dicta* in *In re Bloye's Trusts*, 1 Mac. & G. 488, at p. 494.] The principle is that the mortgagor is entitled to call on the mortgagee so to conduct a sale under the power of sale as to get a reasonable price, and a sale to a man's own agent is inconsistent with this principle, and therefore invalid: *Orme* v. *Wright*, 3 Jur. 972; see also *Marriott* v. *Anchor Reversionary Co.*, 9 W. R. 726. [COZENS-HARDY, J., referred to *Warner* v. *Jacob*, 30 W. R. 731, 20 Ch. D. 220.] Nobody is prejudiced by the delay in paying off, and it makes no difference.

Astbury, Q.C., C. A. Russell, Q.C., and *Lewin*, for the defendants.—Assuming everything in favour of the plaintiff, he has stood aside for ten years with full knowledge of the circumstances and his rights, and is barred by his delay. *Downes* v. *Grazebrook* was quite a different case, and there was no question of *laches* there. Easton was not Mrs. Matthew's solicitor in the matter of the sale when he bought. If the transaction is *bonâ fide*, as is admitted. Easton did not buy as her agent. *Kennedy* v. *De Trafford*, 45 W. R. 671, [1897] A. C. 180, shows that *Orme* v. *Wright* is not law. The solicitor acting for the vendor at the time of and in the purchase—that is, as the vendor's agent for sale—cannot buy on the common law rule of principal and agent. *Martinson* v. *Clowes* goes beyond the earlier cases. It is impossible to say that the transaction here was not a sale. It was intended to be, and was a sale. Therefore the plaintiff only relies on an equity. How, then, can he succeed?

They also cited *Beckford* v. *Wade*, 17 Ves. 87; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787, 5 W. R. Ch. Dig. 60; *Levy* v. *Stogdon*, [1899] 1 Ch. 5; and *Knight* v. *Bowyer*, 6 W. R. 565, 568.

Eve, in reply.—Easton had notice that there had been no exercise of the power of sale in the plaintiff's view. The plaintiff could therefore redeem, as, and when he pleased, in virtue of the relation of mortgagor and mortgagee subsisting between him and Easton, and was not bound to elect at any particular time whether he would do so or not.

COZENS-HARDY, J.—In my opinion the plaintiff has failed to prove his case. From an early stage I have thought that the case depended on a question of law. There was a time when a mortgagee selling under his power of sale was thought and said to be a trustee for sale subject to all the obligations and disabilities of such a trustee. It was said that he must sell for the best price; that anyone who acted as his agent could not buy for himself—that is, bene-

ficially, from him. But all depends on the question, Is the mortgagee to be regarded as a trustee? If he is not a trustee, it is difficult to see how a transaction between a mortgagee selling under his power and his solicitor can be opened at the instance of the mortgagor. I am happily relieved by the authorities from deciding the point. It was laid down by the Court of Appeal in *Farrar* v. *Farrars (Limited)*: "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed," 37 W. R. 196, 40 Ch. D. 395, pp. 410, 411; and again more strongly and more clearly, if possible, by the House of Lords in *Kennedy* v. *de Trafford*: "If a mortgagee, in exercising his power of sale exercises it in good faith without any intention of dealing unfairly by his mortgagors it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. . . . It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion," 45 W. R. 671, [1897] A. C. 180, p. 185, per Lord Herschell; "If a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached," p. 192, per Lord Macnaghten.

In the case before me no imputation was made of bad faith. Am I to treat the transaction as not amounting to a sale at all? It was a *bonâ fide* transaction, and a sufficient price was paid, and there is therefore no ground for saying it is wholly null and void. It bears no resemblance to a sale by a person to a trustee for the vendor, which is no sale at all.

It may possibly be that it is a voidable transaction. I am not, however, satisfied that Mrs. Matthews could have avoided it, and fail to see any ground of which the plaintiff can avail himself, who has never stood in the position of a client to Easton. This is enough to decide the case, but I ought to add that I am not satisfied that Easton ever was solicitor acting in the matter of the sale of this property for some considerable time prior to the assignment to him. The circumstances were known to the plaintiff in January or February, 1888, and according to his own story he then took advice. Knowing, therefore, the facts and his rights, he deliberately stands by for ten years. This being so, no authority is necessary to show that a court of equity will not assist him after such an interval. I dismiss the action with costs.

Judgment for the defendants.

Solicitors, *Nutt; Easton & Cargill.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Jan. 23; March 29.

In re RHOADES.
Ex parte L. RHOADES. (*a.*)

Bankruptcy — Insolvent estate — Administration — Executor's right of retainer—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.

The executrix of an insolvent testator, against whose estate an order for administration in bankruptcy had been made, paid over to the official receiver all such assets of her testator as she had collected, in ignorance of her right to retain the amount of a debt due to her from the testator, for which she presented a proof. On discovering that she had a right to retainer she withdrew her proof before it had been adjudicated upon, and moved for a declaration that she was entitled to retain the amount of the debt due to her.

Held, that the executrix was entitled to her right of retainer.

Motion by the executrix of G. W. Rhoades, deceased, for a declaration of her right to retain out of the assets of the deceased the amount of a debt due to her from him.

G. W. Rhoades died on the 14th of April, 1898; his widow proved his will as executrix, proceeded to collect his assets, and paid the money into her account at Glyn & Co.'s bank. Upon the 11th of July she received notice that a petition had been presented for the administration of the deceased's estate in bankruptcy. An order was made thereon, and the official receiver called upon her to hand over the amount she had collected, which then stood at £895.

The deceased owed Mrs. Rhoades £604, but she, being ignorant of her right to retain her debt, paid over the £895 to the official receiver, and on the 9th of August put in a proof for her debt.

Discovering soon afterwards that she had a right of retainer, she withdrew her proof upon the 15th of August, and applied to the official receiver to recognize her right of retainer. On his refusal she launched the present motion.

Reed, Q.C., and *Rolt*, for the motion.—The executrix having paid this money over under a mistake of law the court is entitled to deal with the matter: *Ex parte James, In re Condon*, 22 W. R. 937, L. R. 9 Ch. App. 609; *Ex parte Simmonds, In re Carnac*, 34 W. R. 421, 16 Q. B. D. 308. In an administration suit the executor never lost his right of retainer by payment into court or to a receiver: *In re Harrison, Latimer* v. *Harrison*, 34 W. R. 736, 32 Ch. D. 395.

Whinney, for the official receiver.—The executrix has no right of retainer save so long as she remains executrix, and the effect of the order for administration in bankruptcy divests the property from the executrix and vests it in the trustee. She should have exercised her right of retainer before notice of petition, or at least declared her intention of exercising it: *In re Williams, Ex parte Lewis*, 8 Morrell, 65; *In re Gilbert*, 46 W. R. 351, [1898] 1 Q. B. 282.

Reed, Q.C., replied.

Cur. adv. vult.

March 29.—WRIGHT, J.—G. W. Rhoades died insolvent on the 14th of April, 1898. His will was proved on the 29th of June by his widow and executrix, who was a creditor for £604 3s. 4d. She proceeded to get in the estate and paid the money which she collected into a bank in her own name.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

On the 11th of July she had notice of a creditor's petition for administration in bankruptcy. On that petition the usual order was made on the 25th of July. On the 30th the official receiver required her to pay to him the assets which she had collected, and she paid them over, and on the 9th of August she put in a proof for her claim. She was then for the first time informed by her solicitor that she had a right of retainer, and on the 15th of August her proof was withdrawn and a claim of retainer was asserted.

The Bankruptcy Act, 1883, s. 125, enacts by sub-section 4 that an order for administration in bankruptcy shall have "the like consequences . . . as under an administration order made on the petition of a creditor," and by sub-section 5 "the property of the debtor shall vest in the official receiver of the court as trustee thereof, and he shall forthwith proceed to realize and distribute the same."

It seems plain from *In re Hubback*, 33 W. R. 666, 29 Ch. D. 934, and *In re Orme*, 50 L. T. Rep. 51, 32 W. R. Dig. 6, that the order for administration did not of itself affect the right of retainer. In the former of these cases, Fry, L.J., said with reference to a balance order under the Companies Acts: "This order is analogous to the old administration decree and the present administration judgment, a form of judgment which it is notorious does not affect the right of retainer of the executor . . . it leaves unaffected all the piorities and all the rights which exist in due course of administration."

In *In re Williams, Ex parte Lewis*, which was relied on for the official receiver in the present case, the moneys sought to be retained were not received by the executor until after administration order, and the judgment seems to proceed on that ground: as to which, however, see Williams on Executors (9th ed.), vol. 1., p. 886. Nor, I think, would the mere fact of payment into the hands of the official receiver of assets collected by the executor necessarily bar the right of retainer, any more than payment into court—*Stahlschmidt* v. *Lett*, 1 Sm. & G. 145; *Chissum* v. *Dewes*, 5 Russ. 29; *Tipping* v. *Power*, 1 Hare 405; *Richmond* v. *White*, 27 W. R. 878, 12 Ch. D. 361; or payment to a receiver in an administration action: *In re Harrison, Latimer* v. *Harrison*, If the debt for which the executor claims the right to retain is disputed, as in the present case it was, it would be quite proper that the assets should be handed over to the official receiver, and it would be his duty as trustee for the interested persons to give effect to the right of retainer on proof of the debt.

Then was her right barred by the fact that the payment over to the official receiver by Mrs. Rhoades of the moneys which she had collected was made without reservation of that right and in ignorance of its existence? I do not find that any such contention was raised in the cases which I have cited of payment into court or to receivers; and if it was right for her to pay over the moneys without any express reservation of her retainer, I do not think that in so doing she can be held to have thereby made any election or waived any right, the facts negativing any intention of that kind.

Further, it was held in *Ex parte James, In re Condon*, that a payment made to a trustee by an execution creditor under a mistake of law may be the subject of relief by the court, and it was said that the trustee is an officer of the court and holds the money in his hands for equitable distribution according to the directions of the court; and this decision was followed and extended in *Ex parte Simmonds, In re Carnac*, and although it has often been said that retainer is not to be aided where there is no legal right to it, still if there was a legal right to retainer, and it has been suspended by a mere slip through ignorance of a somewhat obscure right, it seems to me that the doctrine of *Ex parte James* may, if necessary, be applied.

Lastly, it is said that the right is barred by the fact that Mrs. Rhoades has proved for her claim. It was held by Lord Chelmsford in *Stammers* v. *Elliott*, 16 W. R. 489, L. R. 3 Ch. App. 195, that the right was barred in a case of bankruptcy where not only had proof been made, but dividends had been received and kept, and several cases (*e.g.*, *Ex parte Downes*, 18 Ves. 290; *Ex parte Solomon*, 1 G. & J. 25) decide that a proof may be an abandonment of securities.

But in the present case the proof was withdrawn before adjudication upon it. In *In re Deerhurst, Ex parte Seaton*, 8 Morrell 258, 39 W. R. Dig. 24, Cave, J., says there is no doubt that a creditor may withdraw his proof before it has been adjudicated upon, and I have not found any contrary decision; and if the executrix had the right to withdraw her proof, it seems to me that upon the withdrawal of it, every consequence dependent on the mere fact of making it, ceases. It might have been otherwise if the proof had been made with knowledge of the right of retainer. That might have been a final election to prove, although it could not have been so intended in this case. In the present case there was a mere slip, without any negligence, and there was no delay in retrieving it.

I think that the claim ought to be allowed.

Solicitors for the applicant, *Thomson, Brooks, & Danby.*

Solicitors for the respondent, *Adams & Adams.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — March 28.

THOMPSON AND ANOTHER *v.* LONDON COUNTY COUNCIL. (*a.*)

Practice — Parties — Joinder of defendants—Separate torts—Alternative claims—Negligently letting down house—Ord. 16, *r.* 7.

The plaintiffs claimed damages by reason of the defendants having negligently excavated the subsoil of the street adjoining the plaintiffs' premises, and so taken away the support thereof, thereby causing a part of the premises to subside. The defendants, in their statement of defence, denied that the injuries complained of were caused by their acts, and alleged that the injuries were caused by the negligence of a water company in leaving their water main insufficiently stopped. The plaintiffs thereupon applied to add the water company as defendants in the action.

Held, that the causes of action against the defendants and the water company were separate and distinct, and that therefore the water company could not be added as defendants.

Appeal from an order of Bigham, J., at chambers.

The plaintiffs were the lessees and occupiers of a house and premises in a street along which the defendants were constructing a sewer under section 135 of the Metropolis Management Act, 1855.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The statement of claim alleged that the premises had for more than twenty years been supported by the earth and soil adjoining thereto; that part of the premises consisted of a vault and cellar which extended under the footway of the street; and that the defendants negligently and improperly excavated the earth and soil of the street adjoining the vault and cellar and abstracted the subsoil and subsoil water supporting the premises, by reason whereof the vault and cellar became cracked and injured. The defendants in their statement of defence, while denying negligence, alleged that none of the injuries were caused by the acts complained of, but were caused by the negligence or default of the New River Co. in leaving their water main at a point in front of the premises unstopped or insufficiently and improperly stopped.

The plaintiffs thereupon applied to add the New River Co. as defendants, and the judge at chambers, reversing the order of the master, granted the application.

The defendants, the London County Council, appealed.

F. F. Daldy, for the London County Council.—The claim against the New River Co. is founded upon a different cause of action from that against the London County Council. The learned judge acted upon ord. 16, r. 7, but that rule does not authorize the joinder of distinct causes of action. Order 16 deals with the joinder of parties and not with the joinder of causes of action: *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494; *Sadler* v. *Great Western Railway Co.*, 45 W. R. 51, [1896] A. C. 450; *Gower* v. *Couldridge*, 46 W. R. 214, [1898] 1 Q. B. 348. Rule 4 applies before action brought. Rule 7 allows a plaintiff during the progress of the action to add a defendant, where he is in doubt as to which of two or more persons his cause of action is against. The cases of principal and agent, where the claim is against the principal upon the contract and against the agent for breach of warranty of authority, stand on a different footing, as the claims against each arise out of one common transaction: *Honduras Railway Co.* v. *Tucker*, 25 W. R. 310, 2 Ex. D. 301; *Bennetts* v. *McIlwraith*, 45 W. R. 17, [1896] 2 Q. B. 464. The decision in *Child* v. *Stenning*, 25 W. R. 519, 5 Ch. D. 695, cannot be supported since the decisions in *Smurthwaite* v. *Hannay* and *Sadler* v. *Great Western Railway Co.*

H. Tindal Atkinson, for the plaintiffs.—There is here only one cause of action—namely, the subsidence caused by the acts either of the London County Council or of the New River Co. The damage to the premises, and not the excavation, is the cause of action. For that one cause of action, the plaintiffs are uncertain which of two persons is liable. Therefore they can join the two as defendants under ord. 16, r. 7. In both *Honduras Railway Co.* v. *Tucker* and *Bennett* v. *McIlwraith* there were two causes of action, one against the principal on the contract, and the other against the agent for breach of warranty of authority. These cases are not affected by the decisions in the House of Lords. *Child* v. *Stenning*, which has never been overruled, is directly in point.

A. L. SMITH, L.J.—In my opinion this appeal must be allowed. The plaintiffs have brought an action against the London County Council for having let down a house of which they were the lessees and occupiers while the county council were doing excavating work in connection with a new sewer. The defence of the county council is that they did not let down the house, but that it was the fault of the New River Co., whose main leaked, and thereby the soil became soaked with water, and it was that which caused the house to subside. The plaintiffs thereupon applied to have the New River Co. added as defendants in the action. The question is, Can they be added? I do not agree that the county council and the New River Co. are not, upon the plaintiff's assumption, independent tortfeasors. The one is sued for letting down the house by excavation work; the other is sought to be sued for allowing the water to escape from the main and thus rendering the soil unfit for the support of the house. The question must be which of the two brought down the house. The law upon the matter has been settled by the House of Lords in *Smurthwaite* v. *Hannay*, that order 16 deals with the joinder of parties and not with the joinder of separate causes of action. The authorities before that decision had got into a rather complicated state, but since that decision it is now unnecessary to refer to the earlier cases, because the House of Lords has now laid down that order 16 only applies to joinder of parties. Joinder of causes of action is dealt with in order 18. In my opinion, if the plaintiffs were allowed to join the New River Co. as defendants they would be joining separate causes of action. It is not to the point to say that the damage is the same in each case. The question is, Who is the tortfeasor? It is not a question under rule 7 of order 16 as to which of two defendants is liable upon the one cause of action. The action is an action for misfeasance against the London County Council, and the plaintiffs seek to join in that action a claim for misfeasance against the New River Co. Those are two separate causes of action. In *Sadler* v. *Great Western Railway Co.* two railway companies occupied premises, one on each side of the plaintiffs' premises, and each of the companies brought up their vans in front of their own premises, and the plaintiff sued the two companies in one action for obstructing the street and causing him inconvenience and annoyance. In that case Lord Watson, who put the matter very pithily, said: "It is perfectly obvious that the statement of claim for the appellant sets forth two separate and distinct causes of action against two separate defendants. I do not think that upon any fair construction of his pleading there is set forth any joint claim against the defendants. In these circumstances it has been painfully apparent from first to last of the learned argument we have heard that the contention of the appellant is not only unsupported by authority, but is in the teeth of authority." In my opinion, in the present case there are two separate and distinct causes of action against two separate defendants. That decision is binding upon us, and, if I may say so, I entirely agree with it. It is impossible to bring this case within ord. 16, r. 7. It is said that our present decision is in conflict with what we decided in *Bennett* v. *McIlwraith*, but I said in that case that "the redress, it will be seen, is sought against two persons, but the right to it arises out of one common transaction." That decision does not in any way offend against anything I am saying now. The appeal must therefore be allowed.

COLLINS, L.J.—I am of the same opinion. When once it is admitted that the House of Lords has decided that a plaintiff cannot join in one writ separate and distinct causes of action against separate defendants, there is an end of the case. If it were otherwise, the plaintiff might have relied upon rule 7 of order 16. But it is now well-settled that order 16 only applies to joinder of parties. The argument of the plaintiffs seems to me to be based upon a fallacy, that because in this case there was only one damage the cause of action was one, however

many separate and distinct persons may have contributed towards it. The fallacy lies in confusing the *damnum* with the *injuria*, two things which are quite distinct. That which constitutes the cause of action is the *injuria*. In this case the acts of the London County Council and of the New River Co. are quite distinct, and constitute separate *injuriæ*. As the joint result of two alleged independent torts the plaintiffs' premises subsided. There is only one damage, but there are two causes of action. When *Bennetts* v. *McIlwraith* is examined it is clear that it does not touch the present case. That was an action against an agent for breach of warranty of authority, and the plaintiffs, being in doubt whether the agent had or had not authority, were held entitled to add the principal as a defendant. There was in that case one contract made by a person purporting to act on behalf of another. There being only one contract, the question was, which of the two broke it. If the agent had authority to make the contract, the principal would be liable; if he had no authority, the agent would be liable. In such a case the plaintiff reaches the agent through a technical claim for breach of warranty of authority, but the agent is liable to the same extent as the person on whose behalf he purported to make the contract would be if he had had authority. The form of action by which he is reached is immaterial. The question is, who is liable on the contract. The present is quite a different case.

ROMER, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors for plaintiffs, *Robbins, Billing, & Co.*

Solicitor for defendants, *W. A. Blaxland.*

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — March 23, 24.

BARNES AND ANOTHER v. GLENTON, LEWIS, AND SAUNDERS. (*a.*)

Limitations, Statute of—Simple contract debt chargeable upon land—Trustee debtors—Retirement of one trustee—Payment of interest by co-debtor—Claim after six years—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Mercantile Law Amendment Act,* 1856 (19 *&* 20 *Vict. c.* 97), *s.* 14—*Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

Section 3 *of* 21 *Jac.* 1, *c.* 16, *is not repealed by section* 8 *of the Real Property Limitation Act,* 1874; *the effect of the two Acts, read together, is that no action for a simple contract debt, whether chargeable on land or not, shall be brought after six years, and that no action for a specialty debt chargeable on land shall be brought after twelve years.*

Sutton *v.* Sutton, 31 *W. R.* 569, 21 *Ch. D.* 511, *distinguished.*

Firth *v.* Slingsby, 58 *L. T. Rep.* 481, 36 *W. R. Dig.* 135, *approved.*

In 1882 *the plaintiffs advanced money to the defendants, who were the three trustees of a will, the loan being secured by a transfer to the plaintiffs of mortgage securities belonging to the estate of the defendants' testator, but the defendants entered into no covenant to repay the loan. In* 1883 *L., one of the defendants, retired from the trusts of the will, and the other two trustees continued to pay interest on the loan until* 1896.

In 1897 *the plaintiffs brought an action against L. and the continuing trustees to recover the loan.*

Held, that the action, being for a simple contract debt, although chargeable upon land, was barred as against L. by section 3 *of* 21 *Jac.* 1, *c.* 16—*being brought more than six years after the accrual of the plaintiffs' right of action—and that section* 14 *of the Mercantile Law Amendment Act,* 1856, *prevented the payment of interest by the continuing trustees operating against L.*

Decision of Lord Russell of Killowen, C.J., ante, *p.* 13, [1898] 2 *Q. B.* 223, *reversed.*

Appeal of the defendant Lewis from the judgment of Lord Russell of Killowen, C.J., at the trial of the action, reported *ante*, p. 13, [1898] 2 Q. B. 223.

The action was brought to recover money lent and interest. The defendants were Glenton and Saunders, the present trustees, and Lewis, a former trustee, of the will of Lewis Glenton, who died in 1873. On the 9th of September, 1882, the plaintiffs, at the request of the defendants, took assignments of certain mortgage securities which formed part of the estate of the testator, Lewis Glenton.

The defendants were not parties to these deeds of assignment.

On the same date a deed of declaration of trust was executed to which the plaintiffs and defendants were parties, which recited the above deeds of assignment, and also recited that the plaintiffs, at the request of the defendants, had advanced them the sum of £1,650; and it then provided that the moneys advanced by the plaintiffs should be a first charge upon the transferred mortgage securities, and that no steps should be taken against the mortgaged property or the persons entitled to redeem without the consent in writing of the defendants, such consent only to be refused in case the defendants, within three months after application made to them for such consent, paid off the plaintiffs' claim. The deed contained no express covenant by the defendants to repay the plaintiffs their advance.

Immediately after this assignment the defendant Lewis retired from the trust. The other defendants paid the plaintiffs' interest on the loan up to March, 1896.

The plaintiffs having brought the present action in April, 1897, the defendants set up the defence that the plaintiffs had made the advance solely on the security of the mortgages, and that there was no personal liability on any of the defendants to repay. The defendant Lewis further set up the Statute of Limitations (21 Jac. 1, c. 16), and pleaded that the liability here, if any, was for a simple contract debt which, so far as concerned him, was barred by section 3 of that statute, on the ground that as he had had nothing to do with the trust since 1882 he was within the protection of section 14 of the Mercantile Law Amendment Act, 1856, by virtue of which the payments of interest made by his co-contractors or co-debtors, the other defendants, did not keep the debt alive as against himself.

The plaintiffs, on the other hand, contended that the action did not fall within 21 Jac. 1, c. 16, as it was in substance one to recover a sum of money secured by, or charged upon, or payable out of, land within the meaning of section 8 of the Real Property Limitation Act, 1874, and that the payments of interest by his former co-trustees from time to time kept the claim alive as against Lewis.

Lord Russell of Killowen, C.J., held (1) that the whole transaction constituted a loan by the plaintiffs to the defendants, accompanied by the security of the transferred mortgages, and therefore that the defendants were personally liable; and (2) that, even in the absence of a specialty contract or covenant, the case

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

fell within section 8 of the Real Property Limitation Act, 1874, and that 21 Jac. 1, c. 16, being therefore excluded, the defendant Lewis was not entitled to the benefit of the Mercantile Law Amendment Act, 1856, s. 14, and his liability was kept alive by the payments made by his co-trustees.

From that judgment Lewis alone appealed, and he only appealed on the question as to the Statute of Limitations.

Rufus Isaacs, Q.C. (*C. A. Russell, Q.C.*, and *Dr. H. Greenwood* with him), for the defendant Lewis.—The sole point is whether section 8 of the Real Property Limitation Act, 1874, defeats the defendant's right to plead in defence to the action 21 Jac. 1, c. 16, and section 3 of the Mercantile Law Amendment Act, 1856. The plaintiffs admit that this is a simple contract debt, and the defendant Lewis admits that if section 8 of the Real Property Limitation Act, 1874, applies, then the defendant is out of court, because there has been an acknowledgment of liability by part payment. The defendant Lewis relies upon the decision of Stirling, J., in *Firth* v. *Slingsby*, 58 L. T. Rep. 481, 36 W. R. Dig. 135, in which this very point was argued. The case of *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511, is no authority to the contrary, for all that case decided was that the covenant was held to be gone when the remedy against the land was gone. If, however, the loan is not within section 8 of the Real Property Limitation Act, 1874, that section being merely a replica of section 40 of 3 & 4 Will. 4, c. 27, then the statute of 21 Jac. 1 applies, and Lewis is protected by section 14 of the Merchantile Law Amendment Act, 1856. Before the Act of 1833 (3 & 4 Will. 4, c. 27) an action to recover on a simple contract debt after twenty years could not be maintained: see *Toplis* v. *Baker*, 2 Cox Ch. 118, and *Brocklehurst* v. *Jessop*, 7 Sim. 438. Now, a simple contract debt, whether secured by mortgage or not, must be sued on within six years. The plaintiffs' claim against Lewis is therefore barred.

Dickens, Q.C., and *H. F. Manisty*, for the plaintiffs. — The Act of 1874 repeals the Act of James 1 as to money charged on land whatever the remedy may be. The decision of Stirling, J., in *Firth* v. *Slingsby*, relied on by the defendant on the point raised here with regard to the statute of 21 Jac. 1, c. 16, is really no part of the judgment, but a mere *obiter dictum*. [ROMER, L.J.—I do not agree with that statement. I think that Stirling, J., meant it to be part of his judgment, and we must treat it as such.] *Sutton* v. *Sutton* decides that in cases within this section the limitation applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land, and that therefore an action on the covenant will be barred unless brought within twelve years from the accrual of the right. [ROMER, L.J.—That merely decides that the limitation is not confined to the remedy against the land. But you want to make the decision say you may bring either class of action within twelve years—which it does say, and also that you may bring neither class of action afterwards—which it does not say.] We submit that the provisions of the Act of 3 & 4 Will. 4, c. 27, and the Real Property Limitation Act, 1874, together form a code as to land and all charges thereon, and overrule the provisions thereto enacted by the statute of James 1. The later Acts cover all common law actions relating to money charged or secured on land. When *Toplis* v. *Baker* was decided there was no statute relating to money charged on land, and the present question had never then arisen. *Brocklehurst* v. *Jessop* was decided only one year after 3 & 4 Will. 4 was passed, and the question would not be present to the mind of the court. Before *Sutton* v. *Sutton* was decided, it was thought that the Act of 1874 only applied to the remedy against the land. It is quite clear that section 8 of that statute applies to any action at law, even to any action on a simple contract, and it would seem, therefore, that a simple contract debt is taken out of the statute of James although a simple contract debt may be paid out of real estate within twelve years. *In re Stephens*, 4 Ch. D. 39, 38 W. R. Dig. 116. [ROMER, L.J.—The case is really against you, see judgment of Kay, L.J. pp. 44, 45.]

A. L. SMITH, L.J.—The action that gave rise to this appeal raised a new point, but fortunately there is no controversy between the parties as to the facts. It was an action brought for money lent upon a simple contract loan secured by a charge upon land, and admittedly the action was not brought until more than six years had elapsed from the date when the right of action first accrued.

The real point is whether or no the statute of 3 & 4 Will. 4, c. 27, or if you like it the Real Property Limitation Act of 1874, which modified its provisions in some particulars, has repealed the main provisions of 21 Jac. 1, c. 16, s. 3, in case of a simple contract debt charged upon land, where the creditor has slept on his right to recover such debt for more than six years and the debtor sets up as a defence the earlier statute. In whose favour was the statute of James passed? Undoubtedly in favour of the debtor. Bearing in mind that fact, where do you find in any statute an enactment that deprives the debtor of this plea? It was argued that sections 8 and 11 of the Real Property Limitation Act, 1874, cut down the debtor's right. Speaking for myself I do not think that that is the case, and I think that the right that a simple contract debtor had under the statute of James, was not touched by the provisions referred to in the later Act. It is clear also that while the Act of James applied to simple contract debts, the provisions of the Act of 1874 applies them to the case of specialty debts also. It was argued that in *Sutton* v. *Sutton* it had been decided that the limitation of twelve years imposed by the Real Property Limitation Act, 1874, on actions to recover money charged on land, applies to the personal remedy on a covenant in a mortgage deed as well as to the remedy against the land. The decision did not touch the case of an action not upon a covenant, but for a simple contract debt, and all really decided was that in cases within this section the limitation applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land, and, therefore, that an action on a covenant will be barred unless brought within twelve years from the accrual of the right. Then how does that decision hamper the case we have to deal with. When the case was before the court the point we are now considering was not raised, and I am at a loss to know how anything that was then said could be an authority for us. As to the other cases cited, *Toplis* v. *Baker*, *Brocklehurst* v. *Jessop*, and *In re Stephens*, as far as they go they are really in favour of the appellant's contention. In *Firth* v. *Slingsby*, Stirling, J., deals expressly with the very point we have to decide, and in his judgment he gives it as his opinion that the provisions of the statute of James were still in force in cases of this sort. Again, the text-books, including the last edition of Darby and Bosanquet, are all in favour of the appellant's contention. I think the Lord Chief Justice was led to take an erroneous view of this question because the main argument was directed to the point whether the money was charged upon land, and to the case of *Sutton* v. *Sutton*, which, as I before said, is really

an authority here; whereas the decision of Stirling, J., in *Firth* v. *Slingsby*, which covers it, was not referred to when the action was argued. For these reasons the appeal must be allowed.

COLLINS, L.J.—I am of the same opinion. It is said that section 8 of the Act of 1874 now covers this question in regard to all classes of actions, whether founded on a simple contract or a specialty debt, when read with the decision in *Sutton* v. *Sutton*. It is therefore necessary to see how the law stood after the passing of the Act of 1833 (3 & 4 Will. 4, c. 27), since the Act of 1874 is merely an amending Act, and merely affects the question to this extent—that it cuts down the period in which such actions can be brought from twenty years to twelve. Now, the Act of James enacted that six years should be a bar to actions on a simple contract debt. How, therefore, can a subsequent statute imposing a wider limitation over a larger area extend the limitation already imposed on part of that area by a prior Act? Both Acts were passed in favour of the debtor, and he is entitled to the benefit they give him whenever his case falls within either. *Sutton* v. *Sutton* therefore has no bearing on the present question. Even assuming that decision applies to a simple contract debt, its provisions merely embrace actions against a person as well as actions against the land. Suppose it does; it only imposes a fetter which does not enlarge the rights of the creditor. This view is strengthened by the preamble to the Act of 1874, which describes the Act as one for the further limitation of actions and suits relating to real property. The whole point is that this Act of 1874 is not an enabling Act at all, as was pointed out by Stirling, J., in *Firth* v. *Slingsby*. That fact underlies the whole argument. I think that Lord Russell of Killowen, C.J., came to a wrong decision in this case because *Sutton* v. *Sutton* was given such undue prominence to during the argument.

ROMER, L.J.—Before 1883 the appellant could certainly have pleaded the statute of James, since the action was one to enforce a simple contract debt charged on land: *Toplis* v. *Baker*, *Brocklehurst* v. *Jessop*. Then came the Act of 3 & 4 Will. 4, c. 27, amended by the Act of 1874; and by the decision in *Sutton* v. *Sutton* it must be admitted that the sections of the Act of Will. 4 applicable to this case were not confined, as was previously thought, to actions to raise money out of the land, but included in their provisions what I may call personal actions as well. Except so far, the case of *Sutton* v. *Sutton* has no bearing on this case. What we have to consider is whether the Acts of 1833 and 1874 repealed the provisions of James' Act in favour of debtors and increased the rights of creditors. In my opinion neither of the later statutes were intended to take away from debtors, rights they previously possessed, or to give, on the other hand, additional rights to creditors. [His lordship having read section 40 of the Act of 1833 and section 8 of the Act of 1874, said:] I find nothing in these sections which directly or by implication repeals the rights given to debtors by the statute of James to plead limitation. In my judgment these later statutes were intended to give extra rights to debtors to resist the claims of their creditors. The two sets of Acts are perfectly consistent, and the provisions of the later enactments cannot be taken to repeal the advantage given to debtors by the Act of James. Read together they mean, in substance, this—that no action for a simple contract debt, whether chargeable on land or not, shall be brought after six years, and that no action to recover any debt chargeable on land, even though it be a specialty debt, shall be brought after twelve years. The Act of 1874 does not say that an action may be brought at any time within twelve years; it only says that no action shall be brought after that period. The object of the statutes was not to enlarge the rights of action, but to cut down the period within which alone the action might be brought.

Appeal allowed, with costs.

Solicitors for the appellant, *Calkin, Lewis, & Stokes.*

Solicitors for the respondents, *Maudes & Tunnicliffe.*

From Prob. Div. & Adm. Div. (Lord Russell of Killowen, C.J., and A. L. Smith and Collins, L.JJ.) March 11.

"THE VORTIGERN." (*a.*)

Ship — Charter-party — Warranty of seaworthiness— Voyage divided into stages for coaling purposes.

Where, in a contract for sea carriage, the voyage is such that it is not reasonably possible for the steamer to carry, in addition to her cargo, sufficient coals to take her from her port of loading to her ultimate destination, and the voyage is therefore, for coaling purposes, divided into stages, there is an implied warranty that the vessel shall, at the commencement of each stage, be seaworthy so far as regards the supply of coal necessary for that stage.

Appeal from the judgment of Barnes, J., in favour of the defendants.

By a charter-party it was agreed between the plaintiffs, the owners of the steamship *Vortigern* and the defendants as charterers that the ship should, proceed to Cebu, in the Philippine Islands, and there load a cargo of Philippine produce and proceed therewith to Liverpool, and deliver the same on being paid a lump sum freight of £4,000, calling at Marseilles, if so ordered, and if Marseilles not used the freight to be £125 less; the ship to have liberty to call at any ports in any order; the act of God, perils of the sea, . . . collision, stranding, dangers of navigation or machinery, negligence, default, or error in judgment of the owners, pilot, master, and crew, or other servants of the shipowners excepted. The defendants shipped at Cebu, amongst other cargo, 500 tons of copra in bags for conveyance to Liverpool. According to the engineer's log the voyage was, for coaling purposes, divided into three stages, the first stage being from Cebu to Colombo, the second from Colombo to Suez, and the third from Suez to Liverpool. The ship called at Colombo, where she took in coals, and she passed Perim without calling there to coal owing to the erroneous report of the engineer as to the quantity of coals in the ship's bunkers, and when in the Red Sea the coals ran short, and the master mixed 828 bags of the copra with the coal and burnt it as fuel. Upon the arrival of the ship at Liverpool the plaintiffs refused to deliver the cargo unless the defendants made a deposit against general average of £559, and the defendants were compelled to make this deposit, and they paid to the plaintiffs the freight, less £590,* the value of the copra burnt. The plaintiffs thereupon brought this action to recover £590, the balance of the freight, and the defendants counterclaimed to recover £559, which they had been compelled to deposit against general average.

* The defendants had deducted from the total freight the sum of £610, but in their defence they paid £20 into court, leaving £590 deducted as the value of the copra burnt.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Barnes, J., found upon the facts that the ship when she started from Colombo had not sufficient coals to take her to Suez, and that she was in that respect unseaworthy for that stage of the voyage; and he held, upon the authority of *Thin* v. *Richards*, 40 W. R. 617, [1892] 2 Q. B. 141, that the implied warranty of seaworthiness attached at the commencement of each stage of the voyage. He accordingly entered judgment for the defendants upon the claim and counterclaim.

The plaintiffs appealed.

Scrutton and *D. Stephens*, for the plaintiffs.—The learned judge was wrong in holding that the implied warranty of seaworthiness attached at commencement of each stage of the voyage. Where there is one entire voyage the warranty of seaworthiness attaches at the commencement of the voyage only: *Bermon* v. *Woodbridge*, 2 Doug. 781. In the present case the ship was seaworthy for the entire voyage on leaving Cebu, but as regards perishables, such as coals, stores, &c., she had as much as was necessary to take her to the first usual place of replenishment. It was commercially impossible for her to take in coals at Cebu for the whole voyage to Liverpool. There is no absolute warranty that the ship, before starting on the second stage of the voyage, will take on board sufficient coals and stores for that stage; there is only a promise or an undertaking that the servants of the shipowner will take due care to replenish the stock, and the exception of liability for the negligence of the master and crew and other servants of the shipowner covers this. The principle is clearly laid down in *Dixon* v. *Sadler*, 5 M. & W. 405; *Burgess* v. *Wickham*, 11 W. R. 992, 3 B. & S. 669; *Bouillon* v. *Lupton*, 11 W. R. 966, 33 L. J. C. P. 37; and 1 Arnould on Marine Insurance (2nd ed.), p. 711, where a voyage divided into a river voyage and a sea voyage is discussed. In *Thin* v. *Richards* the voyage was a short one, and the court did not decide the case upon the ground that the voyage was divided into stages. [They also contended that the proper conclusion from the facts was that the ship started from Colombo with sufficient coal to take her to Suez and that the coal ran short owing to the engines breaking down. They further contended that the sacrifice was a general average sacrifice to which the defendants had to contribute, though this question would not arise if the implied warranty of seaworthiness had been broken.]

Joseph Walton, Q.C., and *J. Mansfield* (*Horridge* with them), for the defendants.—This being a voyage, which on account of its length has to be divided for coaling purposes into stages, the implied warranty of seaworthiness as regards the coal supply attaches at the commencement of each stage: *Thin* v. *Richards*. The ship must either take in coal at the commencement of the voyage for the whole voyage, or if it only takes in coal for the first stage it must replenish the coal at each stage. The law applicable to voyages divided into stages, each of which entails a different equipment, is discussed in 1 Arnould on Marine Insurance (2nd ed.), p. 711; *Dixon* v. *Sadler*; *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, 18 W. R. 769; L. R. 3 P. C. 234; *Bouillon* v. *Lupton*. [They also contended that it was not a general average loss.]

Cur. adv. vult.

March 11.—A. L. SMITH, L.J., read the following judgment: This is an action by the owners of the steamship *Vortigern* to recover from the defendants the sum of £610, being for freight under a charterparty dated the 6th of August, 1897, and the defendants defend themselves upon the ground that the cargo, which belonged to them, and which consisted of copra (a species of cocoanut), had during the voyage been burnt up by the captain as fuel for the ship, and that this burning up of the cargo had taken place in consequence of the breach of the implied warranty of seaworthiness which attached to the contract of affreightment at the commencement of the voyage—that is, that coal necessary for the due prosecution of the voyage had not been taken on board when the ship commenced the chartered voyage, and the cargo had therefore to be used as fuel in the place of coal. The defence depends upon a point of law and a question of fact. The value of the cargo burnt equalled the freight claimed excepting as to £20 which was paid into court by the defendants. The charter-party was in ordinary form, and was for a voyage by the plaintiffs' steamship from Cebu, in the Philippine Islands, to Liverpool, calling at Marseilles if ordered. By this charter-party the steamship had liberty to call at any ports in any order, and by the charter-party dangers of navigation or machinery, negligence, default, or error in judgment of the owners, pilot, master, and crew, or other servants of the shipowner were excepted. The point of law is, as to what implied warranty of seaworthiness attaches to a contract of affreightment upon a voyage such as the present when from the necessity of the case the ship cannot start upon the chartered voyage with an equipment of coal on board sufficient for the whole voyage if the ship is to be a cargo carrying vessel, which it clearly was the intention of all parties that it should be. It cannot be denied that the implied warranty which *primâ facie* attaches to a charter-party such as the present is that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that it shall then be in a fit state as to repairs, equipment, and crew, and in all other respects sufficient to take the ship in ordinary circumstances to its port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage. That coals are part of the equipment of a steamship I do not doubt, and if the voyage in this case had been an ordinary voyage, as to which there was no necessity, as regards taking in coal, by dividing it into stages, it cannot be denied that the steamship was unseaworthy when she started from Cebu on her voyage to Liverpool, for the simple reason that she had not then on board an equipment of coal sufficient to take her in ordinary circumstances to her port of destination. To obviate this difficulty—and a great difficulty it is in cases of long voyages of cargo-carrying steamships (for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts upon such a voyage as the present by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination)—it has become the practice by reason of the necessity of the case for cargo-carrying steamship owners to divide these long voyages into stages for the purpose of replenishing their ships with coal, and thus as far as practicable complying with the warranty of seaworthiness which attached when the ship commenced its voyage. This practice was resorted to in the present case, for I find by the engineer's log that the voyage was divided into stages, and it appears from the average adjustment that the cargo-owners subsequently acquiesced therein, the first stage being from Cebu to Colombo, in Ceylon, the second from Colombo to Suez, and the third from Suez to Liverpool. At Colombo the ship accordingly called and took in coal for the second stage, but the learned judge has found and there certainly was evidence to support his finding that the ship did not at Colombo take in a sufficient of coal for the second stage to Suez, and thus, by

reason of the coal falling short whilst passing up the Red Sea, the defendants' copra was resorted to in order to carry the ship on to Suez, where she again coaled, and so was enabled to perform her chartered voyage to Liverpool.

As to the question of fact, it was argued on behalf of the plaintiffs, that the learned judge was in error in finding that the ship was not fully equipped with coal when it started upon the second stage—from Colombo to Suez—and this argument was principally based upon the engineer's log; but this document, when looked at, has been so much altered that little, if any, reliance can be placed thereon. In my opinion Barnes, J., has dealt with this question of fact in the proper manner by investigating the amount of coal consumed by the ship at different parts of the voyage, and I agree not only in the result he has arrived at, but with the reasons he has given, which are fully set out in his judgment.

I come to the point of law, which is this—What was the implied warranty, if any (it matters not whether it is called a warranty or an absolute condition), when the ship started upon the second stage from Colombo to Suez? Was there then an implied warranty that she had a sufficiency of coal on board for this second stage—that is, that she was seaworthy for that stage? This is the real point in the case. The shipowners assert that there is no such warranty, and that the sole obligation they were then under to the cargo-owners was that their master and crew should not negligently omit to take in coal at Colombo or during the stages subsequent to the first stage, and that, although the ship might during the second stage in this case have put into Perim and obtained coal, and although it might be negligence for the master and crew not to have done so, as negligence of master and crew is excepted by the charter-party the shipowners are not liable to the cargo-owners for having burnt up their cargo for fuel as they did. Now reduce this contention of the shipowners into a concrete case to see what in practice it amounts to. Take, for instance, the case of a cargo-carrying steamship commencing a voyage of some 5,000 miles in length, and the shipowners, for coaling purposes by reason of the necessity of the case, having to divide the voyage into five stages of 1,000 miles each. The shipowners must admit that they warrant to the cargo-owners that their ship has a sufficiency of coal on board for the whole voyage, when it commenced that voyage, but they assert that by reason of their dividing the voyage into stages, although for their own purposes, this warranty is thus cut down to the first stage of 1,000 miles, and that as regards the residue of the stages (4,000 miles in all) there is no warranty that the ship has a single ton of coal on board, and that the only liability they are under to the cargo-owners during the residue of the voyage is for the negligence, if any, of their master and crew for not taking coal on board when they might have done, and, as negligence of master and crew is excepted by the charter-party, the shipowners are under no liability whatever to the cargo-owners during the transit of the 4,000 miles; and I am asked to hold that this is the true meaning of the charter-party in the present case. I certainly cannot do so. On the other hand, the contention of the cargo-owners is that, whether the shipowners divide the chartered voyage into stages or not for coaling purposes, that has nothing to do with them, but if from the necessity of the case the shipowners do so, the cargo-owners in no way abandon the undoubted warranty they have at the commencement of the voyage. The only way in which this warranty can be complied with is for the shipowners to extend the existing warranty to the commencement of each stage, and I can see no reason why such a warranty should not be implied, and I have no difficulty in making the implication, for it is the only way the clear intention of the parties can be carried out and the undoubted and admitted warranty complied with. It appears to me to be no answer to say that it is a warranty subsequent to the commencement of the voyage. In my judgment, when a question of seaworthiness arises either between a steamship owner and his underwriter upon a voyage policy or between a steamship owner and a cargo-owner upon a contract of affreightment, and the underwriter or cargo-owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage—and if he fails in this he fails in defeating the issue of unseaworthiness which *primâ facie* has been established against him. In each case it is a matter for proof as to where the necessity of the case requires that each stage should be, and I think that in the present case the necessity for coaling places at Colombo and Suez has been established. The question of dividing up voyages into stages, as regards the warranty of seaworthiness, is by no means destitute of authority. There are numerous cases decided upon policies of marine insurance when the voyage is divided into stages, and there is also a case in this court relating to the warranty of seaworthiness upon a contract of affreightment when the voyage was divided into stages. As regards the first class of cases it suffices to cite from a judgment of Lord Penzance, when delivering the judgment of the Judicial Committee of the Privy Council, consisting of himself, Sir William Erle, and Giffard, L.J., in the case of *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, 18 W. R. 769, at p. 771, L. R. 3 P. C. 234, at p. 241, where the numerous prior authorities relating to voyages consisting of different stages are referred to: "The case of *Dixon* v. *Sadler*, 5 M. & W. 414, and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognized, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions; but it has been equally well decided that the vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of those stages of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with. It was argued that the obligation thus cast upon the assured to procure and provide a proper condition and equipment of the vessel to encounter the perils of each stage of the voyage necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires; and no doubt that is so. But that equipment must, if the warranty of seaworthiness is to be complied with, be furnished before the vessel enters upon that subsequent stage of the voyage which is supposed to require it." Read into this judgment the word "shipowner" in

the place of "the assured," and the judgment is in point in the present case. There is no difference between the implied warranty of seaworthiness which attaches at the commencement of the voyage in the case of an assured shipowner and in the case of a shipowner under a contract of affreightment. In each case the shipowner warrants that his ship is seaworthy at the commencement of the voyage. What Lord Blackburn said in *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, at p. 86, 26 W. R. Dig. 216, in the House of Lords, as to the warranty of seaworthiness which attaches to "contracts for sea carriage" shows that it is the same warranty as that which attaches when a shipowner insures his ship with an underwriter. The judgment of the Privy Council contemplates, it will be seen, stages of necessity, and I can see no difference in principle between physical stages of necessity and other stages of necessity as to the implication of a warranty attaching thereto. But there is also the case in this court in the year 1892 of *Thin* v. *Richards & Co.*, 40 W. R. 617, [1892] 2 Q. B. 141, which I am unable to distinguish on principle from the present. It was an action by cargo-owners against shipowners for non-delivery of cargo, and the point which arose was as to whether there had been a breach of the warrantry of seaworthiness when the ship commenced its voyage. The ship was chartered for a voyage from Oran, in Algiers, to Garston Dock, Liverpool, with liberty to call at any ports in any order. There was also an exception as to the negligence of the master and crew. According to usual practice, the ship, having left Oran with a light cargo of Esparto grass, proceeded to Huelva, in Spain, and there filled up with iron ore, and was subsequently lost on her chartered voyage. It was proved that when the ship left Oran on her voyage she had not a sufficiency of coal on board to take her to Liverpool, nor did she fill up at Huelva with a sufficiency of coal to take her on to Liverpool. The not taking on board sufficient coal at Huelva arose by reason of the negligence of the engineer. This court (Lord Esher, M.R., Fry and Lopes, L.JJ.) held that, whether the voyage was to be taken as a voyage from Oran to Liverpool, or a voyage divided into stages—that is, from Oran to Huelva, and from there to Liverpool, the ship was unseaworthy, and gave judgment accordingly, for, said the court, whether the voyage is taken to be an undivided voyage from Oran to Liverpool, or a voyage divided into stages, the ship was unseaworthy, for if the commencement of the voyage be taken as from Oran, she had not then a sufficiency of coal on board for the voyage from Oran to Liverpool, or if the commencement of the voyage be the stage from Huelva to Liverpool, she had not then sufficient coal on board for that stage, and consequently, whichever the voyage was, the implied warranty had been broken. The doubt expressed by Lord Esher as to whether it was a voyage divided into stages seems to me to have been, not that a voyage could never be divided into stages, if the necessity of the case required it, but whether in such a comparatively short voyage from Oran to Liverpool the necessity of dividing the voyage into stages had been satisfied by proof. In my judgment Barnes, J., was correct when he held upon the facts of this case that there was a necessity for dividing the voyage for coaling purposes into stages into which it was divided, and that therefore the warranty of seaworthiness existed at the commencement of the second stage at Colombo, and that the ship had not then sufficient coal on board for this second stage, and that the defendants were right in their contention. This decides the case in favour of the defendants, and it is unnecessary to embark upon the point raised as to general average. The judgment of Barnes, J., must be affirmed, and this appeal dismissed with costs.

COLLINS, L.J., read the following judgment: I will add a few words to the judgment which has just been delivered. I think the difficulties which have been suggested in this case are very much diminished when it is realized that the warranty of seaworthiness has always been relative. Though absolute when it attached, its precise extent and limitations were relative, and varied according to the standard which the parties must have been supposed to contemplate as applicable to the adventure. A good instance of this principle is to be found in *Burgess* v. *Wickham*, 11 W. R. 992, 3 B. & S. 669, where the standard of seaworthiness required was determined by reference to the class of the vessel which to the knowledge of both parties was intended to be insured. That was a case of a vessel built for river navigation sent on an ocean voyage, and the warranty was held to be satisfied by proof that it had been made as fit as was reasonably possible for a vessel of such a description. The cases cited by my brother Smith are other instances of the same principle. The custom of a particular trade (*e.g.*, the Greenland whale fishery) or the convenience of the parties to a particular adventure may make it reasonable that the vessel should be equipped up to a different standard at different stages of the voyage, and the warranty of seaworthiness has to be adjusted accordingly. It is a necessary corollary of this principle of varying standards at different stages that at each stage the vessel shall conform to the standard required for that stage. I regard this not so much as a concession to the shipowner as an adjustment of the standard of seaworthiness to the requirements which the conditions of the adventure, according to the understanding and convenience of both parties, demand. To come to the case before us, it is obvious that the convenience of both parties required that the adventure should be carried out by a steamer, and that it was not reasonably possible for the steamer in question to carry coals enough, in addition to her cargo, to carry the vessel to her ultimate destination at a reasonable rate of consumption for a vessel of her class. It is obvious, therefore, that the common purpose could not be reasonably carried out unless the vessel's stock of coal should be from time to time replenished. The warranty of seaworthiness, therefore, must be construed by reference to the reasonably possible standard applicable to such a vessel on such a voyage. The voyage, therefore, for this purpose must be looked upon as divided into stages, with the necessary incident that the warranty must be adjusted accordingly. It follows that the warranty must cover a condition that the vessel shall at the commencement of each stage be in this respect seaworthy for that stage. The warranty was, as I have pointed out, in its inception relative—that is to say, varying according to the standard reasonably applicable to the contemplated conditions. Following the process of evolution through which modern commerce has passed, the warranty must be made to conform to modern exigencies—that is, to the rules of convenience which regulate the practice of merchants in respect to particular voyages. To say, as Mr. Scrutton contended, that the warranty is limited to the first stage, and is satisfied if the vessel is fit to perform it, is, as it seems to me, to ignore the principles out of which the doctrine of stages was evolved, and to accept it partially only and not in its entirety. The doctrine of stages involves a recurring obligation to bring the vessel up to the required standard at each stage. It cannot be accepted with an illogical limitation. It must be accepted altogether or not at all. Accepting, as I do, Barnes, J.'s, findings of fact for

the reasons given by him and my brother Smith, it follows that, whether Colombo to Suez or to Port Said is regarded as the second stage in the contemplated voyage, the warranty of seaworthiness as to coal supply was not made good, to which, of course, negligence (though excepted) is no answer, and therefore that the shipowners are liable to make good the value of the copra consumed by reason of the breach of warranty. The question in this case is as to coal only, but the subject-matter as to which the voyage, for the purpose of applying the warranty of seaworthiness, may be deemed to be divided, and what the stages are to be, must be determined in each case by reference to what must be taken as the exigencies of the adventure as contemplated by the parties having regard to the ordinary course of a business.

A. L. SMITH, L.J., said that the Lord Chief Justice asked him to state that he agreed with the judgments which had been delivered.

Appeal dismissed.

Solicitors for the plaintiffs, *Holman, Birdwood, & Co.*

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

From Q. B. Div. (Bkcy.)
(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) March 3, 10.

In re GIEVE.
Ex parte THE TRUSTEE. (a.)

Gaming—Stockbroker—Agreement by way of gaming or wagering—Sale and purchase of stocks and shares—Bargain for payment of "differences"—Higher price if stocks taken up—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

Where contracts between a broker and his customer for the sale and purchase of stocks and shares contained provisions that the price should be one-eighth more if the stock was taken up, or one-eighth less if it was delivered,

Held (*following* Universal Stock Exchange *v.* Strachan, 44 *W. R.* 497, [1896] *A. C.* 166), *that the existence of an option for the customer to demand delivery or payment in cash did not of itself prevent the court finding that the contract was really one for the payment of differences only.*

And held, that the provisions as to price showed that the contract was for differences only, and that such an agreement was void as being "by way of gaming or wagering," within the meaning of section 18 *of the Gaming Act*, 1845.

Decision of Wright, J., *reversed.*

Appeal from Wright, J.

The bankrupt Gieve, who carried on business (under the style of John Shaw) as an outside broker, had had various dealings with the claimant James Moss, a commission agent. The claim was for a sum of £2,323, consisting of £195, the balance due by the bankrupt in respect of stocks and shares bought and sold for the claimant, and £2,128 damages for non-delivery of 400 Canadian Pacific Railway shares bought by the claimant in May and June, 1897.

The sold notes issued by the bankrupt were in the form, "I beg to advise having sold to you," and contained after spaces headed "Amount," "Description," "Cover," and "Price," the words, "*Plus* one-eight if stock is taken up." The bought notes were as follows, "I beg to advise having bought of you . . . Less one-eighth if stock is delivered." All contracts were subject to conditions which were printed on the back of the note, and were substantially the same on sold notes and on bought notes.

Condition 1: "All stocks or shares become closed without notice whenever the cover is exhausted . . ."

No. 2: "The stocks or shares to which this contract refers, unless closed prior to the first day of the account, must either be delivered or carried over to the next account. If to be delivered the certificate or scrip must reach me before twelve o'clock on the first day of the account."

Nos. 3 and 4 contained further provisions as to "cover." and similar matters.

No. 5: "It is to be distinctly understood that I am prepared to deliver" [or, "to accept delivery of"] "the stock or shares to which this contract refers if demanded, but require cash on the first day of the account for securities I have to deliver customers [or, "if required, and will pay cash if desired at any time subject to discount for cash"]."

Prior to the transactions in Canadian Pacific shares the claimant had had many small dealings with the bankrupt, but the shares had in no case been actually delivered or paid for. After the purchase of the Canadian Pacific shares the claimant was not in a position to take them up without borrowing the money, and he did not in fact pay cash on the first day of the account. The shares having largely risen in price, he did, however, on the 7th of December, 1897, demand delivery, which demand was refused, or at least not complied with. Gieve having become bankrupt, the claimant claimed to prove for the above-mentioned sum.

Before the registrar and before Wright, J., it was contended that the claim arose out of a gambling transaction, and was bad under section 18 of the Gaming and Wagering Act, 1845. The registrar accordingly disallowed the claim; but Wright, J., though expressing considerable doubt as to whether the transactions were not contracts merely for the payment of differences and so of the nature of gaming and wagering, held that they were not sufficiently proved to be of that character, and admitted the proof. Gieve's trustee in bankruptcy appealed.

Herbert Reed, Q.C., and *A. H. Carrington*, for the appeal, cited *Universal Stock Exchange* v. *Strachan*, 44 W. R. 497, [1896] A. C. 166.

Muir Mackenzie, for Moss, cited *Universal Stock Exchange* v. *Stevens*, 40 W. R. 494; *Shaw* v. *Caledonian Railway Co.*, 17 Ct. Sess. Cas., 4th Series (Rettie), 466; and *In re Cronmire, Ex parte Waud*, 46 W. R. 679, [1898] 2 Q. B. 383.

No reply was called for.

LINDLEY, M.R.—We have had an opportunity of considering this case, which was begun a week ago, and we are all agreed about it. The question turns, of course, on the true construction of the Act of 1845 (8 & 9 Vict. c. 109), s. 18 of which enacts that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." We have therefore to consider whether this is a "contract or agreement by way of gaming or wagering." Of course, if it is an agreement to buy or sell stock for delivery, and if the stock is to be paid for, the Act has no application at all. But if the real object and the real effect of the agreement is to provide for the payment of differences, and nothing else, then it is plainly an agreement to which the Act does apply. That has been settled by a series of decisions to which I need not refer at present. Where the learned judge in the court below went wrong, as I think,

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

was in not attending sufficiently to the terms of the agreement itself. To my mind—subject to a question of law to which I will address myself presently — the agreement, on the face of it, is a gaming and wagering agreement. The form of the transaction is that Gieve begs to advise having sold so much of a certain stock at a certain price, for account. If that were all it would be an ordinary sold note, and you could not say there was anything on the face of it to show that the parties did not mean what they said. In that case the party alleging that the transaction was within the Act would have to prove, by parol, if he could, that the contract was a gaming and wagering one, and that this sold note did not represent the real meaning of the parties to it. But here you have something else—namely, that the price mentioned is to be paid, "*Plus* one-eighth if the stock is taken up." Now, what does that mean? "*Plus* one-eighth if taken up": that shows plainly that they did not really contemplate the taking up of the stock. The buyer need not take it up at all unless he likes. If he does not he must pay the difference. On the face of it, this is not in truth a bargain for the sale of the stock. That, I think, is where Wright, J., has failed to give effect to the terms of the agreement. Both parties, it is plain, intended to act upon this bargain, and its terms amounted to a wagering contract.

If we look at the conditions subject to which the contract is stated to be issued, they point to the same conclusion. Those conditions, to my mind, look much more like a bargain for the payment of differences than an ordinary sold note. I do not say that "cover" is not applicable to other transactions than agreements for payments of differences. It is not merely the use of the word "cover" that I rely upon. But when you look at the terms altogether, it appears to me that the true effect of the contract, as really intended by both the parties, is this—that this is a bargain for the payment of differences, but that if the buyer likes to pay to the seller the stipulated price and one-eighth more, then the seller will deliver the stock to the buyer.

That state of facts gives rise to the question of law, whether such a contract is within the Gaming and Wagering Act of 1845. There, it appears to me, the case in the House of Lords of *Universal Stock Exchange* v. *Strachan* is very important. The appellants' counsel there had argued for this proposition (p. 169), that "even if the present contracts were for the payment of differences only, the power in either party to turn that into real contracts of sale and purchase by insisting on delivery prevents them from being contracts of gaming and wagering within the Act of 1845." I can understand that argument. It was based partly on the case of *Shaw* v. *Caledonian Railway Co.*, and partly on that of *Universal Stock Exchange* v. *Stevens*. But the House of Lords repudiated the proposition, and Lord Herschell, in his speech, expressly addresses himself to it. He says he would never sanction such a view. So if you have an agreement which is on the face of it a gaming and wagering agreement, and superadded to it there is a clause giving the purchaser the option of actual purchase, that does not make the agreement a good one.

To say that this was not a gaming and wagering transaction we must decide the mixed question of law and fact against the trustee. I have not the slightest doubt that the parties really meant what they said. The terms of the bargain make it a bargain for differences, *plus* an option given to the buyer to demand delivery on payment of an increased price. But the seller can never call on the buyer to take delivery. The buyer could answer, "No. I shall not pay for the stock; I shall only pay the differences." The appeal must therefore be allowed.

RIGBY, L.J.—I am of the same opinion. The main question in the case is the construction of the contract notes, which give an option to the purchaser to take up the stock. He may, if he chooses, by payment of an extra sum equal to one-eighth of the contract price, obtain delivery of the stock. It is plain that that is a contract for the payment of differences, and nothing else, and cannot be turned into anything else except by means of something to be done by the purchaser in a particular case. I think there is not sufficient to blind the court to the fact that this option was never intended to be acted upon at all. When it happened that the purchaser had an extraordinary run of luck in a particular stock, then he demanded delivery. But I do not find that he ever complied or offered to comply with the stipulation that he should pay one-eighth more. I do not see that the vendor under this contract was to be under the obligation of keeping the stock as long as the purchaser liked, and that at any time, perhaps months after, the purchaser might come and take delivery. I think this is, on the face of it, substantially a contract for payment of differences, and cannot be turned into a genuine transaction by simply giving one of the parties an option to take delivery on making an extra payment. The thing is substantially within the meaning of the words "contract or agreement by way of gaming or wagering." I think Wright, J., would have adopted the same view if he had had his attention called to the exact terms of the agreement.

VAUGHAN WILLIAMS, L.J.—I agree. This proof was rejected by the registrar because this was a gambling transaction. I have no doubt myself that the proper finding in fact here is that this transaction, and all these transactions between Moss and Gieve were gambling transactions. Wright, J., came to a different conclusion on the facts. If I thought his conclusion of fact was based upon the credit he gave to the witnesses who gave oral evidence before him, I should hesitate very much before I gave effect to a different view in my own mind as to that evidence, because I consider it a matter of the very highest importance that when witnesses have given oral evidence, and the tribunal before whom that evidence was given, be it judge or jury, has believed that evidence, and has given them credit as witnesses of truth, a court of appeal should not arrive at a different conclusion from the judge or jury who heard the witnesses. But I do not understand Wright, J., to have really based his conclusion on the credit he gave to these witnesses. On the contrary, I do not think anyone can read his judgment without seeing that he did not place any reliance upon the oral evidence that was given before him. The inference he draws is from the facts which really, so far as they are material, were not in dispute.

I am not sure that I am prepared to say that this contract is on the face of it a gambling contract, or a contract which, as far as its terms are concerned, did not entitle either party, or at all events the customer Moss, to call for delivery or acceptance as the case might be. I should be rather inclined to come to the conclusion that the contract, so far as its words are concerned, was a contract which at all events entitled Moss to insist upon acceptance or delivery of the shares. So I base my judgment really upon exactly the same grounds as the judgment was based on in *Universal Stock Exchange* v. *Strachan*, as appears from the opinions delivered by the noble and learned lords in that case. That is to say, assuming that this contract is a contract which upon

the face of it would enable one or both of the parties to insist upon delivery or acceptance, the mere fact that the contract contains such a term does not prevent the court from asking the question whether the transactions between the parties really were based upon that contract. Here, in my judgment, if you look at the whole of this transaction, the proper inference to draw is that neither of these parties ever contemplated delivery or acceptance of the stock and shares the subject-matter of the contract, but both of them intended that the matter should be dealt with as a matter of differences simply, and that there should be no delivery or acceptance. The form of this contract, with this provision at the foot, *plus* one-eighth if the stock is taken up, or less one-eighth if it is delivered, shows that these parties were minded to have a contract between them which should facilitate that which I believe to have been their sole object, gambling in differences. When you look at the conditions of the contract which are endorsed on the contract note, every one of them seems to point in the same direction. The whole form of the transaction is exactly what you would have expected if the parties were minded to gamble in differences, but anxious to put their contract in such a form as to cloak or veil the fact that they were gambling. If you add to that the history of this account from beginning to end, it seems to me that the conduct of the parties leads to the almost necessary inference that they really only intended a gambling transaction.

Appeal allowed; proof expunged.

Solicitors, *Ingle, Holmes, & Sons; Chester & Co.*, for *Lawson, Coppock, & Hart*, Manchester.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) Feb. 14.

COOPER v. BELSEY. (a.)

Settled land—Undivided share—Power of tenant for life to sell—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), s. 2, *sub-sections* 5, 10 (i.).

The Settled Land Act, 1882, *enables the tenant for life of an undivided moiety of land to sell that moiety without the concurrence of the owner of the other undivided moiety.*

In re Collinge's Settled Estates, 36 *W. R.* 264, 36 *Ch. D.* 516, *overruled.*

Appeal from Romer, J.

By his will, dated the 3rd of July, 1847, William Cooper devised a freehold house, 8, Queen-street, Cheapside, to trustees upon trust to pay one moiety of the rents and profits to his wife during her life, and after her death to convey the said moiety to the testator's four sons in equal shares as tenants in common. The other moiety of the rents and profits was to be paid to the testator's daughter, Mary Ann Cooper (the present plaintiff), for her separate use during her life, and after her death was to be held upon trust for her children or other issue.

The testator died in 1850. In 1865, on the death of his widow, the moiety of the messuage of which she had been tenant for life was sold by the four sons to one George Hensman in fee.

In February, 1898, the plaintiff entered into an agreement for the sale of the other moiety to the defendant. The defendant, relying upon the decision of North, J., in *In re Collinge's Settled Estates*, 36 W. R. 264, 36 Ch. D. 516, insisted that the plaintiff, as tenant-for-life of an undivided share of land, could not make a valid sale of her moiety without the concurrence of the owner of the other moiety.

The plaintiff then brought an action for specific performance. Romer, J., declined to follow *In re Collinge's Settled Estates* (in which case it did not appear that North, J.'s, attention was called to the provision in section 2, sub-section 10 (*i.*), of the Settled Land Act, 1882, "land includes . . . an undivided share in land"), and made a declaration that the plaintiff had shown a good title to the moiety she had contracted to sell, and could convey the same without the concurrence of any person entitled to the other undivided moiety.

The defendant appealed.

Badcock, for the appeal, relied upon *In re Collinge's Settled Estates*, and contended that the plaintiff was not "tenant-for-life" within the meaning of section 2, sub-section 5, of the Settled Land Act, 1882.

G. Broke Freeman, for the plaintiff, was not called upon.

LINDLEY, M.R.—It is evident that in *In re Collinge's Settled Estates*, North, J., overlooked section 2, sub-section 10, (*i.*) of the Settled Land Act, 1882. When you look at that sub-section it is plain it is not necessary that the owner of the other undivided moiety should join or concur. The decision of Romer, J., is right, and the appeal must be dismissed.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Hunters & Haynes; G. H. C. Lea.*

High Court of Justice.

Chan. Div. North, J. Jan. 27, 28; Feb. 25; March 4.

In re HODGSON.

DARLEY v. HODGSON. (a.)

Married woman—Will—General power—Appointment in discharge of debt—Erroneous statement of indebtedness — Administration — Assets — Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), s. 4.

Where a married woman, having under a settlement a general power of appointment by will, made a will and directed her trustees, to pay legacies, including one of £1,100 *to D. in satisfaction of a debt due from testatrix to D., and subject thereto, the testatrix, in exercise of the power under the settlement, appointed a life interest in the trust funds to her husband; and where the testatrix's estate was insolvent, and the debt of* £1,100 *was not due from the testatrix to D., but from her husband to D., and the husband, after the wife's death, paid the debt of* £1,100 *to D.,*

Held, (1) *that, the debt of* £1,100 *being the husband's, the legacy of* £1,100 *was perfectly effective at date of testatrix's death, and payment of the debt by the husband did not make any difference;* (2) *that a valid appointment was made of the* £1,100, *and, by section* 4 *of the Married Women's Property Act*, 1882, *the other property not being sufficient to pay debts, that the legacy must go for that purpose.*

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

In this case the testatrix, Juliet Hodgson, wife of Nathaniel Henry Hodgson, by virtue of a general power under a settlement, made a will exercising the power and directing the trustees of the marriage settlement to raise out of the property comprised therein a sum of money sufficient to pay funeral and testamentary expenses and duties and certain legacies, including one of £1,100 to Georgina M. B. Darley "in satisfaction of a debt to that amount due from me to her."

An action was brought by Georgina Darley for the administration of the testatrix's estate, and an order was made by North, J., on the 2nd of December, 1895. The estate turned out to be insolvent, and on an order for further consideration on the 1st of March, 1898, a sum equal to the legacies appointed by her will was ordered to be raised out of the settlement funds and declared liable to be applied in payment of the testatrix's debts.

The testatrix was under a misapprehension in stating in her will that a debt of £1,100 was due from her to Georgina Darley, but this sum was due from her husband to Darley. On the 4th of May, 1898, the husband paid Georgina Darley the sum of £1,100, and afterwards took out a summons in the action for a declaration that the legacy of £1,100 mentioned in the testatrix's will ought not to be treated as an effective legacy, or included in arriving at the total sum referred to in the inquiry directed by the order on further consideration dated the 1st of March, 1898.

Vernon Smith, Q.C., and *A. W. Rowden*, for the summons, contended that there was no valid appointment at all. The intention of the testatrix was to pay her debt, and as there was no debt in existence the appointment fails: *In re Rowe, Pike* v. *Hamlyn*, 46 W. R. 357, [1898] 1 Ch. 153; *In re Fletcher, Gillings* v. *Fletcher*, 36 W. R. 841, 38 Ch. D. 373.

Henry Terrell, Q.C., and *A. Adams*, for the creditors.—If the power was once executed the payment of the debt by the husband could make no difference. The Married Women's Property Act, 1882, s. 4, provides that the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts.

NORTH, J.—The testatrix, when she spoke of the debt due from her to Miss Darley, was really referring to her husband's debt, and she made the appointment for the purpose of discharging that debt. At the date of her death the debt had not been paid, so the appointment was good at that time. The husband afterwards paid the debt, but that did not do away with the appointment, which, in my opinion, is still effectual, and comes within section 4 of the Married Women's Property Act, 1882. Accordingly, the appointed fund is liable for the payment of the testatrix's debts. The other property belonging to the testatrix not being sufficient to pay her debts, this legacy of £1,100 must go for that purpose.

Solicitors, *Patersons, Snow, Bloxam, & Kinder*, for *Gardiner & Jeffery*, Bradford; *Bell, Brodrick, & Gray*.

Chan. Div. North, J. } Jan. 25.

In re HANKEY.

CUNLIFFE SMITH *v.* HANKEY. (*a.*)

Administration—Insolvent estate—Priority of specialty debts.

An executor has no power to pay simple contract creditors in full, to the prejudice of specialty creditors.

In re Orsmond, 58 *L. T. Rep.* 24, 36 *W. R. Dig.* 5, *not followed.*

Adjourned summons.

This was an application by the specialty creditors of Frederick Alers Hankey. His administratrix had paid simple contract debts of the deceased, leaving insufficient assets to meet the applicants' specialty debts.

Terrell, Q.C., and *Stewart Smith*, for the applicants.—The Administration of Estates Act, 1869 (32 & 33 Vict. c. 46) does not enable an executor to retain a simple contract debt due to himself as against a specialty creditor: *In re Briggs*, W. N. (1894), p. 162; *In re Bentinck*, 45 W. R. 397, [1897] 1 Ch. 673; *In re Jones*, 34 W. R. 249, 31 Ch. D. 440; *Wilson* v. *Coxwell*, 23 Ch. D. 764, 32 W. R. Dig. 82. There is no difference between the right to retain and the right to prefer. *In re Orsmond*, 58 L. T. Rep. 24, 36 W. R. Dig. 5, is the only case against us, but it is wrong in principle and is not consistent with the other authorities.

Vernon Smith, Q.C., and *Ingle Joyce*, for the administratrix.—*In re Orsmond* is an express authority in our favour. *In re Williams' Estate*, 21 W. R. 160, L. R. 15 Eq. 270, shows that the right of preference has been enlarged by 32 & 33 Vict. c. 46.

NORTH, J.—The right of an executor to prefer one creditor and the right to retain his own debt are in many respects the same, though the latter can, but the former cannot be exercised after an administration decree. I am asked to follow the words of the Act, but they are not consistent with saying that the executor can pay some creditors leaving others who but for that Act would have priority out in the cold. It might be that the power to prefer was altogether abolished, but there are decisions to the contrary. The question I have to decide is whether the right to prefer is confined to a preference between persons in the same class of creditors. The right to prefer really does not differ from the right to retain: *Talbot* v. *Frere*, 27 W. R. 148, 9 Ch. D. 568. The cases as to the right to retain, *In re Jones*, *In re Briggs*, and *Wilson* v. *Coxwell*, show that the right of preference has not been enlarged so as to enable an executor to prefer a creditor of lower to one of higher degree. *In re Orsmond* is an authority on the other side, but I do not find the judgment as reported very intelligible, and I will follow the other decisions.

Solicitors, *Meynell & Pemberton; Hollams, Sons, Coward, & Hawksley.*

Chan. Div. North, J. } Jan. 25.

PEMBERTON *v.* BARNES. (*a.*)

Will—Devise—Fee simple conditional—Possibility of reverter—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 3.

A possibility of reverter on failure of a fee simple conditional on the birth of male issue is within section 3 of the Wills Act, and is devisable.

Semble, *that such a possibility of reverter is an estate.*

Petition.

By a settlement made in 1839 a moiety of the Tring estates was limited subject to the life interest of Thomas Barnes and Ann, his intended wife, to such

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

uses as they should by deed jointly appoint and in default to them as joint tenants.

By a deed-poll in 1869 Thomas Barnes and Ann Barnes appointed the moiety to trustees for 200 years, and subject to the trusts of the term, to the use of John Barnes for life, with remainder to his first and other sons in tail male, with remainders over.

The Tring estate was sold in a partition action in 1869. There was a fund in court representing the share of the Barnes' family in the proceeds of sale which was being dealt with by this petition. John Barnes was the only son of Thomas Barnes, and had one son only, Thomas Kay Barnes. Ann Barnes died in 1871, Thomas Barnes died in 1872 intestate as to his residuary real estate. John Barnes died in 1891, having devised his residuary real estate. Thomas Kay Barnes died in 1898 without having had issue.

A part of the Tring estate was copyhold of the manor of Bunstrix, in which there was no custom to entail, so a fee simple conditional on his having issue male was created in Thomas Kay Barnes, which determined on his death without issue. The question now argued was, who was entitled to the money representing the Barnes moiety of these copyholds.

Badcock, for the trustees of the will of Thomas Barnes and three of his co-heiresses according to the custom of the manor.—The possibility of reverter could not be devised or assigned, but devolved on the four co-heiresses of Thomas Barnes.

Robbins, for the other co-heiresses.—A possibility of reverter is not an estate. Before the statute *De Donis* there could have been no estate after an estate tail: *Jones* v. *Roe*, 3 T. R. 88; *Earl of Stafford* v. *Buckley*, 2 Ves. Sen. 170; Fearne on Contingent Remainders (10th ed.), vol. 1, 282*n.*; Co. Litt. 18*a*, 22*b*; *Willion* v. *Berkley*, Plowd. 223, at p. 248; *Winchester's case*, 3 Rep. 3*b*. Section 3 of the Wills Act does not extend to a possibility of reverter.

Fuller, for persons claiming under John Barnes' will.—This possibility of reverter descended to John Barnes, and passed under his will: Burton's Compendium, s. 641; *Ingilby* v. *Amcotts*, 4 W. R. 433, 21 Beav. 585; *Roe* v. *Griffiths*, 1 W. Bl. 605.

Vernon Smith, Q.C., and *Clay*, for a residuary legatee under Thomas Barnes' will.—The sale in the partition action effected a conversion. There was a possibility coupled with an interest which could be devised independently of the Wills Act: Sheppard's Touchstone, 239; *Lampet's case*, 10 Rep. 46*b*; *Doe* v. *Tomkinson*, 2 M. & Sel. 165; *Moor* v. *Hawkins*, 2 Eden, 342.

Procter, for a person in the same interest.

Hadley, for a person claiming the fund as realty under Thomas Kay Barnes' will, referred to *Doe* v. *Simpson*, 4 Bing. N. C. 333, 5 Scott 770 (affirmed 3 Man. & G. 929).

Robbins replied.

NORTH, J.—By the appointment of 1869, an estate in fee simple conditional on Thomas Kay Barnes having male issue was created in the copyholds, but as he died in 1898 without having had issue that estate did not arise, and the possibility of reverter was unappointed. It might revert to Thomas Barnes. It clearly would descend on his death (*Doe* v. *Simpson*), and I think that it is clear he could have devised it, but he did not do so. John, however, did devise it, and I think that he could do so. I should say that a possibility of reverter is an estate. In *Doe* v. *Simpson* the testator created a conditional fee by will, but the possibility of reverter was not created by the will and descended to the heir. Lord Hardwick says (*Sodor and Man, Bishop of* v. *Earl Derby*, 2 Ves. Sen. 337, at p. 354) "that a fee simple conditional cannot stand together with an absolute fee, but will be merged in it." An estate in which an estate merges must, I think, be an estate. Some authorities, however, have been read to me to show that a possibility of reverter is not an estate. I do not think it necessary to decide whether it is an estate under the third section of the Wills Act, as it is clearly included in the latter part of the third section. Several passages were cited from Coke on Littleton to the effect that a fee simple conditional on having heirs is equivalent to a gift over if there are no heirs. Mr. Challis deals with this question in his valuable book on Real Property (2nd ed., p. 201) and the language used by him is undoubtedly strong enough to include a possibility of reverter. I think, therefore, that this property passed under the will of John Barnes.

Solicitors, *T. Bore*, for *J. T. Jackson*, Carlisle; *Marcus & Barraclough*; *Metcalfe, Birkett, & Rowlatt*, for *Mounsey & Co.*, Carlisle; *Ullithorne, Currey, & Currey*, for *Hodgson*, Carlisle.

Q. B. Div.
(Darling and Channell, JJ.) April 11.

REG. v. STEWART AND OLSEN. (*a.*)

Ship—Seaman—Engagement of—Foreign ship—Civil debt—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 111, *sub-sections* 1, 4; *ss.* 260, 261, 682, *sub-section* 2.

A person who, in an English port, engages or supplies a seaman to be entered on a ship in the United Kingdom without having a licence for the purpose from the Board of Trade, acts in contravention to section 111, *sub-section* 1, *of the Merchant Shipping Act*, 1894, *and is liable to a fine under sub-section* 4, *notwithstanding that the ship for which the seaman is engaged or supplied is a foreign ship.*

A fine recoverable under sub-section 4 *is not a sum recoverable as a civil debt under section* 682, *sub-section* 2, *but is a fine inflicted as a punishment for an offence the proceedings in prosecuting which are those prescribed by section* 681, *sub-section* 1 (b).

Rule for a *certiorari* to quash two convictions.

Julius Olsen, a foreign shipping agent carrying on business at Liverpool, was convicted on two separate convictions, under section 111 of the Merchant Shipping Act, 1894, for unlawfully engaging two seamen to be entered on board a ship called *The Clarense*, then lying at Port Glasgow, without a licence, and was fined £5 for each offence.

The ship *Clarense* was a sea-going steamer owned in Para and sailing under the Brazilian flag. She was not registered or owned in the United Kingdom. The captain of *The Clarense* instructed Olsen to engage twelve seamen for his vessel. Seven men were at first engaged by Olsen and approved by the captain. Afterwards five other men, including two men named Innis and Cottrell, were engaged by Olsen, and, in accordance with the instructions of the captain, they were sent down by Olsen to Glasgow, where they were met by the captain. The whole twelve were then taken to the office of the Brazilian consul in Glasgow, where the seven men first selected signed on. The remainder, including Innis and Cottrell, were rejected. Olsen was not a person licensed to engage or supply seamen under section 110 of the Merchant Shipping Act, 1894.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The conviction adjudged that the defendant Olsen do forfeit and pay the sum of £5, and in default of payment that the sums due under the adjudication be levied by distress and sale of the defendant's goods, and in default of sufficient distress that the defendant be imprisoned.

Section 110 provides for the granting of licences by the Board of Trade to persons to engage or supply seamen or apprentices for merchants' ships in the United Kingdom.

Section 111 enacts as follows: "(1) A person shall not engage or supply a seaman or apprentice to be entered on board any ship in the United Kingdom, unless that person either holds a licence from the Board of Trade for the purpose, or is the owner or master or mate of the ship, or is *bonâ fide* the servant and in the constant employment of the owner, or is a superintendent, . . . (4) If a person acts in contravention of this section, he shall for each seaman or apprentice in respect of whom an offence is committed, be liable to a fine not exceeding £20, and, if a licensed person, shall forfeit his licence."

Both these sections are in Part II. of the Act.

Under the heading "Application of Part II." section 260 provides as follows: "This part of this Act shall, unless the context or subject-matter requires a different application, apply to all sea-going ships registered in the United Kingdom, and to the owners, masters, and crews of such ships subject as hereinafter provided with respect to (*a*) ships belonging to any of the three general lighthouse authorities, (*b*) pleasure yachts, and (*c*) fishing boats"; and section 261 provides as follows: "This part of this Act shall, unless the context or subject-matter requires a different application, apply to all sea-going British ships registered out of the United Kingdom, and to the owners, masters, and crews thereof as follows: (*a*) The provisions relating to the shipping and discharge of seamen in the United Kingdom, and to volunteering into the navy, shall apply in every case," &c., &c.

Section 680 provides as follows: "(1) Subject to any special provisions of this Act and to the provisions hereinafter contained with respect to Scotland . . . (*b*) an offence under the Act made punishable with imprisonment for any term not exceeding six months, with or without hard labour, or by a fine not exceeding £100, shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts. . . ."

Section 681 provides as follows: "(1) The Summary Jurisdiction Acts shall, so far as applicable, apply (*a*) to any proceeding under this Act before a court of summary jurisdiction, whether connected with an offence punishable on summary conviction or not; and (*b*) to the trial of any case before one justice of the peace, where under this Act such a justice may try the case. (2) Where under this Act any sum may be recovered as a fine under this Act, that sum, if recoverable before a court of summary jurisdiction, shall, in England, be recovered as a civil debt in manner provided by the Summary Jurisdiction Acts.

Sutton showed cause on behalf of the Board of Trade.—Two points are raised in support of the rule. The first is that the sum recoverable in respect of a breach of section 111 is a civil debt, and that consequently the conviction is bad, because if it is a civil debt no imprisonment can be awarded unless it has been ascertained that the defendant has the means to pay, and will not pay. It is conceded that if the sum is a civil debt the conviction is wrong. The second point raised in support of the rule is that section 111 does not apply to a foreign ship. The latter point is based upon the language of sections 260 and 261, and it is argued that because the Legislature has said that Part II. shall apply unless the context or subject-matter requires a different application, and only mentions British ships, therefore the whole of Part II. applies only to British ships. The answer is twofold. In the first place, looking at the crimping sections, it is clear that the subject-matter requires a different application; and, in the second place, the purpose of these sections is to pick out the sections made clearly applicable to British ships and to re-classify them with certain exceptions, at the same time making special provisions applicable to them: see *Hart* v. *Alexander*, 36 Scottish L. R. 64, and *The Milford*, 6 W. R. 554, Swa. 362. With regard to the first point, sub-section 2 of section 681 does not apply to a sum recoverable under section 111. It applies to cases where the sum of money to be recovered is an obligation in itself civil as distinguished from criminal. Examples of this may be found in sections 167, 582, sub-section 5, 591, 649, and 667. But in section 111 the object is not to obtain the payment of a sum of money, but to prevent the commission of an offence, and the conviction in this case, therefore, is not an order for the payment of money, but a punishment for the commission of an offence.

Horridge, in support of the rule.—The decision in *Hart* v. *Alexander* in the Court of Session in Scotland is against me, but it is not binding in this court. Unless there is a necessity, *primâ facie* the Act does not under the term ship include foreign ships; for instance, it has been held that the section limiting liability in respect of collision does not apply to a foreign ship. It is not true to say that the offence here is an offence against the seamen, and that it does not affect the ship. It does very seriously interfere with the ship, see section 111, sub-section 2, which provides that a person shall not employ a person to engage seamen for him unless such person has got a licence. If that applied to foreign ships, a master of such a ship could not procure a crew for it in the manner most convenient to him. Sections 260 and 261 do not say that where the context requires it, Part II. of the Act shall apply to foreign ships. All they say is that Part II. shall apply to sea-going ships, unless something in the context prevents it applying to those ships. If the argument used against the rule were right, the provisions relating to volunteering into the navy would apply to a foreign ship. Section 265 deals with cases where there is a conflict of laws, and provides as follows: "Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this part (Part II.) of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision the case shall be governed by the law of the port at which the ship is registered." That section means that if there is a section which is expressly made to apply to a foreign ship the case shall be governed by that provision. Section 219 provides that where the Government of a foreign country have provided that unauthorised persons going on board British ships which arrive in its territorial jurisdiction shall be subject to provisions similar to those in section 118 in this Act, and desires that those provisions shall apply to ships of that foreign country in British territorial jurisdiction, Her Majesty may in Council order that those provisions shall apply to ships of that foreign country. That section almost conclusively shows that it is not intended that the provisions of the Act should apply to foreign ships except where expressly so stated, or unless an order in Council is made making them so applicable. Many of the sections in

Part II. clearly could not apply to foreign ships; section 105, for instance, dealing with apprentices; section 113, dealing with the engagement of seamen by the master of the ship and the entering into agreements between the master and the seaman; section 126, dealing with rating of seamen; section 127, with their discharge; sections 164, 165, and 167, dealing with the mode of recovering wages.

DARLING, J.—The facts of this case are practically the same as those in *Hart* v. *Alexander*, which was decided in the Scotch Court of Session.

What was done was this: A foreigner not holding a licence from the Board of Trade engaged or supplied seamen to serve upon a ship in an English port, that ship being a foreign ship. It is admitted that what the man did would have been an offence against section 111 of the Merchant Shipping Act, 1894, had the ship been an English ship. But it is said that because the ship was a foreign ship no offence has been committed.

The words of the Act are perfectly general, and in their ordinary meaning the words "any ship" would cover a foreign ship as well as an English ship. But it is said that in this case "any ship" does not mean any ship, but a British ship, and that that is so by reason of sections 260 and 261 of the same Act.

The same contention was raised in *Hart* v. *Alexander*. If the contention were right, all that the Merchant Shipping Act of 1894, which was a codifying Act, would have done would be this: it would have protected English sailors or any sailors in an English port against crimping, if crimping was performed for the benefit of an English ship; but it would have accorded absolute liberty to foreigners to come into an English port and to subject to all the evils of crimping not only foreigners, but British subjects. It would take strong language in the Act of Parliament—knowing, what one cannot help knowing, what was the intention of Parliament in 1894—to convince me that the Legislature in 1894 deliberately passed an Act of Parliament subjecting English shipping to a distinct disadvantage in English ports for the benefit of foreigners; and not only that, but allowing foreigners, if they went into an English port, to subject English subjects to all the evils from which it was desired to protect them if they became crews upon an English ship.

I do not think that sections 260 and 261 do distinguish between British and foreign ships, as is contended. The distinction drawn is between British ships registered in England, and British ships, registered somewhere else. For my part I am content to adopt as my judgment the words used by Lord Moncrieff in his judgment in *Hart* v. *Alexander*. He says: "The second part of the Act contains a variety of provisions; some of them are expressly applicable only to British ships, and some are applicable only to foreign ships; but there is a third class of provisions which are quite irrespective of the nationality of the ship or seamen. The section on which this complaint is founded belongs to that class." That is to say, section 111 is one of the third class of provisions which is quite irrespective of the nationality of the ship or seamen, so that the words "any ships in the United Kingdom" bear their natural meaning, and apply as much to a foreign ship in an English port as to a British ship.

Now it is further said that the convictions ought to be quashed because the proceeding was a criminal one, whereas it ought to have been a proceeding as for the recovery of a civil debt. It is perfectly clear that there are two kinds of offences in the Act. Section 111 speaks of an offence against that section, while section 680 speaks of an offence made punishable by a fine or imprisonment, or an offence punishable by a fine. It is said that a fine is only recoverable as a civil debt, and we are referred to sections 582, 649, and 667. I would point out that although in those sections the fine may be only recoverable as a civil debt, in neither of them is the fine spoken of as the result of an offence. I think that here the fine was a fine following as a punishment for an offence punishable by fine, and that the fine was not in the nature of a debt at all. It was a punishment for an offence, and the convictions are convictions justified under the Act and must stand.

CHANNELL, J.—I am of the same opinion on both points. As to the first point—the applicability of these particular sections to foreign ships—the matter seems to stand thus: section 111, as my brother has pointed out, is quite large enough to apply to foreign ships as well as to English ships. Then it is contended that sections 260 to 266, inclusive, which are headed "Application of Part II.," show that section 111 does not apply to foreign ships. Now, I might content myself with the judgments of the judges of the Court of Session in Scotland on that point, but I also think that the observation of Dr. Lushington in the case of *The Milford*, to the effect that the words of the sections which he had before him and which correspond to sections 260 and 261 of the present Act, were affirmative words and not negative, is very important, and that it assists in the explanation of the whole matter. It seems to me to come to this, that you must read sections 260 to 266 as if they began by saying "and with respect to the application of Part II. to ships registered in the United Kingdom, be it enacted as follows," and then set out section 260, 262, and 263. The effect would be that to those ships the whole of Part II. would apply, except as to the three classes of ships as to which only portions apply. Then, with respect to the application of Part II., to ships registered in the British dependencies, there are special enactments which are contained in sections 261 and 264, namely, that a certain part of Part II. applies to all such ships, and that certain other parts apply if the Colonial Legislature should desire and pass a corresponding Act.

Thus you have provided affirmatively for British ships registered in the United Kingdom and for British ships registered in the colonies, but you have not provided for foreign ships. Therefore, if the matter stood there it would remain to be considered whether, with regard to a particular section, it was so framed as to apply to foreign ships or no. You would have nothing else to guide you. But there is something else to guide you—namely, section 265; and it appears to me that that section says this: "And with respect to the application of Part II. to foreign ships . . .", and then it goes on to say that if the matter is one which would cause a conflict of laws it is to be governed in this way: If there has been an express provision applying a particular portion of Part II. to foreign ships, that is to apply because it is express legislation; but if there has been no such express application of a particular portion of Part II. to foreign ships, but it is left to be applied by general words only, then it is not to be applied to a foreign ship if the matter is such as to cause a conflict of laws; but if the matter is not such as to cause a conflict of laws, then you are to apply the general words in the general way. That leaves the matter free from any difficulty.

Going back to section 111, it deals with matters arising in English ports with which the English Legislature has full jurisdiction to deal in every way, and there is no possible reason why the Legislature should not give protection to seamen in the case of

their being engaged for a foreign ship as in the case of a British ship. If Mr. Horridge's contention is right, if an Englishman is shipped on board a foreign ship, then he loses his protection. There seems to be no reason whatever for saying that the section does not apply to a case where the seaman is engaged contrary to its provisions in an English port and not on board a foreign ship. As to the case where a similar thing is done actually on board the ship, I do not think it necessary for us to give a definite opinion. In that case it does seem to me a substantial doubt might arise as to whether there would be a conflict of laws, and whether, consequently, in that case a conviction would be right; but I do not think that question is definitely before us on the present occasion.

Then, as to the question about the civil debt, I do not think there is any real difficulty about that. Until Mr. Sutton directed our attention to sections 591, 649, and 667 it was not quite easy to understand section 681, sub-section 2; but the moment that was done the meaning of the section became clear. It seems that section 681 merely says this: Whereas certain things which are civil debts have been declared by this Act to be recoverable as if they were not civil debts, but fines and offences, such sums shall be recoverable as if they were civil debts. That does not apply to this matter, which, as my brother has pointed out, is an offence.

Rule discharged.

Solicitor in support of the rule, *Solicitor for the Board of Trade.*

Solicitor against the rule, *Nordon & De Freece*, for *T. Beasley*, Liverpool.

Q. B. Div.
(Lord Russell of Killowen, C.J.) } July 28; Dec. 15.

BLACKMORE *v.* WHITE. (*a.*)

Copyholds—Customary obligation on tenant to keep in repair—Breach of obligation by tenant—Remedy of lord against executors of tenant.

An action was brought by the lord of a manor against the executors of a deceased tenant of a copyhold tenement for not keeping the tenement in proper repair. It was proved that by the custom of the manor the tenant was bound to keep the tenement in repair, and that the ordinary mode by which that obligation had been enforced against the tenant was by presentment, fine, and forfeiture. Upon the death of the tenant the premises were found to be dilapidated and out of repair, but there had been no presentment by the lord in respect of such dilapidations.

Held, that, although there had been no presentment, the lord could have maintained an action in respect of the dilapidations against the tenant in her lifetime upon the implied contract by the tenant to keep the premises in repair arising from her admittance, and that this right of action, being founded on contract, survived against the executors of the tenant.

Further consideration.

The action was tried by Lord Russell of Killowen, C.J., at Exeter, and was reserved by him for further consideration.

The facts were stated as follows in the considered judgment of the learned judge: The action was brought by the lord of an ecclesiastical manor against the executors of the late copyhold tenant of the manor for not repairing copyhold tenements pursuant to the terms of the tenancy. The manor in question was the ecclesiastical manor called Morchard Bishop, in Devonshire, and the rector for the time being of the parish in which the manor is situate, is the lord of the manor. In 1846 the then rector and lord of the manor was Archdeacon Bartholomew. On the 21st of January, in that year, 1846, John Southcott and James Southcott were admitted as tenants in possession of the manor, and the entry from the records and the court roll was as follows: "To this court came John Southcott and James Southcott, and took of John Bartholomew, clerk, lord of the manor aforesaid, three dwelling-houses, three gardens and outhouses, with the appurtenances thereof, situate within the manor, to have and to hold the said dwelling-houses, gardens, and outhouses unto the said John Southcott and James Southcott for the term of their lives and the longest liver of them, according to the custom of the said manor, yielding and paying therefor yearly 1s. and 2s. in the name of an heriot when it shall happen according to the custom of the said manor and by all other burdens, suits, and services therefor, and all right accustomed for such estate in possession of the premises, so had they have given to the said lord for a fine £5, and so are they admitted tenants in possession and do their fealty according to the custom of the said manor."

At the same time on the 21st of January there was a further record of the same court by which the reversion (subject to the above admittance) expectant on the death of the survivor of those two admitted tenants, John and James Southcott, was granted to Charles W. M. Bartholomew for the term of his life according to the custom of the manor.

In 1871 John Southcott died, and in 1872 James Southcott died. In March, 1875, the widow of James Southcott was admitted as tenant for life according to the custom of the manor by custom of free-bench. In November, 1884, the present lord succeeded to the rectory and to the lordship of the manor, and it was not in controversy that whatever rights the original lord—namely, Archdeacon Bartholomew—had, were now the rights of the present plaintiff, who has been since 1884 and still is the lord of the manor.

On the 14th of June, 1896, the widow of James Southcott, who had been so admitted as tenant for life by custom of free-bench, died, appointing by her will the present defendants her executors, and it was admitted that if the cause of action here claimed was well founded against the executors, they had assets to meet any damages awarded.

On the death of the widow in 1896 reference was made to Charles Bartholomew, to whom was made the grant in reversion expectant on the death of the two admitted tenants, John and James Southcott, and expectant also on the life estate of the widow by the custom of free-bench. He was then communicated with, but he disclaimed and declined to take the interest in reversion or to claim to be admitted, and, in fact, he never was admitted, and he died in July, 1897, before this action was commenced.

It was common ground that the premises in question were allowed to get out of repair, and it was found as a fact in this case that they were neglected not only during the period when the deceased widow was the tenant in possession, but during the existence apparently of the previous tenancies of John and James Southcott, but on behalf of the plaintiff the claim was restricted to a claim in respect of the breach of the condition or implied contract upon which the plaintiff was relying, that breach being confined to the action of the widow, whose executors the defendants were.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

The customary obligations of a tenancy by copyhold in this particular manor were that the tenant should keep the premises in ordinary repair, and the ordinary mode by which that obligation or term of the tenancy was enforced was by presentment, by fine, and in some cases by forfeiture, and this also extended to the case of widows admitted as tenants by free-bench.

Finally the writ in this action was issued on the 8th of April, 1898.

Foote, Q.C. (*Howland Roberts* with him), for the plaintiff.—There is no allegation here of any wilful waste. The action is for dilapidations, that is, for not keeping the premises in repair, and it is brought against the executors of the deceased tenant. We submit that the action is maintainable against the tenant, and after the tenant's death against the executors; and the chief point we wish to establish here is that the plaintiff, the lord of the manor, is entitled to maintain this action and recover some damages, and so far as we can find out it is the first case of the kind that has been brought by the lord of a manor. The customs of the manor and the entries on the court rolls prove that there is a liability on the tenant to keep in repair, with a liability to fine and forfeiture for not keeping in repair. Therefore by the very fact of the admittance of the tenant, and arising out of such admittance, there is the liability of the tenant to keep in repair, and this liability is based upon the implied contract by the tenant to keep the premises in repair. An action always lay for copyhold fines, and the form of the action was *indebitatus assumpsit* (Bullen and Leake (3rd ed.), p. 149); and the lord could always bring an action of debt against a copyholder for the recovery of his fine (1 Cruise's Dig. (4th ed.), p. 303); and this right of the lord is recognised in *Fraser* v. *Mason*, 32 W. R. 421, 11 Q. B. D. 574. The right to sue for this fine depends upon the admission: *Hayward* v. *Raw*, 6 H. & N. 308, at p. 326, 9 W. R. C. L. Dig. 20. The lord is also entitled to sue in equity for waste and for an account in respect of waste, whether the waste is commissive or permissive: *Richards* v. *Noble*, 3 Mer. 673. In answer to the argument in that case that a court of equity would leave the lord to his remedy at law for a forfeiture, Lord Eldon, L.C., there said that "in many cases the forfeiture was a very inadequate remedy." In *Dench* v. *Bampton*, 4 Ves. 700, Lord Loughborough held that the lord had no remedy in equity for an injunction and for an account, but was confined to his legal remedy for waste committed by the copyholder. This must be taken as no longer law, as Lord Brougham, L.C., said in *Parrott* v. *Palmer*, 3 My. & K. 632: "The case of *Dench* v. *Bampton* is clearly not law, and independently of its having been overruled a few years afterwards in the case of *Richards* v. *Noble*, the principle has never been considered a sound one." In *Woodhouse* v. *Walker*, 28 W. R. 765, 5 Q. B. D. 404, which is an analogous case with regard to freeholds, a similar action was held to lie against the tenant and against her executor after her death, under 3 & 4 Will. 4, c. 42, s. 2. That was stated by Lush, J., to be an action on the case, but in the later case of *In re Williames, Andrew* v. *Williames*, 52 L. T. Rep. 41, 33 W. R. Dig. 125, 54 L. T. Rep. 105, the right to maintain the action was based on the implied contract, that the acceptance by the tenant created an obligation to repair. In the same way if the admittance to the copyhold tenement be taken upon the terms or subject to the customs of the manor, an action for non-repair will lie against the tenant in the lifetime of the tenant and against the executors of the tenant after the tenant's death.

He also referred to the Ecclesiastical Leases Act, 1861 (24 & 25 Vict. c. 105).

Duke, for the defendant.—This is a case of permissive waste only, and an action of this kind does not lie for permissive waste. The plaintiff, upon the death of the widow, lost his right upon any implied contract to keep the premises in repair; but there is no trace in any book on copyhold law of any such implied contract, or of anything other than a customary right. An action on the case does not lie against a copyhold tenant for permissive waste; for permissive waste the lord has no remedy at law: *Countess of Shrewsbury's case*, 5 Rep. 13*a*. In the case of copyholds the liability of the tenant to the lord does not depend on the relations of the tenant to the lord apart from the customs of the manor. The liability depends on the customs of the manor, and in such cases the lord's rights are presentment, where presentment is necessary as in this case, and following presentment, fine, and then forfeiture. These are the rights and the only and exclusive rights of the lord against the tenant for permissive waste, and these rights and liabilities respectively are determined by *status* and not by contract; and in the statement of claim in this case the plaintiff's right is based upon the customs of the manor and not upon contract. If this had been commissive waste an action might have been brought, but as it is permissive waste the lord can only proceed by the customary means, that is, by presentment, and it is admitted there has been no such presentment here. The ordinary relation between lessor and lessee does not apply as between the lord and the copyholder, but the plaintiff here is really seeking to enforce the ordinary relations as between a lessor and lessee. Non-repair of the copyhold tenement is a forfeiture: Coke's Law Tracts, p. 134. With regard to the authorities, it has been held that an action on the case does not lie for permissive waste: *Dench* v. *Bampton*; *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 507; *Gibson* v. *Wells*, 1 B. & P. N. R. 290. It has been argued that *Dench* v. *Bampton* has been overruled by *Parrott* v. *Palmer*. There the lord's right had been interfered with without any relation to copyholds, and the tenant had simply taken the lord's property and was in possession of it. The action here is an action arising *ex delicto*, and not *ex contractu*: *Powys* v. *Blagrave*, 2 W. R. 700, 4 De G. M. & G. 448; *Re Williames, Andrew* v. *Williames*; *Woodhouse* v. *Walker*; *Batthyany* v. *Walford*; 35 W. R. 814, 36 Ch. D. 269; *Phillips* v. *Homfray*, 32 W. R. 6, 24 Ch. D. 439. The action being one of tort, the maxim *actio personalis moritur cum personâ* applies, and the right of action died with the deceased tenant, and cannot be maintained against the executors: *Eastcourt* v. *Weeks*, 1 Salk. 186; *Sollers* v. *Lawrence*, Willes, 413; *Wheatley* v. *Lane*, 1 Wms. S. 239.

Foote, Q.C., in reply.

Cur. adv. vult.

Dec. 15.—Lord RUSSELL OF KILLOWEN, C.J., delivered the following judgment: [His lordship set out the facts as above stated, and proceeded:] Upon these facts the question is whether the lord of the manor could have maintained an action against the widow under the circumstances of this case, and whether he can now maintain an action against the executors of the widow for the failure to comply with the condition or the implied contract upon which, as it is said, the tenant held. The customary obligations or incidents of the tenancy of a copyhold tenant in this manor, so far as is now material, were that there was an obligation upon the tenant to keep the premises in ordinary repair, that repair extending

outside as well as inside, and that the ordinary mode by which that term or obligation of the tenancy was enforced and was enforceable was by presentment, by fine (which was generally remitted if the premises were repaired), and in some cases by forfeiture, and this customary obligation or condition of the tenancy applied to the case of widows admitted by the custom of free-bench. In this case there was no presentment, but I will deal with that later on. Once it can be rightly determined what is the true effect of the existence of these conditions or incidents of the tenancy, many of the questions which at first sight seemed to create some difficulty, to a large extent disappear. In my judgment, the effect of the establishment in face of those customary obligations was that one of the obligations under which the lord made his grant, and one of the terms of the tenancy and obligations which the tenant undertook as incident to his tenancy, was to keep the premises in repair; and from these facts there is to be implied, and to be clearly implied, a contract by the tenant to fulfil that obligation to keep the premises in reasonable repair, and these obligations attached by force of the custom to each tenant upon admittance. If that be so, why should not the lord be entitled to sue for the neglect to fulfil those obligations? It is clear that the obligation exists as one of the implied terms, I may almost say the express terms, of the tenancy; and if this were a case not of a copyhold tenant, but of a tenant who held on the terms that he should repair as was customary according to the custom of the county or the parish, it would be unarguable to say that in such a case the landlord could not sue upon an implied covenant for breach of an implied term of the tenancy.

It is said, however, that this being a copyhold tenant, a tenant holding at will according to the custom of the manor, the case is different, and in that view a number of questions have been raised with which I must now deal *seriatim*. The first contention was in substance that the widow being a tenant at will according to the custom of the manor, no action for permissive waste would lie against her. I am now treating the case as if the action had been brought against the widow. In answer to that contention it would be more correct to say that this is not an action for permissive waste, but that it is rather an action for breach of an implied term of the tenancy. It may be admitted, and I think it is clear, that apart from contract, express or implied, there is no cause of action even for permissive waste strictly so called against a tenant at will, and apart from contract the same observation would apply to many other tenancies, which I might suggest, except where they are brought within the statute of Marlebridge or of Gloucester. It is said that in the case of a copyhold tenant holding at will, no such contention would apply. The first case to which reference was made was *The Countess of Shrewsbury's case*, 5 Rep. 13*a*, decided in 1660. When we examine that case it will be seen that it does not at all support the proposition that no action for permissive waste—even if this were strictly an action for permissive waste—lies. The head-note is "An action on the case does not lie against a tenant at will for permissive waste; but if tenant at will commits voluntary waste it amounts to a determination of the will and an action of trespass lies against him." The Countess of Shrewsbury had brought an action on the case against one Crompton, a lawyer of the Temple. She had leased to him a house at will and he so carelessly managed his fire apparently that the house was burnt down. There it was adjudged that "for this permissive waste no action lay against the opinion of Brook in the abridgment of the case of 48 E. 3, 25, Wast. 52, and the reason of the judgment was because at the common law no remedy lay for waste, either voluntary or permissive, against lessee for life or years, because the lessee had interest in the land by the act of the lessor, and it was his folly to make such lease and not restrain him by covenant, conditions or otherwise, that he should not do waste." It is clear, therefore, that the explanation of that case is, not that an action for permissive waste will not lie when there is an express or implied contract against it, but that there must be an express or implied contract against it to found the action. That, I think, is made clear in a note of Mr. Hargrave to the case: Co. Litt. 57*a*. Another case referred to was that of *Grubb* v. *Earl of Burlington* (5 B. & Ad. 507), decided in 1833. The marginal note there is: "If a copyholder pull down a barn without any intention of rebuilding, the lord cannot recover the place from him on the ground of a forfeiture, if the jury find that the premises are not damaged." That simply comes to this—that in that case there was no cause of action, because there was no waste. The next case was *Gibson* v. *Wells* (1 B. & P. N. R. 290), decided in 1805. The same explanation will be found to exist in that case as I have already given in the *Countess of Shrewsbury's case*; and it ought to be borne in mind that it was an action on the case. The first count alleged commissive waste, and the second alleged permissive waste. There was no allegation of a contract express or implied, but there was a suggestion that by the mere fact of the tenancy the obligation against permissive waste arose. Sir James Mansfield, before whom the case was tried, being of opinion that the dilapidations proved amounted only to permissive waste, non-suited the plaintiff, saying that, "although an action on the case in the nature of waste might be maintained for commissive waste, yet that he had never known an action being maintained for permissive waste only." The ground there clearly was that the tenant was a tenant at will only, and that from that fact only and apart from agreement there was not to be implied the contractual obligation of doing or suffering permissive waste. The same observations may be made with regard to the cases of *Powys* v. *Blagrave*, 2 W. R. 700, 4 De G. M. & G. 448, decided in 1854; *In re Skingley*, 3 Mac. & G. 221, decided in 1851; and *Herne* v. *Bembow*, 4 Taunt. 764, decided in 1813. Therefore, where the tenant at will, whether a copyhold tenant or a tenant not a copyhold tenant, takes a tenancy upon the terms that he shall keep the premises in repair—that is that he shall not suffer them to go out of repair—there is no authority for the proposition that he should not be liable for a breach of that implied, or it might be express, stipulation in his contract.

It was next said that even if there were the implied obligation as one of the terms of the tenancy not to allow permissive waste and to keep in reasonable repair, that this being a tenancy by custom of the manor, which custom provides certain modes of remedy for breaches of the customary obligations of the tenancy, the lord has no right to resort to an action at law. It is contended that the true remedy is presentment, if necessary, and after presentment forfeiture, and following forfeiture, ejectment, if necessary. In favour of the plausibility of that view it may be urged that it is impossible to find any instance of an action of this kind brought against any copyhold tenant. The explanation of that may be—though it is not a full or complete explanation—the course of events before the Ecclesiastical Leases Act, 1861 (24 & 25 Vict. c. 105). Up to that time it appears that the usual course was, as in this case, to make a grant in possession to certain tenants with reversion to some third person, and when one life

dropped to have another life added, so continuing practically *toties quoties* the life tenancies, the lord getting his fine upon each successive admittance. Then the legislature thought it right to put an end to this state of things in the case of ecclesiastical manors, the object being to spread more equally for the benefit of successive incumbents the benefits that would be derived from dealing with copyhold estates. The effect of that Act is that for the future the lords of these manors, being the rectors, are bound to lease at what are called rack-rents, to lease them in fact at their annual value instead of taking fines upon admittance. Looking to the antecedent state of things it was not very likely a case of this kind would arise, because, if there were these successive interests, practically perpetual interests, it would always be the interest of the persons in reversion to see, and they would have a right to see, that the conditions of the tenancy were carried out, and that the value of the reversion was not allowed to be injured by the neglect to fulfil the conditions as to repair or otherwise. In this case, however, we are dealing with tenancies created and based upon admittances prior to that Act. When the admittances and grants in this case came to an end, there was no reversioner after Bartholomew, who was dead, who had any interest in seeing that the premises were not run down, or in seeing that they were properly kept up and maintained. Those considerations may to a large extent account for the absence of precedents upon this subject, but we must consider on principle the question whether the remedy of the lord is confined to the customary remedy by presentment, by forfeiture and ejectment, if they are necessary. Upon this part of the case the first authority relied on for the defendants was *Dench* v. *Bampton*, 4 Ves. 700, decided by Lord Loughborough in 1799. That case is without doubt an authority for the proposition stated in the marginal note, that "the lord of a manor is confined to his legal remedy for waste committed by a copyholder, and has no equity for an injunction and account." The Lord Chancellor points this out at p. 703, and at p. 707 he says: "The law settles the matter between the lord and tenant. If by committing waste a forfeiture is incurred the lord proceeds for the forfeiture, and it is a question at law whether the act done is a forfeiture or not." I think it is quite clear that that does not express the law, because not only is there the considered judgment of Lord Brougham in 1834 in the case of *Parrott* v. *Palmer* 3 My. & K. 632, but within a few years of *Dench* v. *Bampton*, Lord Eldon, in *Richards* v. *Noble* 3 Mer. 673, decided in 1807, had expressed an opinion that it was not the law. The Lord Chancellor, in a considered judgment in that case, said: "In many cases the forfeiture was a very inadequate remedy, and he noticed the instance of a barren spot upon which many valuable timber trees grow. If the copyhold tenant only forfeited his copyhold by cutting down these trees he might in such a case be a considerable gainer by his own wrongful conduct." The point I wish to insist upon in this judgment of Lord Eldon is that the forfeiture might be, or was, he says, a very inadequate remedy; and taking that view, he overruled the demurrer in that case for want of equity, which demurrer was based on the decision in *Dench* v. *Bampton*. That case of *Dench* v. *Bampton* is still more explicitly stated to be no longer the law by Sir John Leach, M.R., and Lord Brougham, in the case of *Parrott* v. *Palmer*, 3 My. & K., at p. 632. In the judgment in that case it is said (at p. 639), "the case of *Dench* v. *Bampton* before Lord Loughborough is clearly not law, and independently of its having been overruled a few years afterwards in the case of *Richards* v. *Noble*, the principle on which Lord Loughborough proceeded has never been considered a sound one, namely, that the only remedy of the lord for waste done by the tenant in cutting timber without licence or custom, is at law for the forfeiture, a doctrine laid down by his lordship in a case of timber, but which he clearly applied to mining and all other waste as well." We may therefore disregard the authority of *Dench* v. *Bampton*; but it seems to me that there is some other light which can be thrown upon the matter. There is clear authority for saying that an action may be brought for a fine: 1 Cruise's Digest (4th ed.), p. 303 *Fraser* v. *Mason*, 32 W. R. 421; 11 Q. B. D. 574, and *Hayward* v. *Raw*, 6 H. & N. 308, which latter case principally deals with the point that the liability of the tenant depends upon his admittance. Again, actions or suits in respect of waste may be maintained, for which *Richards* v. *Noble* and *Parrott* v. *Palmer* are authorities; and I think that there are authorities that an action may be brought for the rent which is reserved by the customs of the manor; yet these are all cases in which proceedings by forfeiture might have been taken. They all give ground for forfeiture, and in the majority, if not all of them, that right of forfeiture is said to accrue *eo instante*—that is to say, that no presentment is necessary in such a case. In that connection I shall only refer to one or two passages on copyhold in Coke's Law Tracts, p. 132, s. 57, which deals with acts which amount to forfeiture, and these he divides into those which are forfeits *eo instante* that they are committed, some that are not forfeits till presentment — and in that enumeration he gives a number of these cases. [His lordship read these cases, and proceeded:] Lord Coke there mentions those acts which are not forfeitures till presentment, and as to that a further point was made during argument that presentment was necessary. With regard to that I merely refer to the authorities I have given. Lastly, as pointed out by Lord Eldon in *Richards* v. *Noble*, forfeiture may be a very inadequate remedy, and it seems to me that the present case is a good illustration of that, as the tenement, which originally consisted of one or two houses divided into three houses, with a very small portion of land attached, was undoubtedly allowed to go as to thatch, walls, and so on, into a very bad condition. In this connection a further point was made that presentment was necessary before this action. As I have pointed out the authorities seem to me to point in a contrary direction, and I need not refer to them again. I think presentment was not necessary. The next point made was that the lord—if there has been a breach—is not the person to sue, that he is not the person really injured, that the person really injured was the reversioner, and that the reversioner therefore was the person entitled to sue. It is not necessary to discuss that point at length. Even if there were a reversioner in the real sense interposed between the lord and possession, it seems to me that an action for at all events nominal damages would lie in such a case at the instance of the lord. In this case there was in fact no reversioner at all. When the widow died, Bartholomew, the person who had the grant in reversion, had his attention called to the matter. He disclaimed and declined to be admitted, and, in fact, never was admitted. Therefore, as regards him, his rights and obligations would, as *Hayward* v. *Raw* shows, be based solely on the fact of his admittance, and as he never was admitted he never had the rights or obligations of a tenant. He declined to come forward, and the result was that the premises reverted to the lord and the lord was in possession. Who, then, was the party injured? The lord alone was the person who was injured, and he alone was the person entitled to sue.

On this point I need refer to two cases only. The first is *Woodhouse* v. *Walker*, 28 W. R. 765, 5 Q. B. D. 404, decided in 1880. It was cited for the defendants as showing that the remedy there was treated as in the nature of an action for tort, but that is not the point with which I am now dealing. That was not the case of contractual obligation at all, as the action was brought by the remainder man in fee against the executor of the previous tenant for life, so that there was no contractual relation at all between them. The ground of the judgment there was that the devise was upon the terms and conditions that the tenant for life should keep in repair, and that the person who was injured—namely, the remainderman, had a right of action for the breach of that condition to repair, and that the action lay against the executor of the deceased tenant for life, the action having been brought within the period of limitation of 3 & 4 Will. 4, c. 42, s. 2. The next case is *In re Williames, Andrew* v. *Williames*, 52 L. T. Rep. 41, decided in 1885, which in my opinion takes the more correct view of what the character of the action was. In that case it was held upon the facts of the case that the executor of the deceased tenant for life was liable for omission to repair, as such omission was a breach of condition or implied contract contained in the will; and the case of *Woodhouse* v. *Walker* was followed, and the decision of Kay, J., in that case was affirmed by the Court of Appeal (54 L. T. Rep. 105). I think, therefore, that the lord is the right person to bring the action.

It is further said that the action is one to which the maxim *actio personalis moritur cum personâ* applies. In my judgment that is answered by the authorities which I have cited. This is a case in which there was an implied, or almost an express, term of the tenancy that the premises should be kept in repair. The remedy, therefore, sounds in contract and not in tort. In Williams on Executors (9th ed.), p. 1593, it is said: "The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant or other duty, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator." That principle applies here, and the judgment of Kay, J., in *In re Williames, Andrew* v. *Williames*, shows that he was of opinion that a case of this kind falls within that rule.

I now deal with the last question. If the plaintiff is entitled to sue, and if the defendants are liable as the executors of the tenant who was under the contractual obligation to keep the premises in repair, for what are those executors liable? As regards this part of the case, I am relieved from difficulty because the plaintiff has disclaimed any intention of seeking to base his claim in respect of any defaults by John or James Southcott, and he has restricted his claim to any breaches made by the widow. As regards that I think the justice of the case will be met by my dealing with a fair apportionment of the claim for the six years previous to her death, counting down to the bringing of this action. This action was brought and was considered important, not so much as to the *quantum* of damages, but with the view of establishing the right of the lord to maintain this action, and that being so, I think justice will be done by considering the damages only in respect of that which would be within the ordinary Statute of Limitations, and I fix the damages to which the plaintiff is entitled at £30. I therefore give judgment for the plaintiff for £30, with costs on the High Court scale.

Judgment for plaintiff.

Solicitors for the plaintiff, *Guscotte, Wadham, & Bradbury*, for *Sparkes, Pope, & Thomas*, Crediton.

Solicitors for the defendants, *Coode, Kingdon, & Cotton*, for *James Wellington, jun.*, Crediton.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — April 15.

In re ROYAL COLLEGE OF SURGEONS OF ENGLAND (*a*.)

Inland revenue—Bodies corporate and unincorporate—Exemption from duty—"Property appropriated and applied for the promotion of science"—Customs and Inland Revenue Act, 1885 (48 *&* 49 *Vict.* c. 51), s. 11, *sub-section* 3.

By section 11 *of the Customs and Inland Revenue Act*, 1885, *duty is imposed upon the annual value, income, or profits of all property belonging to, or vested in, any body corporate or unincorporate, subject to exemption from duty in the case of "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, science, or the fine arts."*

The College of Surgeons was a body corporate with two main objects—namely, the promotion of the science of surgery, and the promotion and encouragement of the practice of surgery, including examinations to qualify for such practice. The property of the college consisted, among other things, of general offices, an examination hall, and a library; but there had been no appropriation of this property by conveyance, declaration of trust, or otherwise, to the first-named of the above objects as distinguished from the second. The fees received in respect of the examinations constituted a large part of the income of the college. The college had no school of instruction or training for persons seeking admission to the college. The above property having been assessed to the annual duty imposed by section 11 *of the Act of* 1885,

Held, that as the college had two main objects, only such of its property as was legally appropriated and applied to the first-named object, as distinguished from the second, was exempt from duty within section 11, *sub-section* 3, *of the Act, and that as none of the property in question was legally appropriated thereto the exemption did not apply.*

The words "legally appropriated" mean appropriated so as to create a legal obligation upon the part of the administrators of the property to apply it in a particular manner.

Judgment of the Divisional Court (46 *W. R.* 538) *affirmed.*

Appeal from the judgment of the Queen's Bench Division (Wright and Channell, JJ.), reported 46 W. R. 538.

The Royal College of Surgeons petitioned to be discharged from an assessment made under the Customs and Inland Revenue Act, 1885, on the ground that the college was an institution the income whereof was legally appropriated and applied for the promotion of education and science.

The petition stated that the petitioners were a body corporate established by Royal Charter in the year 1800.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The objects of the petitioners' incorporation as specified in the said Royal Charter were the benefit of the commonweal of this kingdom by the promotion of the art and science of surgery, and the due promotion and encouragement of the study and practice of the said art and science of surgery.

Further powers and privileges had from time to time been conferred upon the petitioners by subsequent Royal Charters, the object with which such further powers and privileges were granted being in the charters expressed to be more effectually to promote and encourage the study and practice of the art and science of surgery.

By the charter divers obligations and duties were imposed upon the petitioners' corporation for the benefit of the public at large and the promotion and encouragement of the art and science of surgery.

The petitioners were, under terms imposed by Government, the custodians at their own expense of the "Hunterian Collection," which was national property.

On the 24th day of June, 1894, the annual value or income which had accrued to the petitioners during the yearly period ending on that date from real property belonging to or vested in them during such yearly period was £7,200. The total value of the petitioners' invested personal estate at the same date was £187,195 17s. 11d., and the income or profits thereof accrued to the petitioners during the said yearly period was £5,833 5s. 7d. (No question arose in this case as to the personal estate.)

The whole of such property, real and personal, or the income or profits thereof, was legally appropriated and applied for the benefit of the public at large or for the promotion of science, literature, or education.

The petitioners were called upon by the Commissioners of Inland Revenue to deliver an account in accordance with section 17 of the Customs and and Inland Revenue Act, 1885, and did deliver such account, thereby claiming that all their property real and personal was entitled to exemption from assessment or duty, and alternately that divers portions thereof were entitled to such exemption as by the said account more particularly appears.

The petitioners were notwithstanding assessed by the commissioners at £3,161, and required to pay as duty thereon the sum of £158 1s.

The sum of £3,161 included the following which the petitioners had alternatively claimed to be entitled to exemption: The sum of £300, being the annual value of that part of the library of the petitioners situate within the premises Nos. 40, 41, and 42, Lincoln's-inn-fields; the sum of £250, being the annual value of the official residence of the conservator of the petitioner's museum, which contained among other things the Hunterian Collection, such residence having, through other portions of the college premises, internal access to the museum; the sum of £200, being the annual value of premises No. 39, Lincoln's-inn-fields, being another portion of the petitioners' library.

Apart from their claim to total exemption the petitioners submitted that in any event the above property was entitled to exemption from duty, being property which, or the income or profits whereof, was legally appropriated and applied for the benefit of the public at large or for the promotion of science, literature, or education.

The petitioners prayed that the assessment should be discharged by reason of the same being assessed upon property entitled to exemption from duty, or that the amount of the assessment be reduced to such sum as the court might order, and that the respondents should be ordered to repay them the said sum of £158 1s., or the sum by which such duty should be reduced.

As regards the museum, it was stated in the college calendar that the Hunterian Collection, which formed the basis of the contents of the museum, was originally purchased by the British Government and presented in 1799 to the Corporation of Surgeons upon certain terms, and was now in the possession of the college, and the present museum was subsequently built, the Government contributing towards the expense thereof. The official residence of the conservator of the museum adjoined the museum, and the conservator was required to reside there.

As regards the library, the calendar stated that members of the college had the privilege of personally introducing a visitor; and that persons not members desirous of admission must make application in writing to the librarian, accompanied by a letter from a fellow or member recommending that a ticket be granted to the applicant. Tickets of admission, which were not transferable, were granted for six months. In the case of students the application must be made on a form to be obtained from the librarian; and tickets were granted to students on the sole condition that the library was used by them for such purposes of study as they might be unable to pursue without the aid of books not accessible elsewhere. These tickets were granted for three months.

The affidavits filed in the case stated that the college had, shortly after the Medical Act, 1886, was passed, in conjunction with the Royal College of Physicians of London, instituted examinations and granted diplomas to the successful candidates which entitled them to practise as surgeons, and built a hall on the Thames Embankment where the examinations were held, and where laboratories were erected. The fees received on these examinations formed a large part of the income of the college. The college had no school of instruction or training for persons seeking admission to the membership of this college. Professors, however, delivered lectures in the theatre of the college, to which the public were admitted free of charge. The college awarded prizes for dissertations on subjects connected with the science of surgery.

The charters of the college and the bye-laws are sufficiently referred to in the judgment.

The commissioners allowed exemption in respect of the museum, and of that part of the property which consisted of laboratories, but disallowed any exemption in respect of the library, the conservator's official residence, the general offices and the building used for examinations.

The Divisional Court allowed exemption in respect of the conservator's residence, but affirmed the decision of the commissioners in respect of the other exemptions claimed.

The college appealed.

Sir E. Clarke, Q.C., and *J. R. Paget*, for the appellants.—The property of the college and its income are legally appropriated and applied for the promotion of science within the meaning of section 11, sub-section 3, of the Customs and Inland Revenue Act, 1885. The case is not distinguishable from the *Commissioners of Inland Revenue* v. *Forrest*, 39 W. R. 33, 15 App. Cas. 334, where the property of the Institution of Civil Engineers was held exempt within this sub-section. The word "exclusively" does not occur in section 11, as it does in section 1 of the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), upon which the case of *Royal College of Music* v. *Westminster Vestry*, [1898] 1 Q. B. 809, 46 W. R. Dig. 126, was decided; and the word "solely" occurs in the Income Tax Act, 1842 (5 & 6 Vict. c. 35), Schedule A, r. 6, upon which *Sulley* v. *Royal College of Surgeons of Edinburgh*, 19 Ct. Sess.

Cas., 4th Ser., 751, was decided in Scotland. Though part of the income of the college is derived from examinations, that does not alter the character of the college so far as regards its corporate property, the whole of which is expended on purposes covered by the charter. The fact that the Legislature has by the Medical Act, 1886 (49 & 50 Vict. c. 48), and other Acts recognized the diploma of the college as one test of the right to practise surgery does not make the institution any the less one for the promotion of science. The examinations may properly be described as tending to promote the science of surgery. If the society is incorporated for scientific purposes, then all its property must be regarded as appropriated for the promotion of science. In *Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 14 Ct. Sess. Cas., 4th Ser., 34, the Court of Session in Scotland held that the library of the Writers to the Signet did not come within the exemption. But that library is used exclusively by the members of the society, like the library of the Law Society in London, whereas the library of the College of Surgeons is open to any member of the public who wishes to use it to pursue his scientific studies. Property held by a body corporate or unincorporate for the promotion of science is property held upon trust for that purpose, and is therefore "legally appropriated" to it: *In re Bootham Ward Strays*, 40 W. R. 632, at p. 635, [1892] 2 Q. B. 152, at p. 165. The property in question is therefore exempt from duty.

They also referred to *Incorporation of Tailors in Glasgow* v. *Commissioners of Inland Revenue*, 14 Ct. Sess. Cas., 4th Ser., 729, and to the charters of the college.

Sir Richard Webster, A.G., and *Danckwerts*, for the Crown.—To come within the exemption the property or its income must be legally appropriated and applied in fact for the promotion of science. The College of Surgeons has two objects—the promotion of the science of surgery and the promotion of the practice of surgery, and there is no deed or anything of that nature appropriating the property to the first object. The charters of the college contain no such appropriation. In the case of the Institution of Civil Engineers in the Court of Appeal (36 W. R. 598, 20 Q. B. D. 621) and in the House of Lords (39 W. R. 33, 15 App. Cas. 334) reliance was placed upon the charter and bye-laws of the institution to show that the property was legally appropriated and applied for the promotion of science, but there the institution had only one object. In the present case the charters of the college do not show any legal appropriation of the property in question for the promotion of science. If a society has two objects, one within and one without the exemption, and there is no legal obligation to apply any of its property to one of the excepted objects, then the property is wholly without the exemption. "Legally appropriated" means so appropriated as to create an obligation upon the part of its administrators to apply it in a particular manner: *Incorporation of Tailors in Glasgow* v. *Commissioners of Inland Revenue*; *In re Linen and Woollen Drapers' Institution*, 58 L. T. Rep. 949, 36 W. R. Dig. 97; *In re Bootham Ward Strays*, 40 W. R. 632, at p. 634. Even if there is such an appropriation there is no application of the property for that purpose. Science may be promoted by the education of surgeons, but the main object of the college, as shown by its charters and bye-laws, is to regulate admission to the profession and to protect its members. Since the time of Henry 8 the college has been one of the portals through which members enter the profession. The Medical Act, 1886, shows that there are privileges attaching to membership of the College of Surgeons. As regards the library, there is no legal appropriation of it for the promotion of science. The college might turn it to any use it pleased. The property, therefore, and its income are not exempt from duty.

They also referred to *Mayor of Colchester* v. *Brooks*, 7 Q. B. 339, at p. 382 (as to the powers of the college under the old charters); *Davies* v. *Makuna*, 33 W. R. 668, 29 Ch. D. 596; *Howarth* v. *Brearley*, 36 W. R. 302, 19 Q. B. D. 303.

Paget, in reply.—Before the Medical Act, 1858 (21 & 22 Vict. c. 90), anyone could practise as a surgeon if he obtained the bishops' licence: *D'Allan* v. *Jones*, 26 L. J. Ex. 79.

Cur. adv. vult.

April 15.—ROMER, L.J., read the judgment of the court as follows: This is an appeal by the Royal College of Surgeons of England, and raises the question whether certain property of the college is subject to duty under the Customs and Inland Revenue Act, 1885. It is contended by the appellants that the property is exempt from duty under sub-section 3 of section 11 of the Act, as being property which, or the income or profits whereof, is or are legally appropriated and applied for the promotion of science. In order to see whether this contention is correct or not, it is important to ascertain what is the main purpose and object of the college. It was finally determined by the House of Lords in the case of *Commissioners of Inland Revenue* v. *Forrest* that if the main purpose or object of an institution be the promotion of science, though there may be some subsidiary purposes or objects, then its property, having to be applied and being applied for the purposes of the institution, is legally appropriated and applied for the promotion of science within the meaning of these words as used in the Act, and is accordingly exempt from duty. Now the case before us differs essentially from the case above mentioned of the Institution of Civil Engineers before the House of Lords. That institution had only one main object and purpose. The college has two main objects, each of great importance. In fact it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising or about to practise surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects.

In order to establish this statement as to the second main function, we must shortly refer to some of the more important facts connected with the charters governing the college and the bye-laws, rules, and regulations made thereunder, and the statutes affecting, and duties discharged by, the college. We do not think it necessary for the purpose to inquire in detail into the constitution or duties discharged by, the predecessors of the present corporation, though such an inquiry would tend to confirm the views above expressed. We must, however, point out that by an Act of 18 Geo. c. 15, entitled, "An Act for making the Surgeons of London and the Barbers of London two separate and distinct corporations," the college's immediate predecessor was incorporated under the title of the master, governors, and commonalty of the art and science of surgeons of London, and by section 8 it was provided in substance that persons who passed a satisfactory examination held by that corporation

tion should be at liberty to practise as surgeons. By a charter of the 22nd of March, 1800, granted by King George 3, the last-mentioned corporation was declared dissolved and the present college was incorporated. In this charter we find the reasons for its grant stated in the following recitals: "And whereas it is of great consequence to the commonweal of this kingdom that the art and science of surgery should be duly promoted, and whereas it appears to us that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science"; and then followed the incorporation of the college. It will be seen from the above recitals that the college was established, not merely for the promotion of the science of surgery, but also for the encouragement and promotion of the practice of surgery. It was also provided by the charter that the college should exercise and enjoy all the rights, liberties, privileges, and possessions of the dissolved corporation, and that the governing body of the college should transact and ordain all such matters and things as the governing body of the dissolved corporation might heretofore have lawfully done, transacted, or ordained. And the charter appointed examiners for the college. It also provided that no person should become a member of the college unless he obtained from it letters testimonial of his qualifications to practise the art and science of surgery. The examiners were, when requested, to examine all army and navy surgeons and their assistants, and to be paid fees for doing so. By a subsequent charter of King George 4, dated 13th of February, 1822, after reciting that it appeared expedient, in order more effectually to promote and encourage the study and practice of the art and science of surgery, that further powers and privileges should be granted to the college, further provisions in its favour were made. By a charter of Her Majesty, dated the 14th of September, 1843, it is provided, "in order more effectually to promote and encourage the study and practice of the said art and science of surgery," that there should be fellows of the college, who were to be appointed after examination by the examiners of the college. By clause 10 of this charter no member of the college was thenceforth to be eligible as a member of the council of the college who was not a fellow, and no fellow was to be eligible whilst practising midwifery or pharmacy, nor unless he should reside and *bonâ fide* practise his profession of surgeon within five miles from the General Post Office in St. Martin's-le-Grand (this provision was altered by clause 7 of the charter of 1852 and clause 4 of the charter of 1888); and by clause 20 all future examiners were to be elected from the council or from the fellows. By a subsequent charter of Her Majesty, dated the 18th of March, 1852, it was directed by clause 17 that a board of examiners should be appointed by the college for the purpose of testing the fitness of persons to practise in midwifery and of granting certificates of such fitness; and by another charter of the 8th of September, 1859, after referring to the Medical Act, 1858 (21 & 22 Vict. c. 90), there was, in pursuance of the power given by section 48 of that Act, granted to the college power to appoint a board of examiners to test the fitness of persons to practise as dentists who might be desirous of being so examined and to grant certificates of such fitness, and the college was to receive reasonable fees for the examination.

From the time of the above charters the college continued to hold the examinations thereby directed or provided and to grant certificates and to be paid fees for the examinations. In particular we may point out that from the passing of the above-mentioned Act of 18 Geo. 2, c. 15, down to the incorporation of the college its predecessor continued to hold examinations to qualify persons for practising the profession of surgery, and from its incorporation the college continued the examinations until the Medical Act, 1886, hereafter mentioned, came into operation. Persons who passed these examinations became duly qualified to practise under and by virtue of the above-mentioned Act of George 2, which still remains in force. Since the Act of 1886 came into force examinations have been held in pursuance thereof by the college and by the Royal College of Physicians, as hereafter more fully stated. The examination by the college in midwifery ceased in 1888, but the examination in dentistry is still continued. These examinations by the college have always been of great importance, and the certificates given to those who passed have been highly valued in the surgical profession, and a large income has been derived by the college from the fees on these examinations.

The importance of the functions discharged and work done by the college, by its examinations and otherwise, in promoting and encouraging the practice and profession of surgery received further legislative recognition in the year 1858 by the Medical Act then passed. By that Act was established a General Council of Medical Education and Registration of the United Kingdom, and it was provided that one member of that council should be chosen by the college. Numerous powers and duties were imposed on the general council with reference to medical practitioners, and the registration of duly qualified persons thereby provided for. Apart from persons practising before the 1st of August, 1815, only those qualified by certain colleges and bodies set forth in Schedule A could be registered or obtained the benefit of registration. In Schedule A is included "fellow or member or licentiate in midwifery of the Royal College of Surgeons of England." Section 19 provided that any two or more of the above colleges and bodies might, with the sanction of and under the direction of the general council, unite or co-operate in conducting the examinations required for qualifications to be registered under the Act. Section 28 provided that, if any of the said colleges or bodies should at any time exercise any power they possessed by law of striking off from their lists any member, notice should be given to the general council, who might thereupon, if they saw fit, strike off the name of such member from the register as a person qualified by being such member, subject to a proviso that no person should be erased from the register on the ground of his having adopted any theory of medicine or surgery. By section 31 every registered person was to be entitled, according to his qualification, to practise medicine or surgery, or medicine and surgery, as the case might be, with certain privileges therein mentioned, including the right to recover his charges in a court of law. And by section 32 it was provided that no unregistered practitioner should be entitled to recover his charges in a court of law. By the Act various other provisions were made in favour of registered practitioners. This Act, with certain amendments, has since continued in force. By the Medical Act, 1886 (49 & 50 Vict. c. 48), certain alterations were made in the general council, but the college had still the right to choose one member of it, and section 3, sub-section 1 (*b*), provided that an examination qualifying for registration might be held by any combination of two or more medical corporations in the same part of the United Kingdom who might agree to hold a joint examination in medicine, surgery, and midwifery, and of whom one at least should be capable of granting a diploma conferring the right of registration in respect of medicine, and

one at least should be capable of granting such diploma in respect of surgery.

Shortly after this Act, and in pursuance of the above statutory provisions, the College of Surgeons and the Royal College of Physicians agreed to hold, and have since held, such a joint examination as that above mentioned, and for the purpose of such joint examination those two bodies have taken a lease of certain land and erected thereon a hall in which the examination is held; and it is in respect of the college's property in this hall, so far as used for the purpose of the examination, amongst other properties of the college, that this appeal is brought. The college has further duly recognized and carried out its duties connected with the practice and profession of surgery by its bye-laws and rules, many of which are devoted to the maintenance of a high standard of honour in that profession. We may refer by way of example to section 14, sub-section 1, of the bye-laws as to the examinations and qualifications necessary for membership of the college, and to sub-section 4 as to the declaration required of every person on his admission as a member of the college that he will demean himself honourably in the practice of his profession. See also section 16 of the bye-laws, providing that no fellow or member of the college should publicly profess or advertise a secret method or process of cure relating to his practice as a surgeon,* or advertise or publish any matter or thing prejudicial to the interest or derogatory to the honour of the college or disgraceful to the profession of surgery, under penalty of removal from being a fellow or member of the college. Such removal would, of course, have very serious results on the person removed in his practice, especially having regard to the provisions of the Act of 1858. Section 20 of the bye-laws may also be referred to as showing the close connection between the college and the profession. Sub-section 1 provides for the council annually publishing a list of all hospitals and schools of surgery and medicine whose certificates of the professional education of candidates for the fellowship would be received by the college. Sub-section 3 provides for the council making or altering rules respecting the professional education of candidates for the fellowship; and sub-section 4 gives the subjects for the professional examinations for the fellowship. Lastly, the diplomas issued by the college to persons satisfactorily passing the examinations for surgery and dentistry respectively testify under the college seal that those persons are qualified to practise surgery and dental surgery.

We think that the above facts amply show the dual nature of the object and purpose of the college as above stated by us. Now, so far as concerns property which may be legally appropriated and applied to what we have called the second main function of the college, as distinguished from its other function of the promotion of the science of surgery, it appears to us clear that such property would not come within any of the exemptions from duty mentioned in section 11 of the Customs and Inland Revenue Act, 1885. It is equally clear that property which may be legally appropriated and applied by the college for the promotion of the science of surgery is exempt from duty. But a question arises as to property of the college which is not legally appropriated and applied to one of the two main functions of the college as distinguished from the other. Of course in a case like that of the Institution of Civil Engineers (*Commissioners of Inland Revenue* v. *Forrest*) no such question could arise. Where an institution has only one main object and purpose, any property belonging to and properly dealt with by the institution must of necessity "be legally appropriated and applied" for that object and purpose, as was pointed out by the House of Lords. But in a case like the present, where the institution has two main objects, difficulty may arise both under the word "applied" and under the words "legally appropriated." The difficulty under the word "applied" would be merely one of fact—that is to say, the difficulty of determining to which of the two objects the property or its income was in fact being applied. But the words "legally appropriated" raise a question as to their meaning when used in section 11. They clearly mean something more than "applied." And on the construction of the section we agree with the view expressed in the case of *The Incorporation of Tailors in Glasgow* v. *Commissioners of Inland Revenue*, and in the other authorities cited to the same effect, that the words mean that the property or its income is so appropriated as to create a legal obligation upon the part of its administrators to apply it in a particular manner. Now, there has been no legal appropriation in the above sense of any of the properties the subject of the present appeal, or of their incomes, to the first main object of the college as distinguished from the second main object. As above pointed out, seeing that the college has two functions, there can be no legal appropriation to one as distinguished from the other merely from the fact that the college owns the properties; and there has been no appropriation by the college by conveyance, declaration of trust, or otherwise. So that the college is under no legal obligation either to apply any of such properties or their incomes to the first main function of the college, or not to apply them to its second main function. So that there has been no legal appropriation for a purpose exempting from duty.

But beyond this we agree with our brothers Wright and Channell in the view they took that no property the subject of this appeal, or its income, is being even applied so as to exempt it from duty. For example, the £681 income derived from personal estate is applied for the general purposes of the college, and not separately for the purpose of the promotion of science; and the *corpus* of that personal estate is of course not applied for the last-mentioned purpose. Similar remarks apply to Nos. 37 and 44, Lincoln's-inn-fields, and the income derived therefrom. As to the part of the examination hall made subject to duty, that is applied for the second rather than for the first main purpose of the college. The offices at Nos. 40, 41, and 42, Lincoln's-inn-fields, which have been made liable to duty, are not applied, in our opinion, for the promotion of the science of surgery. We feel more doubt as to the libraries, but on the whole we think that they are not so applied as to exempt them from duty. They appear to us, on the whole, to be like the case cited of the library of the *Society of Writers to the Signet* (14 Ct. Sess. Cas. 4th Ser. 34), which was held by the Court of Session in Scotland not to be exempt. The appeal therefore must be dismissed with costs.

Appeal dismissed.

Solicitors for the college, *Wilde, Moore, & Wigston.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

* The lord justice was reading from the bye-laws in force in 1894, when the assessment was made upon the property of the college. This bye-law was altered in 1895.

High Court of Justice.

Chan. Div. North, J. — April 21.

In re LANDOR (A SOLICITOR). (a.)

Solicitor—Costs—Taxation—Refusal to deliver bill of costs—Disclaimer of right to costs—Common order to tax.

A client obtained the common order for delivery of a bill of costs and taxation against his solicitor, who had received the loan of money from him. No bill was delivered, and the client moved for leave to issue a writ of attachment. The solicitor, in defence, said he made no claim for costs, and that such a claim, if made, was statute-barred.

Held, that, if the solicitor made a further affidavit that he had not been paid for work done, and refused to claim costs for such work and abandoned any right to receive costs therefor, no bill of costs could be demanded.

In this case it appeared that Robert Landor had acted as solicitor for James Moxon over a period of forty years and had been in the habit of sending in his bill for professional services at stated intervals up to November, 1889, when his last bill was delivered. Since that date Landor had acted as solicitor for Moxon on several occasions, and especially on the sale of some freehold properties in 1892, but he had sent in no bill of costs.

In the year 1891 his client Moxon had lent Landor the sum of £400, and this loan had never been repaid. Moxon made repeated applications to Landor for the bill of costs due after 1889, but no such bill was ever delivered.

On the 23rd of December, 1898, Moxon obtained the common order for delivery of a bill of costs and taxation against the solicitor, but no bill was delivered within the stated period and Moxon now moved for leave to issue a writ of attachment.

On the 22nd of February, 1899, Robert Landor made an affidavit in which he said: "I fully intended to make out an account of my professional charges, but find that owing to the long lapse of time since I acted for the applicant it is impossible for me now to make out a satisfactory bill of costs. As I am informed and believe, counsel on my behalf and also my solicitors have already repeatedly disclaimed all claim to any bill of costs, but the applicant refuses to accept a disclaimer by counsel or solicitors as sufficient and requires me to state on oath, as I now do, that I make no claim for any costs against the applicant. In fact my claim was wholly statute-barred and but for the applicant's submission to pay I could not have made any claim, and I have determined to make no claim."

F. Whinney, for the motion, said that the respondent was bound to deliver his bill of costs and his cash account. He could not get out of his liability by abandoning his claim for costs. His disclaimer only means that he has paid himself out of the client's money in his hands and he must give an account of the balance.

Ashton Cross, for the solicitor, said that he disclaimed all right whatever to the costs by way of set-off or otherwise, and refused to send in a bill. He could not be compelled to deliver a bill of costs when he claimed none, and he could not be compelled to claim costs for the sake of being made to give credit for cash received.

Whinney replied.

NORTH, J., A solicitor cannot get out of delivering his bill by paying his costs out of money belonging to the client in his hands and then saying that no costs are due to him from his client. The defence, however, goes much further than that, and than the affidavit. It admits that he did work for which he might have claimed, and that he has not been paid on account of this work, and refuses to send in a bill of costs now. His right to receive costs on account of this has been abandoned, and the sum in his hands ought to be paid over without any deduction. The solicitor may, however, make a further affidavit that he has not been paid anything on account of work done since the last settled account, and that he refuses to make any claim for such work, and abandons the right to receive costs in respect thereof. It is now suggested that, even after such an affidavit has been made, a cash account is required, because otherwise he would escape the summary jurisdiction of the court. I don't think this is so if a proper application were made, but I do not think the common order to tax involves an account of all monetary transactions between the solicitor and his client independently of costs due from the client. I think after an affidavit of that kind has been made I cannot require a bill of costs. If, therefore, such an affidavit is made, I shall make no order except that the solicitor is to pay the costs of this action.

Solicitors, *A. S. C. Doyle*, for *J. G. Moxon*, Hanley; *Mills, Curry, & Gaskell.*

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. — April 18, 19, 28.

NICHOLL v. URBAN DISTRICT COUNCIL OF EPPING. (a.)

Local government—Public health—Power to require sufficient water-closet to be provided in place of a privy—Injunction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 35, 36, 268.

Section 36 *of the Public Health Act*, 1875—*which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, earth-closet, or privy, and an ashpit, or either of them, and, in case of non-compliance, empowers the local authority to do the necessary works and recover the expenses—does authorize the local authority to order a sufficient water-closet to be provided in place of a privy, where the existing accommodation is insufficient.*

Motion.

This was a motion by the plaintiff asking for an injunction to restrain the defendants from entering upon certain premises belonging to him, and from interfering with, pulling down, or converting the privies attached to the said premises into water-closets, and from digging into, excavating, or otherwise interfering with the said premises.

The plaintiff was the owner of four cottages at Epping, in Essex, rented at £3 15s. or £4 per annum. Each of the cottages had a privy attached to it.

The defendants were the urban district council for the Urban District of Epping, in the county of Essex.

On the 25th of May, 1898, the district inspector of nuisances reported to the defendants that the said houses were without a sufficient water-closet, earth-closet, or privy, and that a sufficient water-closet ought to be provided.

It appeared that each house was considered separately by the inspector, and that in respect of each house he came to the conclusion that the existing

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

accommodation was insufficient, and ought to be replaced by a sufficient water-closet.

On the same day each report was read at a meeting of the district council; the inspector was present and was consulted as to each report.

Thereupon the defendant council caused notices to be served on the plaintiff in the following form: Take notice that the Urban District Council of Epping, in the county of Essex, being satisfied on the report of their inspector of nuisances, dated 25th day of May, 1898, that the house above described is without a sufficient water-closet, earth-closet, or privy, hereby require you in pursuance of the provisions of the Public Health Act, 1875, to provide for the said house within the space of six weeks from service upon you of this notice a sufficient water-closet. If the above notice is not complied with within the time aforesaid, the Urban District Council of Epping may, at the expiration of such time, do the work required to be done and recover the expense incurred in so doing in the manner provided by the said Act.

After some correspondence the defendants gave the plaintiff notice that they intended themselves to do the work necessary for replacing the privies by water-closets. The plaintiff brought this action to restrain the defendants from acting on such notice.

The Public Health Act, 1875, provides: Section 35. "It shall not be lawful newly to erect any house, or to rebuild any house pulled down to or below the ground-floor, without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings. . . . Section 36. If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet, earth-closet, or privy and an ashpit furnished as aforesaid, or either of them, as the case may require. If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing. . . ."

Section 268.—Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties. Any proceedings that may have been commenced for the recovery of such expenses by the local authority shall, on the delivery to them of such copy as aforesaid, be stayed; and the Local Government Board may, if it thinks fit, by its order, direct the local authority to pay to the person so proceeded against such sum as the said board may consider to be a just compensation for the loss, damage, or grievance thereby sustained by him.

Upjohn, Q.C., and *Stokes*, for the plaintiff.—The plaintiff is willing to make the privies sufficient. Under the Public Health Act he has an option as to the nature of the accommodation, and as long as it is sufficient the local authority has nothing to do with the nature of the accommodation. The only power of the defendants was to require the accommodation to be made sufficient, but not to compel him to provide a sufficient water-closet.

They referred to the Public Health Act, 1875, ss. 35, 36, 37, 38, 40, 41; Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 81; *Barnett* v. *Laskey*, 68 L. J. Q. B. 55; *Tinkler* v. *Wandsworth Board of Works*, 6 W. R. 390, 27 L. J. Ch. 342, 2 De G. & J. 261; *St. Luke's Vestry* v. *Lewis*, 10 W. R. 249, 1 B. & S. 865.

Macmorran, Q.C., and *Parkyn*, for the defendants, relied on the statutory rights of the district board under the Public Health Act, 1875, s. 36. No particular kind of water-closet was insisted upon, but only, in the words of the section, "a sufficient water-closet." The plaintiff has mistaken his remedy. He must either comply with the order of the local authority, and erect suitable water-closets, or he must permit the local authority to erect them, and then when called upon to pay, appeal to the Local Government Board under the Public Health Act, 1875, s. 268. The question of sufficiency is not one for the court to consider.

They referred to *St. Luke's Vestry* v. *Lewis*; *Tinkler* v. *Wandsworth Board of Works*; *Wood* v. *Widnes Corporation*, 46 W. R. 293, [1898] 1 Q. B. 463; *Robinson* v. *Sunderland Corporation*, 62 J. P. 216, 46 W. R. Dig. 103; *Whitaker* v. *Derby Urban Sanitary Authority*, 55 L. J. M. C. 8, 34 W. R. Dig. 8.

Upjohn, Q.C., replied.

April 28.—STIRLING, J., in giving judgment, after stating the facts and referring to the notices served on the plaintiff, said: This action was brought to restrain the defendants from acting on these notices. It was admitted that the plaintiff could not in this court impeach the report of the inspector; and that, if the plaintiff had any ground of complaint in respect of it, his course was to appeal to the Local Government Board under section 268 of the Public Health Act of 1875. Upon the hearing of the motion two objections were raised to the proceedings of the defendants. First, that the local authority were acting in pursuance of a general scheme to introduce water-closets in the place of privies without exercising a discretion as to the exigencies of each particular case, as required by the statute. This was rightly abandoned in the course of the argument. The second objection, and that chiefly relied upon by the plaintiff, was that the defendants had no authority to require the plaintiff to provide a sufficient water-closet in place of a privy. The determination of the question thus raised turns upon a few words in the Public Health Act, 1875, ss. 35, 36. [His lordship read the sections.] It was quite clear that the Legislature had not prohibited the erection of privies. The question was whether the local authority, having found an existing privy to be insufficient, had power to require the owner to provide a sufficient water-closet, subject, of course, to a right of appeal to the Local Government Board similar to that which admittedly existed as to the sufficiency of the existing accommodation. The material words in section 36 were "or either of them, as the case may require." The plaintiff contended that these words related merely to "privy and an ashpit"; the defendants contended, on the other hand, that they related to the three classes of accommodation, "water-closet, earth-closet, or privy and an ashpit." In my opinion the words "or either of them, as the case may require," read in their natural sense, have not the narrow meaning contended for by the plaintiff. There is no decision precisely in point upon the Public Health Act, 1875. *Wood* v. *Widnes Corporation*

referred to a different point; for there the local authority gave notices prescribing the particular form of closet to be adopted; and the expressions which occurred in the judgments of the learned judges seem to be directed to the question before them and not to that which I have now to decide. Reference has been made, however, to decisions on the provisions of the Metropolis Management Act, 1855, s. 81. In *Tinkler* v. *Metropolitan Board of Works*, 2 De G. & J. 261, Knight Bruce, L.J., expressed an opinion that the provisions of that Act did not constitute the local authority the judges of what ought to be required to be provided in the place of defective existing accommodation. Turner, L.J., expressed no opinion as to this, but gave his decision on the ground that the local authority was acting in pursuance of a general scheme. In *Vestry of St. Luke's* v. *Lewis*, the question came before the Court of Queen's Bench, consisting of Cockburn, C.J., Wightman and Crompton, JJ. They unanimously held that the local authority had the power claimed, but each relied on the frame of the latter portion of the clause in the Act under consideration, which differed from that which I have now to consider. The Chief Justice, however, pointed out reasons why the Legislature might have thought right to entrust such a power to the local authority. The abuse of such a power was guarded against by the right of appeal to the Local Government Board. It was said that on the view of the law contended for by the defendants, an owner having provided accommodation in accordance with section 35 might within a year or other short time be compelled under section 36 to provide accommodation of a different kind. That, however, could only happen on the occurrence of two events—(1) That the accommodation provided proved insufficient; and (2) that the circumstances of the particular case required another kind of accommodation; and on both those points the owners would have a right of appeal. Although the language of the Public Health Act, 1875, differs from that of the Metropolis Management Act, 1855, yet under section 36 of the former Act, if the notice was not complied with, the local authority might do the work thereby required to be done; so that even if the notice followed the exact terms of the Act, the discretion as to the precise work to be executed would ultimately rest with the authority. On the whole, although the enactment is not so clear as that in the Metropolis Management Act, 1855, I think that the language is sufficient to confer the power claimed by the defendants, and that the motion consequently fails.

Solicitors for the plaintiff, *Pownall & Co.*, for *R. D. Trotter*, Epping.

Solicitors for the defendants, *Robbins, Billing, & Co.*, for *G. J. Creed*, Epping.

Chan. Div. } Kekewich, J. } March 28; April 11.

TIESSEN v. HENDERSON AND OTHERS. (*a*.)

Company—Reconstruction scheme—Special resolution—Notice of meeting—Sufficiency—Non-disclosure of interest of directors—Underwriting—Injunction.

In a notice convening an extraordinary general meeting for the discussion of the reconstruction of a company by the sale of the undertaking to another company, it was stated, inter alia, *that the full issue of debentures had been guaranteed by a third company.*

By another notice, convening a second extraordinary general meeting, the proposal to adopt the said reconstruction scheme was made conditional upon the non-acceptance of an alternative scheme. Neither notice disclosed the fact that the directors of the selling company were directors of or largely interested in the guaranteeing company. The resolutions as to the said reconstruction scheme were passed and confirmed.

Held, that the notices did not sufficiently disclose the interests of the defendant directors, and that therefore the resolutions were not binding upon shareholders absent from the meeting (Kaye v. Croydon Tramways Co., 46 *W. R.* 405, [1898] 1 *Ch.* 358, *discussed and followed*); *but that all the shareholders had been sufficiently informed of the conditional proposal announced in the second notice.*

Alexander v. Simpson, 38 *W. R.* 161, 43 *Ch. D.* 139, *distinguished.*

Motion made by a shareholder of the Violet Consolidated Gold Mining Co., suing on behalf of himself and the other shareholders, against the directors and liquidator of the company, asking for an *interim* injunction to restrain the defendants from carrying into effect or acting upon certain resolutions passed at two extraordinary general meetings of the company.

On the 7th of February, 1899, a notice was sent out to the shareholders of the company stating that an extraordinary general meeting would be held on the 16th of February for the purpose of considering and, if thought fit, passing certain resolutions which were set out in the notice as to the winding-up and reconstruction of the company, and the approval of a draft agreement between the company and its liquidator of the one part and a new company about to be formed of the other part. A circular which accompanied the notice set out the nature of the scheme for reconstruction, stating that "the full issue of debentures has been guaranteed by the Henderson's Transvaal Estates (Limited), so as to secure the necessary amount for paying off the mortgage and for carrying on the work of the company." It having been mentioned that, out of the 500,000 proposed shares, 100,000 would be "kept in reserve," the circular further stated that "a call on shares is reserved as to 50,000 for the managers and issuing company, and as to the remaining 50,000 for the guarantors"; and it was further proposed "that the board of the company should consist of Messrs. Henderson, Richards, Schlesinger, and Van Ryn, and the Hon. Chandos Stanhope, as representing the Consolidated Gold Fields" (to which company it was proposed to entrust the management of the company in South Africa). The said circular did not disclose the facts that the first defendant Henderson was a director of the Violet Consolidated Gold Mining Co., and chairman of, and large shareholder in Henderson's Transvaal Estates (Limited), and that some of the other directors of the Violet Co., who were defendants, were also personally interested in Henderson's (Limited). At the meeting of the 16th of February, when the resolutions were carried, another scheme was brought forward, and, by another notice of the 23rd of February, the shareholders were informed that an extraordinary general meeting would be called to consider resolutions to adopt this new scheme (referred to as that of the General Mining and Finance Corporation (Limited)). The notice further stated that in the event of such resolutions not being passed, an extraordinary general meeting would be held to confirm the resolutions passed at the meeting of the 16th of February, and to approve the agreement with Henderson's (Limited); it was mentioned that "the directors would suggest that both meetings should be held together." In the event the

(*a*.) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

resolutions as to the new scheme were not passed, the meeting in that respect being adjourned; the resolutions relating to the first scheme were, however, confirmed.

Article 51 of the articles of association of the Violet Co. provided, in respect of general meetings, that seven clear days' notice at the least, specifying the place, the date, and the hour of meeting, and in the case of special business the general nature of the business, should be given by notice as therein provided.

Warmington, Q.C., Warrington, Q.C., and *Gore-Browne*, for the plaintiff, contended that the first notice was bad because it did not disclose the interest which the directors, or some of them, were to get in the guaranteeing company under the proposed agreement (*Kaye* v. *Croydon Tramways Co.*, 46 W. R. 405, [1898] 1 Ch. 358); and that the second notice, calling the meeting for confirmation, was bad for being conditional: *Alexander* v. *Simpson*, 38 W. R. 161, 43 Ch. D. 139.

Ingle Joyce, for the defendant Henderson, stated that he had done what he thought best for the company.

Renshaw, Q.C., and *G. F. Hart*, for the defendant Schlesinger, argued that the real ground of the decision of the Court of Appeal in *Kaye* v. *Croydon Tramways Co.* was that the agreement submitted to the meeting was in reality a twofold agreement (on the one hand for sale, and on the other for the compensation of the officers) which was not properly set out in the notice, and the court in consequence thought it bad. Schlesinger did not get any personal profit from his agreement with respect to underwriting. He was a stockbroker, and acted wholly for the benefit of his clients.

They also referred to *Grant* v. *United Kingdom Switchback Railways Co.*, 37 W. R. 312, 40 Ch. D. 135, per Cotton, L.J., at p. 139.

W. F. Hamilton, for the defendant Van Ryn.

Herbert Reed, Q.C., and *Austen Cartmell*, for the Violet Co. and its liquidator.

KEKEWICH, J.—It has always seemed to me that the application of the doctrine of *Foss* v. *Harbottle*, 2 Hare 461, to joint-stock companies involves, as a necessary corollary, the proposition that the vote of the general meeting, which binds a dissentient and an absent minority by a majority, must be a vote given with the utmost fairness; that not only must the matter be fairly put before the meeting, but that the meeting itself must be conducted in the fairest possible manner. The well-known case of *Menier* v. *Hooper's Telegraph Works*, 22 W. R. 396, L. R. 9 Ch. App. 350, illustrated that; and it may be that the law, which is not, I think, in a satisfactory condition as regards the exceptions to the general rule, may be elucidated by the Court of Appeal in the case of *Hovenden* v. *Wallis*, which was before me not very long ago. Then I may hazard the hope that we shall have an exposition of the doctrine on the subject, because I do not think at present we know quite where we are. But I think that if you are to apply that rule in its entirety, as, of course, it is my duty and wish to do, that a vote of the majority controls the minority, and, of course, also the absent shareholder, it is a matter of absolute necessity that there should be the most perfect straightforwardness and openness throughout. The question is whether each shareholder as and when he received the notice of the meeting, in which I include the circular which was of the same date, and I suppose sent at the same time—whether as each shareholder received those documents he had fair warning of what was to be submitted to the meeting. A man may with great propriety throw a notice of that kind into the waste-paper basket. He does not do that prudently without reading it, but if when he reads it he sees that it is a matter which he does not care to take any personal interest in, but is willing to leave it to the decision of the majority, no one can say that he is not acting prudently and safely. He is content to be bound by the vote of the majority, but he is content because he knows what the majority are to vote about, and what the matter is before the meeting; and if he does not know that, then he has not a fair chance of determining what is his duty to himself—that is to say, whether he ought to attend the meeting, whether he ought to make further inquiries, or whether he may leave it to others to determine for him.

It has been argued on behalf of the defendants by Mr. Renshaw that there is no necessity for a director to disclose his interest to a general meeting. I observe that that point, or a point of that kind, was argued in the case of *Kaye* v. *The Croydon Tramways Co.*, because it is alluded to by Lindley, M.R., in his judgment. The question which, it seems to me, I have to consider here is whether a director's interest must be disclosed, not because it is his duty to disclose his interest, but because it is the duty of the board to tell the shareholders precisely that, or fairly that, about which they are to vote. I have before me the notice of the 7th and the circular, which I think must be treated as one document. There is no inconvenience, irregularity, or impropriety in supplementing, as is often done, a notice by an explanatory circular; and the shareholder, though perhaps strictly he might say, "Why trouble me with a circular? What I am entitled to is a notice," still I think may be fairly entitled to look at the two as one document, and he has both before him for his consideration. The notice in this particular case tells us nothing really except a resolution to be proposed. With that I pass over that part of the compound document. The circular does tell us a great deal more, and it is important to notice that it does expressly say that a call on shares is reserved as to 50,000 for the managers and issuing company, and as to the remaining 50,000 for the guarantors, which has to be exercised at par within three years from the date of the formation of the new company. Then a little further down in the next paragraph but one there is a statement that the full issue of the debentures has been guaranteed by the Henderson's Transvaal Estates (Limited) the result being that the call of 50,000 shares is stated to belong to Henderson's Transvaal Estates (Limited). It is a little more difficult to understand from the circular what is to be done with the other 50,000 shares. They are to be reserved for the managers and issuing company—the managers are the Consolidated Gold Fields of South Africa (Limited), but I do not myself find any mention of the issuing company, and that seems to me a fault in drafting the circular. But that is, to my mind, of little importance, because the issuing company might be any company, and it is not suggested here—at least, I do not understand it to be suggested—that the issuing company were the Henderson's Transvaal Estates (Limited), and as long as there was some company issuing and they, with the managers—namely, the Consolidated Gold Fields of South Africa (Limited), had the call of 50,000 shares, this circular, though not quite plain and explicit, is sufficiently plain for practical purposes. Then we come to this, that Mr. Henderson was the chairman of Henderson's Transvaal Estates (Limited) and he

was a very large shareholder in that company, and he was to receive considerable benefit, or was likely to receive considerable benefit, from the adoption of this scheme. It is said that it was well known, at any rate to a large number of the shareholders, that he occupied that position; and I think it must be taken to be well known that Henderson's Transvaal Estates (Limited) was largely interested in the reconstruction of the company—largely interested, that is to say, in the company, reconstructed or not reconstructed. I am not disposed to attach much weight to the position of Mr. Henderson. I think it would have been better, and made the thing more clear, if that had been dwelt upon; but if that stood alone I do not think that that would be sufficient to justify me in saying that this circular was not thoroughly explicit so as to put the thing fairly before the shareholders.

But two other directors were distinctly interested. Mr. Van Ryn had agreed to underwrite a certain number of the debentures. I will take it from his own affidavit. He says: "I agreed to underwrite or guarantee the subscription of a portion of the debentures, and was to receive as commission or remuneration for so doing a call on certain shares of the new company in the same proportion as others who were willing to underwrite the debentures." It seems that later he withdrew from that, and there was no binding contract, but when the notice was issued it undoubtedly was his own statement that he had made what he calls an agreement, and what ordinary persons call an agreement, although it may not be enforceable in a court of law, to underwrite the debentures and to receive a commission for the same, and that fact was not disclosed. Mr. Schlesinger, another director, was still more largely interested, practically in the same way. He was a stockbroker, he had clients who were largely interested in this company, and he busied himself on behalf of his clients. He says that he was to receive no benefit from it himself, that he only did it on behalf of his clients. It seems to me impossible to go into that. The man who really entered into the agreement by which he was to receive a large benefit—namely, a call on shares to the extent of 12,500, a fourth of the 50,000, was Mr. Schlesinger, and how he was to distribute them among other people seems to me to be perfectly immaterial. He was the only man known to the directors—the only man known to those who were craving this reconstruction scheme. Who his clients were was not stated, and was not inquired into by anyone. That is a fact which is left out again; and therefore the shareholder who receives this circular is told, no doubt, that there is to be a call on 50,000 shares for the managers and the issuing company and another 50,000 for the guarantors; he is told that the 50,000 are going to the guarantors, he is told that the other 50,000 are going to the Consolidated Gold Fields of South Africa (Limited), either that company or some other company which is the issuing company; but he is not told that some of his own directors, the persons whom he is trusting to put this before the meeting, are themselves largely interested in this, and that they are to have a portion of the call on these shares. We must regard the shareholder as a man of ordinary prudence. Treating it as a commercial matter, he has invested his money in this company; the company is in difficulties, and reconstruction is necessary, and what he has to consider when the notice and circular come to him is whether, on the whole, this is the best thing that can be done. He is either to vote himself in person or by proxy, or he is to leave it to the majority to decide. It seems to me impossible to exclude from the matters which he ought, as a prudent man to consider, the question whether some of his directors should be remunerated by the means of this call on shares. It is really the same thing which occurred in *Kaye* v. *The Croydon Tramways Co.* There is a passage in Rigby, L.J.'s, judgment which I only read because he expresses agreement with what the Master of the Rolls said in his own language, and so one has the conjoint opinion. On p. 373 of [1898] L. R. 1 Ch. he says: "I quite agree with what the Master of the Rolls has said, that no man of business would ever come to the conclusion that when a meeting was summoned for the purpose of sanctioning a sale from the company to a purchaser, it was also intended at that meeting to do so different a thing as to sanction the payment of a portion of the consideration that was to proceed from the purchaser, not to the company, but to the directors of the company." It seems to me that with a very slight change of words you may apply that directly to this case. Why should any shareholder reading this think for a moment that two of his directors (I am including Mr. Henderson) were to have a large proportion of the 50,000 on which there was to be a call in favour of the guarantors? He is told that the guarantors were Henderson's Transvaal Estates (Limited). He is not told that the guarantors were to be some of his own directors, and that they were to derive a personal benefit. Of course I am told—and with perfect honesty, I have no doubt—that these gentlemen only wished to do the best for the company, that they were largely interested in it, and they thought it the best thing to do. True; but they did so for a commission or for remuneration, and they were not prepared to do the best they could without being paid for it—neither Mr. Schlesinger nor Mr. Van Ryn, and those facts were not stated in the circular. If a meeting properly convened, and properly instructed as to the purpose for which it is convened, chooses to assent to this, there is no reason on earth why they should not; but I think they ought to have the opportunity of considering it. The man I am protecting is not the dissentient shareholder, but the absent shareholder—the man who is absent because with more or less care—perhaps less, but still, having received this, and looked at it, comes to the conclusion that on the whole he would not oppose; he would leave it to the majority. I cannot tell—none can tell—whether he would have left it to the majority of the meeting to decide if he had known the real facts. He did not know the real facts; and therefore I think the resolution is not binding upon him.

[On the second point his lordship was of opinion that *Alexander* v. *Simpson* was entirely different from the present case, and continued:] The second part of the meeting was to be held at a certain place, at a certain time, on a certain date. I think that the shareholder had ample notice of what was intended to be done, that there was nothing conditional to affect his mind.

But, on the other ground, I think the plaintiffs are entitled to an injunction restraining the defendants and each of them until the hearing of this action or further order from acting upon or carrying into effect the three resolutions referred to in the indorsement on the writ. The liquidator will also be restrained.

Solicitors, *Hicks, Davis, & Hunt; Michael, Abrahams, & Co.; Foss & Ledsam; Wilson, Bristowes, & Carpmael; Hollams, Son, Coward, & Hawksley.*

Chan. Div.
Cozens-Hardy, J. } March 16, 23.

SALTON v. NEW BEESTON CYCLE CO. (a.)

Company—Director—Qualification—Implied contract to acquire—Remuneration—Apportionment.

The terms of the implied agreement between a director who has accepted office and acted, and the company—viz., on his part to serve the company on the terms of the articles, and on the company's part that he shall receive the remuneration provided by the articles—are cross-contracts, and are not interdependent.

An article providing that the office of a director shall be vacated if he cease to hold the due qualification, does not apply to the case of a qualification never possessed.

An article providing a sum for the remuneration of the board in each year applies to every member of the board, including a de jure *director who has not acquired his qualification shares under the articles.*

The omission to apply for and obtain such shares from the company is not such a breach of duty as to constitute a defence to any claim for remuneration.

Where the articles provide a sum for the remuneration of the board "in each year," no remuneration can be claimed except for a complete year, and there is no apportionment in respect of an incomplete year.

Action.

The above-named company was incorporated under the Companies Acts on the 3rd of June, 1886, with a nominal capital of £1,000,000, divided into 100,000 shares of £10 each.

By article 79 of the articles of association the first directors were to be nominated in writing by the subscribers to the memorandum of association, and Lord Norreys, one of the defendants in the above action, was one of the persons nominated.

Articles 80 and 81, upon which the questions arising for decision mainly turned, were as follows: "80. The qualification of a director shall be the holding of shares of the company of the nominal amount of £250. A first director may act before acquiring his qualification, but shall in any case acquire the same within one month from his appointment, and unless he shall do so, he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly. 81. The board shall be entitled to receive by way of remuneration in each year £5,000. Such remuneration shall be divided among the directors in such proportion and manner as they shall from time to time agree, or, in default of agreement, equally. The company in general meeting may increase the amount of such remuneration, either permanently or for a year or longer term." And by article 92 the office of a director was to be vacated, *inter alia*, if he "ceased to hold the due qualification."

Lord Norreys did not acquire any shares before the end of the month from his appointment, but in March, 1897, he acquired twenty-five shares, not from the company, but from the promoter, and that, as the court held, plainly did not satisfy the requirements of article 80.

The capital subscribed was only £140,000, a sum which was inadequate for the purposes of the company. The company was accordingly wound up in November, 1897.

Between June, 1896, and November, 1897, Lord Norreys attended eight meetings of the board, and that was all he appeared to have done in his character of director. Mr. Jarratt, one of the original directors, retired on the 18th of November, 1896, and the directors (including Lord Norreys) resolved to pay him £100 as remuneration for his services, and this sum was paid by the company. It was suggested that on that day Lord Norreys and the other directors agreed to make no claim for remuneration, but the evidence did not suffice to prove this. Jarratt's place was not filled up, and there were thenceforward only six directors. At a meeting of the board of directors on the 14th of July, 1897, at which Lord Norreys was not present, the other directors resolved not to claim remuneration.

The above action was by a party claiming as mortgagee of Lord Norreys to recover the moneys alleged to be due to Lord Norreys from the company in respect of his director's fees and remuneration.

Eve, Q.C., and *T. L. Wilkinson*, for the plaintiff.—Lord Norreys was not a party to the resolution by which the other directors agreed not to claim remuneration, and anything which he has done or omitted to do cannot deprive him or the plaintiff, who stands in his shoes, of the right to receive his directors' remuneration under the articles in respect of the full period from June, 1896, to November, 1897, during which the company was in existence.

Younger, for the company.—Lord Norreys is not entitled to any remuneration. The contracts to take qualification shares and for remuneration are mutual, and only a duly qualified director can claim it: *Eley* v. *Positive Assurance Co.*, 24 W. R. 338, 1 Ex. D. 88: *Swabey* v. *Port Darwin Gold Mining Co.*, 1 Megone, 385; see also *Isaacs' case*, 40 W. R. 518, [1892] 2 Ch. 158, 164; *Archer's case*, 40 W. R. 212, [1892] 1 Ch. 322, 337. There is at anyrate no liability to pay more than a year's remuneration. There is no apportionment of directors' remuneration: *Lowndes* v. *Earl of Stamford*, 18 Q. B. 425.

Eve, in reply.—Lord Norreys was not disqualified. *Forbes' case* shows that article 92 does not touch him: L. R. 8 Ch. App., at p. 768, 775. *Isaacs' case* defines his position, and is not in favour of the defendant. See also *Hutchinson's case*, 43 W. R. 267, [1895] 1 Ch. 226. The contracts for acquiring qualification shares and for remuneration are separate and not interdependent. As to the amount of remuneration the meaning of the articles is that it is to be at the rate of £5,000 per annum: *In re Peruvian Guano Co.*, 43 W. R. 170, [1894] 3 Ch. 690.

March 23.—COZENS-HARDY, J., after stating the facts of the case, said: Lord Norreys having accepted the office of director and acted as such, I must infer an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles, and on the part of the company that he shall receive the remuneration provided by the articles for the directors: see *Isaacs' case*. I think these must be regarded as cross-contracts and not as interdependent contracts. The resolution of the 14th of July, 1897, in no way bound Lord Norreys or his mortgagee. It remains therefore, to consider what are the legal rights of Lord Norreys against the company, for the plaintiff cannot stand in a better position than Lord Norreys. It was argued by counsel on the part of the company that Lord Norreys vacated his office of director at the end of the first month, so that no remuneration could be claimed for more than one month. It seems to me, however, that it is an unnatural interpretation of article 92 to say that Lord Norreys "ceased to hold" the due qualification when in fact he never had any qualification. The article contemplates the use of a qualification once possessed and subsequently lost, but not the case of a qualification never possessed. It was next contended

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

that article 81, according to its true construction, could only apply to a board of duly qualified directors, and that, therefore, Lord Norreys could not claim any remuneration. If Lord Norreys had only been a *de facto* director and never a *de jure* director I think there might have been force in this contention, but it seems to follow from what I have held on the first point that Lord Norreys, not having ceased to be a director, must be regarded as still a member of the board, and as such entitled to remuneration. It was further contended that the omission to apply for and obtain shares from the company was such a breach of duty on the part of Lord Norreys that it might be available as a defence to any claim for remuneration. I think, however, that this is not the true view, and that, although the company may have a cross-claim against Lord Norreys for £250, they cannot deny his title to some remuneration. The plaintiff contended that Lord Norreys was entitled to one equal sixth share of remuneration at the rate of £5,000 a year from the incorporation of the company to the date of winding up after deducting from the total remuneration the £100 paid to Mr. Jarratt, he never having concurred in any other division. Against this it was urged that at the utmost only one year's remuneration could be claimed, and that there is no apportionment in respect of an incomplete year. This seems to me to be right. Article 81 does not give remuneration at the rate of £5,000 a year, but only provides that the board shall be entitled to receive by way of remuneration in each year £5,000. I see no ground for extending this language or for holding that any remuneration can be claimed except for a complete year. It follows, therefore, that Lord Norreys can only claim against the company one-sixth of £4,900. I was asked by the company's counsel at the bar to allow an amendment of the defence by claiming a set-off in respect of the £250 due from Lord Norreys to the company for the shares which he has been liable to take and pay for since July, 1896. I allow the amendment, and I think the company is entitled to the set-off as against the plaintiff, Lord Norreys' mortgagee. The result is that I must give judgment for the plaintiff for £816 13s. 4d., less £250—that is to say, for £566 13s. 4d.—and the company must pay the costs of the action, such costs not to be increased by reason of the joinder of Lord Norreys as a defendant.

Judgment for the plaintiff.

Solicitor for the plaintiff, *Robert Greening.*

Solicitors for the defendant company, *Sharpe, Parker, & Co.*, for *Hughes & Masser*, Coventry.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Darling and Channell, JJ.) April 27.

EATON v. TAPLEY. (*a.*)

County court—Practice—Notice of statutory defence—Statute of Limitations—County Court Rules, 1889, 1895, *ord.* 10, *rr.* 14, 14a, 18a—*Form* 95a.

In a county court action a notice of a defence under a statute of limitation, filed under ord. 10, *r.* 10, *is sufficient if it complies with ord.* 10, *r.* 14a, *and Form* 95a, *and need not set forth the particular statute relied on nor the date from which it began to run. Ord.* 10, *r.* 18a, *does not apply to defences under statutes of limitation.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Appeal from a county court.

The respondent brought an action in a county court against the appellant for money lent. The appellant, within five days of the return day, filed a notice that he intended to rely upon the defence of a statute of limitation. The notice was in accordance with form 95*a* of the County Court Forms, 1895.

The county court judge held that the notice was insufficient, and gave judgment for the respondent.

Ord. 10, r. 10, of the County Court Rules, 1889, provides as follows: "Where the defendant intends to rely upon any of the grounds of defence mentioned in rules 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of this order, or upon any counterclaim, he shall file a notice stating thereon his name and address, together with a concise statement of such grounds, five clear days before the return day; . . ."

Ord. 10, r. 14, is as follows: "When a defendant intends to rely on the defence of any statute of limitations, he shall in his statement specify the date from which he alleges that the statute began to run."

Form 95 of the County Court Forms, 1889, paragraph 3, which is the part applicable to ord. 10, r. 14, is as follows: "Take notice, that the defendant intends at the hearing of this action to give in evidence and rely upon the following ground of defence. . . . That the claim for which the defendant is summoned is barred by a statute of limitation. [Here set forth the statute and the date from which it began to run]."

Ord. 10, r. 14*a*, made in 1895, is as follows: "Ord. 10, r. 14, and the third paragraph of form 95, are hereby annulled; and where a defendant intends to rely on the defence of any statute of limitations, his statement shall be according to form 95*a* in the appendix."

Form 95*a* (County Court Rules, 1895) begins like form 95 of the Rules of 1889, and proceeds: "That the claim for which the defendant is summoned is barred by a statute of limitation."

Ord. 10, r. 18*a*, is as follows: "When in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter upon which he relies."

Loehnis, for the appellant.—The notice of special defence is sufficient. It is not now necessary in giving notice of a defence under a statute of limitations to set forth the statute or the date from which it began to run, because rule 14*a* of order 10 expressly annuls rule 14 and substitutes a new form in which the directions to set forth the statute and the date are omitted. The history of the rules shows that ord. 10, r. 18*a*, was not intended to apply to defences of a statute of limitation.

Sims Williams, for the respondent.—The notice was insufficient because it did not comply with the provisions of ord. 10, r. 18*a*: see *Brutton* v. *Branson*, [1898] 2 Q. B. 219, 46 W. R. Dig. 41, and *Pullen* v. *Snelus*, 27 W. R. 534, 48 L. J. Q. B. 394.

Lord RUSSELL OF KILLOWEN, C.J.—No one can say that this point is plain. But it is unnecessary to follow Mr. Loehnis through the history of this evolution of confused forms. I give my judgment upon a construction of the rules of 1895 as compared with those of 1889. Under ord. 10, r. 14, there is an obligation to set forth the statute of limitation which is relied on and the date from which it began to run. The rules were reframed in 1895, and rule 14*a* is substituted for rule 14, and rule 14 is annulled. A new form is given in which the words "here set

forth the statute and the day from which it began to run" are omitted. If the matter stood there it would be too clear for argument. But then comes ord. 10, r. 18*a*. How is rule 14*a* to be reconciled with rule 18*a*? In this way. Out of the operation of rule 18*a* you are to except cases provided for by rule 14*a*. The learned county court judge was wrong in holding that the defendant had not complied with the rules, and the case must be remitted to him.

DARLING, J.—I am of the same opinion. Ord. 10, r. 18*a*, might well have been thought to apply to defences under statutes of limitation if provision had not already been made in the case of such defences in rule 14*a* of the same order. It is impossible to suppose that, having provided in one rule that one thing shall be done, the framers of the rules intended in another rule to order that a perfectly different thing should be done.

CHANNELL, J.—I agree with the judgment of the Lord Chief Justice.

Appeal allowed.

Solicitors for the appellant, *Rowcliffe, Rawle, & Co.*, for *A. E. Whittingham*, Nantwich.

Solicitors for the respondent, *Colson & Knight.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Jan. 25; Feb. 16.

In re WREXHAM, MOLD, AND CONNAH'S QUAY RAILWAY CO. (*a*.)

Railway company—Unauthorized borrowing—Interest on debenture stock—Overdrawn banking account—Subrogation of lender to rights of creditors—Secured creditors.

A railway company having power to borrow money by the creation of three classes of debenture stock, A, B, and C, had exhausted its borrowing powers, and then applied to its bankers for a loan in order to pay the half-yearly interest then due on the debenture stocks. The bank made the requisite advance. Shortly afterwards a judgment creditor of the company petitioned for and obtained the appointment of a receiver. The A stock had priority over the B and C stock, and the B stock over the C stock.

It subsequently came to the knowledge of the bank that the income of the company in the receiver's hands was sufficient to pay the next half-year's interest on the A stock, and part of the interest on the B stock.

Held, affirming Romer, J. (ante, *p.* 172), *on the application of the bank, that the bank was not entitled to be repaid in priority to the B stockholders, even to the extent of the interest on the A stock paid out of the bank's money.*

If a lender advances money to a company which has exhausted its borrowing powers, he is only entitled to have that portion of the advance actually expended in payments of debts of the company treated as a valid advance.

No right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers can be justified in principle.

Appeal of the North and South Wales Bank from Romer, J. (reported *ante*, p. 172).

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

The Wrexham, &c., Railway Co. had power by their Act of 1883 to create and issue debenture stock to the extent of £175,000 by A stock, £175,000 by B stock, and by a further Act of 1888 to the extent of £145,000 by C stock. The A stock had priority both in principal and interest over the B and C stocks, and the B stock had a similar priority over the C stock.

In July, 1897, the borrowing powers of the railway company being exhausted, they applied to their bankers, the North and South Wales Bank, for an overdraft with which to pay the interest becoming due on the 1st of August on the debenture stocks. A sum of £9,672 was thus advanced, of which £3,850 was used for the payment of interest on the A debenture stock.

On the 5th of August, 1897, the Great Central Railway Co. obtained judgment against the Wrexham Co. for a sum of £59,128, and on a petition under the Railway Companies Act, 1867, obtained an order for the appointment of a receiver on the 12th of August.

The current account of the Wrexham Co. was discontinued by the receiver on the 5th of November, 1897, when the debt due to the bank amounted to £7,601.

The bank claimed to be entitled to be subrogated to the rights of the debenture stockholders, first of all, to the full extent of the £9,672 which they had paid to the debenture stockholders, in priority to any payment to be made by the receiver to the debenture stockholders. Romer, J., disallowed this claim on the 1st of November.

The bank then claimed to be subrogated to the extent of the £3,850 paid by them to the A stockholders, and to be entitled to payment out of any surplus in the receiver's hands in priority to any payment to the B and C stockholders. Romer, J., disallowed this claim also.

The bank appealed.

Neville, Q.C., Methold, and *Danckwerts*, for the appellants, used the same arguments as in the court below.

Frederick Thompson, for the A and B debenture-holders.

Theobald, Q.C., for the C debenture-holders.

R. J. Parker, for the Wrexham Co.

Mark Romer, for the judgment creditors, the Great Central Railway Co.

Neville, Q.C., replied.

Cur. adv. vult.

Feb. 16.—The following written judgments were delivered:

LINDLEY, M.R.—Agreeing as I do with Romer, J., and with the judgments which my brothers have prepared, and which I have read, I should say nothing more if it were not that I think I ought to express my dissent from the observations of Fry, L.J., on which the appellants base their contention. The decision of the court in *Baroness Wenlock* v. *River Dee Co.*, 35 W. R. 822, 19 Q. B. D. 155, was quite right, and the judgment in it is very valuable. Fry, L.J., who delivered it, was the very last person to shut his eyes and not get at the real facts and substance of any case before him. But in dealing with that case the lord justice says (p. 165) that "the court closes its eyes to the true facts of the case." I cannot help thinking that this is incorrect. A prohibition against borrowing more than a given sum is only in reality and substance disobeyed when an obligation to pay more than that sum is contracted. Courts of equity have always looked into the facts to see whether the

prohibition has been really disobeyed or not. If it is disobeyed, and to the extent to which it is disobeyed, the prohibition is enforced. But if the facts when ascertained show that in truth it has not been disobeyed, an advance of money is treated as not prohibited, although it may at first sight appear to be so, because it is beyond the limited amount. The application of the money borrowed shows whether the obligations of the borrowing company have been increased or not, and the extent, if any, to which they have been increased. So far as such money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the courts have so decided. The subrogation theory has been had recourse to in order to account for the decisions ultimately arrived at; but the theory was really not wanted in order to justify them. It was, however, adequate for the purposes for which it was used, and as applied to the cases before the courts it led to just results. But, if logically followed out in other cases, it leads to consequences not only not foreseen by those who had recourse to it, but to results so startling that I cannot accept the theory as sound. There is no decision yet in which it has been applied so as to defeat any innocent person, nor so as to place the lender in a better position than he would have been in if his loan had not been prohibited. But that would be the result in this case if we adopted that theory and pushed it to its logical consequences, as the appellants contended we ought.

The Legislature (30 & 31 Vict. c. 127, s. 26) has recognized and partially acted upon the true principle in enacting that money borrowed and applied in paying off existing statutory mortgages or bonds shall, so far as the same is so applied, be deemed money borrowed within and not in excess of its statutory powers. This principle obviously cannot in reason be confined to statutory bonds or mortgages; and courts of equity have acted upon the principle, and have not confined its application within arbitrary limits, but have enforced it more widely than the Legislature, in order to prevent great injustice. They have done so, however, not by closing their eyes to the real facts and acting on a fiction, but by diligently ascertaining the real truth and by attending to the real substance of each case. Even if the fiction of subrogation were correct, the maxim *In fictione juris semper existit æquitas* would prevent its application to this case.

RIGBY, L.J.—The only questions arising on the present appeal are as to the right of the North and South Wales Bank to rank in priority to the claim for interest of the debenture stockholders of the railway company, or some of them, in respect of payments of past interest on debenture stock already paid by the bank at a time when the railway company had exhausted its borrowing powers. There are three classes of debenture stock, A, B, and C, all charged on the undertaking of the company, but ranking thus in order of priority—first A, second B, and third C. Under a judgment creditor's petition, presented in pursuance of the Railway Companies Act of 1867, a receiver has been appointed; and by the Act it is provided, section 4, that all moneys received by him after due provision for the working expenses of the railway and other proper outgoings of the undertaking are to be applied and distributed, under the direction of the court, in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein. Subject to the claim of the bank, the debenture stockholders are without question entitled according to their priorities, *inter se*, to be paid, in preference to all other claimants, the interest now due to them, and there is sufficient in the receiver's hands to satisfy the whole interest payable on stock of class A, and part, but only part, of that payable on stock of class B. The bank claim, first, to have priority in respect of all their advances which have been applied in payment of interest or debenture stock over all interest payable in respect of debenture stock; or, secondly, priority in respect of all advances applied in payment of interest on stock of class A over interest payable in respect of classes B and C; and similarly as between classes B and C for priority so far over interest on class C for advances applied in payment of interest on class B. The claim in each case is rested on a supposed subrogation and right to stand in the place of, and with the right to the securities and priorities of, the creditors paid off; and this is the only claim which I propose to deal with.

I do not think that any right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers has ever been allowed or can be justified in principle. I will first deal with the authorities cited before us. I put aside the *German Mining Co.'s case* (2 W. R. 543, 4 De G. M. & G. 19) as being a decision only on the ordinary partnership rights of directors and shareholders in an unlimited company in the special circumstances arising, and found as facts by Knight Bruce, L.J., in that case. With regard to all the following cases it is no doubt the fact that expressions pointing to some sort of subrogation or other are used by the learned judges in delivering judgment; but it is necessary to examine closely what was actually decided in the different cases.

The first case is that of *In re The Cork and Youghal Railway Co.*, 18 W. R. 26, L. R. 4 Ch. App. 748. There a claim was made for payment out of a surplus by holders by deposit of Lloyd's bonds of sale moneys arising from a sale of the company's undertaking under statutory authority. This surplus under the statute was to be applied thus: "The surplus shall be subject to all the rights, equities, priorities, claims, and demands, whether of preference or ordinary shareholders, bondholders, or others, to which the property would, in case this Act had not been passed, have been subject, and shall be applied accordingly." No question was dealt with, or, indeed, arose except as between the claimants and the shareholders. The order actually made ran as follows: "Declare that the receipt and expenditure by the directors of the company, in payment of any sums recoverable from the company of moneys advanced on or procured by means of the deposit of the alleged bonds (*i.e.*, the Lloyd's bonds) was *pro tanto* an adoption by the company of the transactions; and, having regard to the representations contained in the alleged bonds, the moneys so expended constituted debts owing from the company." Then followed an inquiry which, shortened only for clearness, ran as follows: Whether the company had the benefit of any expenditure in payment of sums recoverable from the company of moneys advanced on or procured by the deposits of the alleged bonds, and whether any of the sums so expended still remained unpaid by the company. In this order there is nothing of the nature of subrogation to the rights of creditors, and, of course, no subrogation either to their securities or priorities if they had any. The *primâ facie* illegal Lloyd's bonds are held to be evidence of debts to the extent only to which the transaction amounted to a borrowing with one hand and expenditure in reduction of the liabilities of the company with the other, the company being *pro tanto* treated as not borrowing in excess of their powers, and, therefore, capable of

adopting the transactions. This is, in substance, the explanation of the case given in the judgment of the Court of Appeal delivered by Lord Selborne in the case of *The Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*, 31 W. R. 98, 22 Ch. D. 61, at p. 71, to which reference will be made below.

That action was one for, amongst other matters, the recovery by the official liquidator of certain assets of the company—viz., deeds deposited with Cunliffe, Brooks, & Co., their bankers. The defence to this part of the action, with which alone the Court of Appeal was concerned, was that the defendants had a lien for moneys owing on their banking account. The Vice-Chancellor of the court of the County Palatine, from whom the appeal was brought, had disaffirmed the lien on the ground that the overdrafts on the banking account constituted an illegal borrowing by the society, which had no power to borrow. The Court of Appeal (22 Ch. D., p. 71) reversed this order and remitted the case to the Duchy court, with directions and declarations, of which the following is the most material: Declare that at the date of the petition to wind up the society, the appellants were entitled to hold the title-deeds and documents in the pleadings mentioned as a security for repayment of so much, and so much only, of the moneys advanced by them from time to time to the society as were applied in payment of the debts or liabilities of the society properly payable, and had not been subsequently repaid to the appellants, if at the time appointed anything which had been so applied remained due. This was in substance following the cases of *In re The Cork and Youghal Railway Co.* It gave effect to a part of the security given to the bank, but not by way of subrogation to the right of creditors paid off their securities or priorities. The grounds on which it is based were explained by the Lord Chancellor at p. 71 of the report. There was an appeal by the bankers from the order in this case to the House of Lords, but no cross-appeal, so that the equitable doctrine acted upon did not come into question: see 33 W. R. 309, 9 App. Cas. 857. Lord Blackburn did indeed guard himself against expressing any opinion on the question now being discussed.

There was a second action in *The Blackburn Building Society's case*, which was an action for a general account of all moneys received by the bank and the application thereof, as distinguished from the action for redemption already dealt with; and in that second action the question as to the allowance to be made to the bank took a wider form. The case in the Court of Appeal is reported 29 Ch. D. 902, 34 W. R. Dig. 25. One equity there allowed the bankers was to follow their money when they could show it to have been invested in, and get the benefit of, any securities which the society would not have had but for the investment of the money so followed. With this equity we have nothing to do. The other equity was that they were allowed the benefit of money applied in payment of withdrawing members who had been paid off by means of that money, and who would not have been paid but for it. This is no extension, but a mere application of the rule laid down in the first case, when once it was admitted, as it had to be, that these payments were liabilities which the society were bound to pay before paying anything to the continuing members. The withdrawing members had no priority as between themselves and other creditors, and no securities, but came in after all outside creditors as themselves—creditors or *quasi*-creditors: see *Walton* v. *Edge*, 33 W. R. 417, 10 App. Cas. 33. There could therefore be no subrogation in their case to any securities or priorities, and it became a matter of indifference whether the bankers were said to stand in their place, or whether, as I think is the better way of stating it, the discharge of the liabilities of the company to them validated the overdraft of the company on the bank in the banking account to the extent of the moneys so applied.

The remaining case, and, so far as I know, the only one material to be considered, is that of the *Baroness Wenlock* v. *The River Dee Co.* in its various stages. It was not reported in the Law Reports on the first hearing in the Court of Appeal, but the judgments are given in 36 Ch. D. 675n. The company was a going company. The action was one by the personal representative of Lord Wenlock to recover on a covenant money to a large amount lent by him to the company. Baron Huddlestone on the trial had given judgment for the plaintiff to an amount not less than £85,000. The Court of Appeal held that the company had no borrowing power beyond £25,000, but decided that the plaintiff had a right to recover up to the amount of that £25,000, and to the extent to which she could show that the moneys advanced had been expended in paying off debts and liabilities recoverable against the company; thus following the first *Blackburn Building Society case*. No doubt in the judgments of Lord Esher and Cotton, L.J., there are expressions which seem to found the equity that they were administering as depending upon a right to stand in the place, and as assignees of, the creditors paid off; but I do not think that they intended to differ from the grounds laid down in the first *Blackburn Building Society's case*. Bowen, L.J., in so many words, refers to and professes simply to follow that case. No question of securities or priorities of creditors paid off arose in that case, and in such circumstances it makes practically no difference whether the equity is described as a right of subrogation to creditors, or as it was described by Lord Selborne at 22 Ch. D., at p. 71. The case was taken on appeal to the House of Lords, but the only question there dealt with was the company's power to borrow, as to which the decision of the Court of Appeal was affirmed. Before the referee, to whom the inquiries directed by the Court of Appeal were referred, a question arose whether the creditors paid off must be creditors who were creditors at the time of the advances being made, or whether the payment of creditors whose debts became due after the advances made might not also fall within the scope of the inquiry. Again, no question arose as to securities held by or priorities of the creditors paid off. The Court of Appeal, both on the form of the inquiry already directed, and on principle, held that creditors fell within the scope of the inquiry, whether their debts became due at or after the time of the advances out of which they were paid. The case at this stage is reported at 19 Q. B. D. 155. The judgment of the court was delivered by Fry, L.J., and it is upon a passage in this judgment that the appellants place their chief reliance. That passage, see p. 165 of 19 Q. B. D., is as follows: [His lordship read the passage, and continued:] Now, the first observation on that part of the judgment is that it has nothing to do with any securities held by the creditor, nor, as I think, with his priority over other creditors. If it did refer to securities or priorities of the creditors it would be an *obiter dictum* only. If the equity extended to securities it would probably, in most cases, be impossible to give effect to it, as the creditor paid off, not knowing where the money to pay him off came from, would give up the securities and the company would deal with them in the ordinary course of business long before the *quasi*-lender could assert his rights. If it extended to priorities it would in many cases work injustice. It cannot be suggested that the *quasi*-lender gets any equity as against the

creditor paid off, for the latter does not know where the money comes from; still less, if it were possible, can he have an equity against creditors who have no part in the transaction, to be ranked before them. I do not think that it would be fair to suppose that the Court of Appeal intended to lay down any new law or make a statement in any way at variance with the authority which they were following. The statement, it seems to me, ought to be confined to the equity so far, if at all, as it depends upon subrogation. Indeed, the judgment goes on to quote with approval the very passage from Lord Selborne's judgment at 22 Ch. D. 71, which I have already quoted, and to apply it in exactly the same way as Lord Selborne had done. If the equity, so far as it depends upon subrogation, is founded upon a fiction, and involves a closing of the eyes of the court to the true facts, so far as it is expounded by Lord Selborne, it depends upon the real facts and requires a complete examination of them.

I think that the great preponderance of authority shows that the doctrine of subrogation has very little, if anything at all, to do with the equity really enforced in the cases, and that there is, at any rate, no authority for any subrogation to the securities or priorities of the creditors paid off. Dealing with this case independently of the authorities, I see no reason why the parties to an illegal lending should have anything more than bare justice dealt out to them, and this they get if they are allowed, as they have hitherto been allowed, to have that portion of the advance actually expended in payment of debts of the company treated as a valid advance. If the advance had been within the borrowing powers of the company, the bank could have had no right to the securities or priorities of the creditors paid off. It seems to me that it would be unjust to other creditors that a fiction should be invented for the purposes of making an invalid loan more valuable than a valid one. I entirely agree with what Romer, J., has said about the unsatisfactory way in which such a doctrine as is contended for by the appellants would work in practice, and I do not consider it necessary here to repeat what he said.

VAUGHAN WILLIAMS, L.J.—The question in this case is a question as to what is the position of the North and South Wales Bank (Limited), which has advanced money to the Wrexham, Mold, and Connah's Quay Railway Co. for the purpose of, and which has been applied to, paying the half-yearly interest due to the holders of certain debenture stock. And the first question to be decided is the position of the bank in relation to the railway company, which, although it is now insolvent, and although a receiver has been appointed at the instance of the Great Central Railway Co., who are judgment creditors, is nevertheless an existing railway and a going concern. At the date when the bank supplied the money which was paid to the debenture stockholders no receiver had been appointed. The debenture stockholders are divided into three classes—series A, series B, and series C. Series A is entitled to be paid in priority to series B, and series B is entitled to be paid in priority to series C.

Generally speaking, if a company which has exhausted its borrowing powers purports to borrow further money, and thus obtains a supply of money, the contracted loan is void and *ultra vires*, and the lender has no right of action against the company. But nevertheless, in some cases, the person supplying the money is able to obtain recoupment from the funds of the company. And the question to be determined in this case may be stated generally to be, what is the principle upon which the person supplying the money is entitled to recoupment as against the company; and what is his relation in regard to priority to the various classes of creditors of the company? Now, there seem to me to be two principles upon which the right of recoupment may be enforced against the company which has exceeded its borrowing powers by the person supplying the money.

The one principle is that, although the borrowing power is exhausted, and the transaction which purported to be a loan to the company is as such *ultra vires*, and therefore null and void, so that the would-be lender can neither enforce repayment of the loan nor rely upon the securities which he has taken for the loan, yet if the company apply the money in their hands to the payment of debts actually owing by them, there is thereupon a new transaction between the company and the person who has paid the money for the purpose of the *ultra vires* loan. If the *ultra vires* loan is to be treated as an illegal prohibited transaction, as distinguished from a contract into which the company have no capacity to enter, there is no action at law or in equity by which lenders can recover back moneys which they have paid over in pursuance of the illegal contract. If on the other hand the *ultra vires* loan is to be treated merely as something *ultra vires* and not as an illegal transaction, there is no reason why the lenders should not recover the money thus paid from the company as money received to the use of the lenders by reason of the failure of consideration arising out of the incapacity of the company to borrow, provided always that the dealing by the company with the money has not been such as to show that, nothwithstanding the form of action adopted, the money has really been so dealt with by the company as that in the interval between the lending of the money and the bringing of the action the company has increased its borrowing obligations beyond its borrowing powers. In order to make more clear this statement of what I conceive the position of the company to be in a case where the loan can properly be treated as an *ultra vires* as distinguished from an illegal loan, I will put a hypothetical concrete case. Suppose a company purport to borrow a sum of money in excess of their borrowing powers, and before they have in any way made use of the money an action is brought to recover it as on failure of consideration for which it was paid, the money would be recoverable; or, again, suppose the company has applied the money in the payment of pre-existing debts, the money would be recoverable; because in each of these cases there has been no real excess of the powers of the company, and the form of action is not made a cloak to cover a transaction which is really *ultra vires*. It is like the case of money in the hands of a stakeholder before it has been dealt with in accordance with the result of the wager. But if the company, instead of either refraining from adopting the loan or applying it in such a manner as that their total indebtedness shall remain unchanged, apply it, say, to the purchase of new property, the company cannot, after so doing, be sued in any form for a return of the money since the money has been dealt with under the contract of loan, and to allow the company to repay it would simply be to allow the company to carry through an *ultra vires* transaction. I do not know that the distinction between an illegal and an *ultra vires* contract really makes much difference in the present case; for, in my judgment, on the facts there never was a moment of time during which the loan was illegal or *ultra vires*, because the loan took the form of a request by the company to the bank to pay the interest—*i.e.*, the debt to the holders of the debenture stock

warrants and a payment by the bank direct to the holders. But in considering the decisions which base the right of the lenders to recoupment upon some new contract between the company and the lenders for the application of money paid as and for a performance of the *ultra vires* contract, it is desirable to consider how far the money so paid continues in the hands of the company to be the money of the lenders, and how far the court is justified in implying a new bargain for the application of the money which has thus been dealt with by the order of the company; and if the court is justified in so doing, whether this involves the assumption of an assignment to the bank by the debenture stockholders of their rights in respect of which they have received payment from the bank.

The other principle upon which the right of recoupment has been allowed to be enforced against a company in a case where the borrrowed money has been applied in payment of debts of the company is to subrogate the lender to the rights of the creditor of the company who has been paid off, and to treat the lender of the money as the assignee of the debt which has been paid off.

I propose now to go through the authorities and see what are the principles in each case upon which the rights of the lenders to recoupment have been enforced against the company. The first case, *The German Mining Co's case*, seems really only to decide that an ordinary company is liable to pay the debts contracted by the manager. The second case, *In re The Cork and Youghal Railway Co.*, was a case in which the Cork and Youghal Railway Co., after it had exhausted its borrowing powers, issued to one Lewis, Lloyd's bonds to enable Lewis to raise money for the purposes of the company. Lord Hatherley, when that case came up on appeal from Malins, V.C., in his judgment pointed out that the judgments of Crompton and Blackburn, JJ., in *Chambers* v. *The Manchester and Milford Railway Co.*, 12 W. R. 980, 5 B. & S. 588, made it clear that where a company is authorized only to raise a given amount of capital by shares and a certain other sum by debentures or mortgages, then the company cannot issue any debenture or loan note or any security of that description for the mere purpose of raising money, and that such instrument would be just as void in equity as at law, being contrary altogether to and absolutely forbidden by the statute (7 & 8 Vict. c. 85). Accordingly, the Lloyd's bonds in that case not being issued in respect of debts actually due, but simply issued for the purpose of raising money were held to be null and void and instruments to which no legal validity could be attributed. The inference which I draw from the judgment of Lord Hatherley is that he thought that the borrowing of money by the company for the purpose of paying off debts of the company was not, in a case where the money was so applied an *ultra vires* borrowing at all, and I do not quite understand why Mr. Lewis who lent the money should not have sued at law for the money so lent, in so far as the money was lent for the payment of the legitimate debts of the company and so applied. In the actual case before the court it was not Mr. Lewis who was seeking to recover the money advanced, but the persons from whom Mr. Lewis had raised the money which was thus applied. And it may be that it was the absence of privity between these persons and the company which made Lord Hatherley think it necessary to say that these persons were entitled to obtain repayment from the company of the moneys so advanced by virtue of their standing in the shoes of the creditors whose debts were paid off. But undoubtedly he does base their right on this consideration. I observe that Giffard, L.J., in his judgment (p. 762) speaks of the bondholders as the assignees of Mr. Lewis, and not as the assignees of the creditors of the company whose debts had been paid off, and it seems to me that this is a more correct way of stating the position. But in the present case the bank are in the position of Mr. Lewis, and I cannot understand why there is any need to invent any fiction whatever to give the bank the right of action, or any necessity to vest in the bank the rights of the creditors who have been paid off. If, however, there is any necessity, these judgments seem authority for the proposition.

The next case to be considered is the *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* in the Court of Appeal. In that case the building society had overdrawn their account to a large amount, and by a memorandum of agreement had purported to give their bankers security for the balance from time to time due on certain deeds deposited with them. That overdrawing of the bankers' account was *ultra vires*, and it was held that the bankers had no lien under the agreement on the deeds deposited, but that they were entitled to use the deeds for such part of the money advanced by them as had been applied in payment of the debts and liabilites of the society properly payable. Lord Selborne, after pointing out that the transaction was *ultra vires*, and that the bankers had no lien on the deeds under the agreement, says at p. 70 of 22 Ch. D.: [His lordship read the passage from Lord Selborne's judgment dealing with an equitable principle, and continued:] Now, it does not seem to me that the equity relied on by Lord Selborne involves in any way an assumption that the debts of the creditors of the company who have been paid off are to be treated as assigned to the lenders who provided the money; for, although he states it to be the equity established by *The Cork and Youghal Railway Co.'s case*, this does not involve the assumption of an assignment, for he seems to treat that part of the judgment of Lord Hatherley and Giffard, L.J., as not being essential to the judgment. It is right, however, to point out that Lord Blackburn in the House of Lords in dealing with an appeal which did not go to the main question itself, seemed to regard the position of those who pay off the creditors as being that of standing in the shoes of the creditors paid off.

The next case is *Baroness Wenlock* v. *The River Dee Co.* In that case there can be no doubt that the Court of Appeal did treat the right of the lender of money borrowed by the company *ultra vires*, to recoupment, as being based upon subrogation to the rights of the creditor paid out of such money, and also held that the right to recover from the company the amount of their debts or liabilities so paid off is not confined to the amount of debts and liabilities existing at the time of the advance, but extends to debts and liabilities accruing subsequently to and paid out of such advance. Fry, L.J. thus states at p. 165 of 19 Q. B. D. the equity upon which the right of the lenders is based: [His lordship read the same passage as Rigby, L.J., had read, and continued:] It is to be observed that Fry, L.J. does not purport to be going beyond the judgment in *The Blackburn Building Society* v. *Cunliffe, Brooks & Co.* It seems to me that there is no trace in that judgment of the benevolent equity spoken of by Fry, L.J. There is some trace perhaps of the assumption of an assignment, but it does not seem to me that either in this case or in that of *In re The Cork and Youghal Railway Co.* the assumption of an assignment of the debts of the creditors paid off is in any way essential to the equity on which the judgment is based. No case is to be found in which the

lenders have ever in fact succeeded in enforcing the securities of the paid off creditors.

I have thus dealt with the authorities at length in order to arrive at the principles upon which the courts have gone in cases of this character; but I do not think that all the difficulties which the courts had to deal with in these other cases arise in the present case, for in the present case the bank simply lent money for the payment of a half-year's interest due to the debenture stockholders, and paid the money direct to those stockholders. I do not believe that this transaction was *ultra vires* at all, and if so I cannot understand why an action for money paid should not successfully be brought by the bank. The money never was in the hands of the railway company. There was no interval of time after the money was lent during which it was uncertain how the money would be applied; and this being so I see no need for the invention of any fiction whatever. I very much doubt whether at law or in equity a man who pays off a debt at the request of another is necessarily to be treated as the assignee of that debt, but a very little evidence will be sufficient to establish that as between himself and the person at whose request he has paid off the debt it was intended that he should be treated as the transferee of the securities, if such there be, in the hands of the creditor. In the present case, however, there are no such securities. The discharged interest certificate is not such a security, and I do not see what right the company and the person who supplies the money to pay off the creditor, have to say that the debt which has been paid off shall be treated as if it had not been paid off. There has been no assignment in fact by the creditor, and I do not see that the justice of the case in any way requires that the court should assume, contrary to the fact, that there has been such assignment. My judgment, so far, assumes that in the circumstances of this case there has been no borrowing in excess of the powers of the company, and that no occasion arises for the application of any equitable principle to do justice between the bank and the company.

But if my conclusion as to this is wrong and the directors did assume to do an act *ultra vires* of the company in getting the bank to pay these interest warrants, equity will treat the illegal or *ultra vires* transaction entered into by the directors, under which the company has received the money, as being an *intra vires* transaction to the extent to which the borrowing of which the company have had the benefit could have been effected as an *intra vires* transaction at the moment of the making of the payment of which the company have had the benefit; and this whether the original contract purported to be made was merely *ultra vires* or illegal. The principle is not unlike that adopted at law, where money paid for the purpose of an illegal transaction is held to be recoverable, so long as the contract is executory or *in fieri*. This equity as defined in the earlier cases cited seems to involve no assumption of assignment or subrogation as Fry, L.J., seems to have assumed in *Baroness Wenlock* v. *The River Dee Co.* I should shrink myself from saying that the state of things assumed in equity for the purpose of doing justice between the parties must not be carried to its logical results. If equity requires you to assume a contract where none has been executed, it seems to me that equity as well as law must govern the relations between the parties to the assumed contract on the basis that there was a contract in fact. Nor do I see that pushing the equity to its logical conclusion would do any injustice to innocent persons. It makes no difference to the other creditor whether the creditor having priority is the warrant holder or the bank.

Appeal dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool; *Field, Roscoe, & Co.*, for *Evan Morris, & Co.*, Wrexham; *Sharp, Parker, & Co.*, for *Alsop, Stevens, Harvey, & Crooks*, Liverpool; *Morris, Allens, & Chapman*, for *J. B. Pollitt*, Manchester; *Cunliffes & Davenport*, for *R. B. Lingard-Monk*, Manchester.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — April 25.

In re ATKINSON.
WALLER *v.* ATKINSON. (*a.*)

Married woman—Will—Assent of husband—Husband proving will—Practice of Probate Division.

Where a married woman, who had no power of disposition by will except with the assent of her husband, bequeathed all her property to her husband, subject to the payment of a legacy of £10,000, *and appointed him sole executor,*

Held, that, as probate of a married woman's will is now granted only in general terms, the husband did not by merely proving the will thereby assent to the dispositions it contained.

Held, also, on the construction of the will, that, whether or not the husband had assented, it did not dispose of the property, which would have gone to the husband if the testatrix had not made a will.

Decision of Stirling, J. (46 *W. R.* 439), *affirmed.*

Appeal against a decision of Stirling, J. (46 W. R. 439).

By her will dated the 6th of May, 1880, Amelia Atkinson gave all the personal estate of which by virtue of any power or authority, or of any separate right of property, or otherwise howsoever, she was competent to dispose, including her portion or fortune and other interest (if any) under the will of her late father, James Shaw Taylor, unto her husband, Joseph Beaumont Atkinson, for his own absolute use and benefit, subject nevertheless to the payment thereout of the pecuniary legacy thereinafter bequeathed by that her will, and also of any legacies bequeathed by her by any codicil to that her will, together with the expenses (but not including legacy duty) incident to the discharge of such legacies. The testatrix further bequeathed to Lavina Waller the sum of £10,000 in manner therein mentioned; but, if the said Lavina Waller should die in the testatrix's lifetime, she gave the same legacy or sum of £10,000 to such person or persons as at the time of the testatrix's death would have been Lavina Waller's next-of-kin, and entitled to her personal estate under the statutes for the distribution of the personal estate of intestates, if she had died immediately after the death of the testatrix. The testatrix appointed her husband the sole executor of her will.

Mrs. Atkinson died in February, 1892, and her husband proved her will in general form in May of the same year. Her property other than that which she took from her father was of very small amount.

At the time of Mrs. Atkinson's death, proceedings with reference to the estate of her father, J. S. Taylor, were pending in the State of New York. J. S. Taylor was an Englishman, but had considerable property in the United States. One of his executors was resident in New York, and had instituted a suit

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

there for the purpose of having the estate within the control of the New York court administered by that court. To that litigation the next-of-kin of Lavina Waller (who had died in the lifetime of the testatrix) and Mr. Atkinson were parties. It was decided that Mrs. Atkinson had no power of disposition over the property which she took from J. S. Taylor, and could not dispose of it by will without the assent of her husband. The next of kin of Lavina Waller then took out before Stirling, J., an originating summons against Mr. Atkinson, asking for payment to the plaintiffs of the legacy of £10,000 bequeathed by the will of Mrs. Atkinson. The question before Stirling, J., was, had Mr. Atkinson assented to the disposition contained in the will so as to bind himself? Stirling, J., decided that he had not so assented, and the next-of-kin of Lavina Waller appealed. In the Court of Appeal, at the request of the appellants, further evidence of assent by Mr. Atkinson was admitted; and the question whether on the true construction of Mrs. Atkinson's will it disposed of property which, in the absence of disposition, would have gone to Mr. Atkinson, was raised for the first time on the argument of the appeal.

Butcher, Q.C., and *T. T. Methold*, for the appeal referred (in addition to the authorities cited below), to *Selwood* v. *Mildmay*, 3 Ves. jun. 306 (commented on in *Miller* v. *Travers*, 8 Bing. 244, at pp. 252-3).

Jenkins, Q.C., and *Stewart Smith*, for the defendant, were stopped.

LINDLEY, M.R.—I do not think that when this case is thrashed out, as it has now been, there is really any difficulty in coming to a decision upon it. The practical question is whether the plaintiffs are entitled, under this will and in the events which have happened, to the legacy of £10,000. That is the real question. They place their title upon the provisions of the will of Mrs. Atkinson, and upon the assent of her husband at her death to the bequest which she had made. Mrs. Atkinson, the testatrix, was married about 1868, and during her coverture she made a will. In my view that will was in the ordinary form of a will made by a married woman.

A married woman in those days could not make a valid will of property, unless it was settled to her separate use, without the assent of her husband. The effect of that assent is discussed by Lord Selborne, L.C., in *Noble* v. *Willock*, 21 W. R. 711, L. R. 8 Ch. App. 778, at p. 789, where the Court of Appeal and then the House of Lords, had to consider the effect of the Wills Act upon dispositions by married women. Lord Selborne says: "What is the doctrine of law as to the husband's assent? As I understand all the authorities and all the cases, it means neither more nor less than this, that as to all the property of the wife of which the husband is purchaser, which, if reduced into possession during the marriage, becomes by law his, and which, if it remains not reduced into possession when the marriage is dissolved by the wife's death becomes also by law his (subject indeed to the necessity of taking out administration to the wife); as to all this property, vested in him in his marital right, he may, if he pleases, waive his right, and so waive it as to give effect to a will made by his wife during the coverture in derogation of his marital right." As I understand the authorities, the husband is at liberty during the life of his wife to give her leave, or to license her to make a will, and may nevertheless revoke that licence; but if after her death he has really assented to the will he cannot revoke that assent. Before Stirling, J., this case was argued on the assent of the husband, and on the ground that he had proved the will, and that that amounted to an assent to the dispositions it contained. Under the old law I suppose that would have been an assent to the will. It would not, of course, have affected the construction of it, but it would have been an assent to it. The question on the construction of this will does not appear to have been brought before Stirling, J.; and the learned judge decided—in my opinion quite rightly decided, having regard to the alteration of the law as to proving of wills by husbands—that the mere fact of the husband proving the will does not amount to an assent to it. Formerly, proving the will did amount to an assent, because there were two steps in the probate, one as to what the wife could dispose of, and had disposed of by will, and the other as to the rest of her property. Now, there is only one step, and if the husband proves at all he must prove in the general form. That being the case, the inference which would at one time have been drawn from the fact of the husband proving can no longer be drawn; and so far as Stirling, J.'s, judgment was concerned that concluded the matter.

But in this court the case has been argued on further materials. We have admitted a very important letter of October, 1893, which, taken in connection with the other evidence to which our attention was called by Mr. Butcher, raises a strong inference that the husband did assent. I do not decide that he did, because we have not heard Mr. Jenkins, or have not given him an opportunity of explaining that letter. In my view, it is unnecessary to explain it. As the case now stands, I think I should incline to the view that the husband did assent; but, apart from the fact of obtaining probate, the evidence of assent before Stirling, J., was quite insufficient. On the evidence which is now before us I should incline to the view that the husband assented to the will of his wife. But what is that will? It is the will of a married woman giving property to her husband subject to the payment of a legacy of £10,000. The question which you have to consider in regard to that will, before you begin to talk about assent, is this: Is there anything in it which, if it is fairly construed, leads you to take the view that the testatrix was disposing of that property which her husband would take if there was no disposition by her? I cannot find any such thing at all in this will. I do not think she was in fact making a will of the property which would pass to her husband without her assistance. What she says is, I give all the property which I am competent to dispose of, including my portion or fortune and other interest (if any) under the will of my late father, to my husband, subject nevertheless to the payment of (in substance) the legacy of £10,000. Let us look at the language fairly—not hypercritically, for I never like that way of construing documents—and ask ourselves this question: Can we fairly come to the conclusion that the testatrix was dreaming at all of disposing of the property which would pass to her husband if she did not make a will? It seems to me plain that throughout she assumed that the property she was dealing with would not go to her husband if she made no will, but that it was property which she could somehow dispose of. It appears to me that it would be forcing her language, and putting quite an unfair construction upon it, to hold that it amounts to a disposition by her to her husband of property which he could claim if she did not make any disposition of it at all. That view of the meaning of her will is absolutely conclusive of this case. Whatever the husband may have assented to, it could be nothing which would affect the right he now asserts. He certainly cannot have assented to more than she has done. I cannot help thinking that his assent was

given upon the supposition that the wife had, under the powers conferred on her by her father's will, made a valid disposition; and, if so, it was of course given upon an entire misapprehension, and it would be a piece of sharp practice if the next-of-kin of Lavina Waller were to take advantage of that. I think that on the true construction of this will the plaintiffs are not entitled to payment of the sum of £10,000 which they claim, and that the appeal must be dismissed.

RIGBY, L.J.—I agree in all respects with the Master of the Rolls.

COLLINS, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors, *Learoyd, James, & Mellor*, for *Learoyd & Co.*, Huddersfield; *Busk, Mellor, & Morris*, for *Sale, Seldon, & Co.*, Manchester.

From Q. B. Div. (Earl of Halsbury, L.C., and A. L. Smith, L.J.) March 17.

HASLUCK *v.* CLARK. (*a.*)

Bankruptcy—Administration—Insolvent estate—Execution creditor—Completion of execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125.

Section 45 *of the Bankruptcy Act*, 1883, *which disentitles an execution creditor to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he completes the execution before the date of the receiving order, is not applicable to an administration of the estate of a deceased debtor under section* 125.

Appeal from the judgment of Wright, J., on the trial of an interpleader issue, reported [1898] 2 Q. B. 28.

On the 29th of September, 1897, a judgment was obtained by Isabella Clark against Joseph Metz for £4,488 18s. 3d. On the 18th of October Metz died. On the 22nd of October the goods of the deceased judgment debtor were seized in execution under a writ of *fi. fa.*, but they were not sold. On the 3rd of November letters of administration were granted to the judgment debtor's widow. On the 19th of November an order was made, with the concurrence of the widow, for the administration of the estate of the deceased debtor under section 125 of the Bankruptcy Act, 1883. The sheriff, having received notice of this, interpleaded, and an order was made for the trial of an interpleader issue, in which the official receiver was to be the plaintiff, and the execution creditor defendant, to determine the question whether at the time of the seizure the goods seized were the property of the official receiver, as the trustee of the estate of the deceased, as against the execution creditor. Subsequently Hasluck was appointed trustee in the place of the official receiver, and was substituted for him as plaintiff in the issue.

Wright, J., held that the goods were not the property of the trustee as against the execution creditor, and gave judgment for the defendant.

The plaintiff appealed.

The arguments on the appeal were heard before the Earl of Halsbury, L.C., A. L. Smith, L.J., and the late Chitty, L.J.

Herbert Reed, Q.C., and *Muir Mackenzie*, for the plaintiff.

A. T. Lawrence, Q.C., and *T. W. Chitty*, for the defendant.

Cur. adv. vult.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

March 17.—A. L. SMITH, L.J., read the following judgment: This is an interpleader issue, and the material facts are these. [His Lordship stated the facts, above set out, and continued]. The question is. Do the goods seized and held by the sheriff vest, under the administration order of the 19th of November, 1897, in the trustee Hasluck freed and discharged from the execution, so that the execution creditor is thus deprived of her right to the proceeds of the goods so seized and held by the sheriff in execution upon her judgment? Apart from the bankruptcy of an execution debtor intervening between seizure and sale of goods by a sheriff, and apart from the question raised in this case, the answer would clearly be No.

By the Sale of Goods Act, 1893, s. 26, which re-enacts a provision in the Statute of Frauds, it is enacted that a writ of *fi. fa.* shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed. By section 125, sub-sections 1 and 2, of the Bankruptcy Act, 1883, the true construction of which has now to be decided, it is enacted that a petition, in certain events which exist here, may be presented praying for an order for the administration of the estate of a deceased debtor according to the law of bankruptcy, and that an order for the administration in bankruptcy of the deceased debtor's estate may be thus obtained. Now, upon such an order being obtained, what is to happen as to the property of the deceased debtor? Sub-section 5 deals with this, and enacts that upon an order being made for the administration of a deceased debtor's estate the property of the debtor shall vest in the official receiver, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of the Act. What does this mean? Does it mean that the property of the deceased debtor, bound as it is by the execution levied thereon, shall vest in the official receiver, or that the property of the debtor, unbound by the execution, is to vest in him? In this sub-section 5 of section 125, which is the vesting section, I cannot find words which show that the property of the debtor, unbound by the execution, is to vest in the official receiver. It is the property of the debtor,—which may be either bound or unbound by an execution when the order for an administration is obtained,—which is to vest and which is to be administered under the administration order. If it is bound it vests subject to the fetter; if it is unbound it passes as it is. Then comes sub-section 6 of section 125. It enacts that, "with the modifications hereinafter mentioned" (these will be found in sub-section 7 and *post*, and do not affect this case), "all the provisions of Part III. of this Act relating to the administration of the property of a bankrupt shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act." This, I think, means, as Fry, L.J., has pointed out in *In re Gould*, 35 W. R. 569, 19 Q. B. D. 92, that the section applies to the mode of administration and not to the subject-matter to be administered.

I have already dealt with what is the property of the deceased debtor which vests in the official receiver or, as in this case, in the trustee, and which is to be administered. Part III. embraces sections 37 to 65 inclusive, amongst which is section 45. This section enacts that "where a creditor has issued execution against the goods . . . of a debtor . . . he"—that is, the creditor—"shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor unless he has completed the execution . . ."—that is, by seizure and sale—"before the date of the receiv-

ing order and before notice of the presentation of any bankruptcy petition . . . against the debtor or of the commission of any available act of bankruptcy by the debtor."

It is argued that an order for the administration of the estate of a deceased debtor under section 125, if not a receiving order, a bankruptcy petition, or an act of bankruptcy within the meaning of those terms, is equivalent thereto. If the Legislature had intended that this should be so, I should certainly have expected to have found it enacted that an administration order was to have the same effect as, or be equivalent to, a receiving order, a bankruptcy petition, or an act of bankruptcy; but no such words are to be found. I do find, however, in the Act what effect an administration order is to have, for by sub-section 9 of section 125 it is expressly enacted that notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition for an order for administration, in the event of such order being obtained, shall be deemed to be equivalent to notice of an act of bankruptcy, so that after such notice no payment or transfer of property shall operate as a discharge to such personal representative. Nowhere in the Act is it enacted that notice of a petition for administration shall be equivalent to notice of an act of bankruptcy to an outside execution creditor, so as to take away the right he possessed to have the goods in the hands of the sheriff sold and applied to the payment of the judgment debt. I would also point out that in sub-section 13 of section 18 of the Act of 1883, where the Legislature, as regards Part III., intended that particular words should have particular meanings, it specifically enacts that they shall have such meanings. No reference is made therein to the case in hand.

If the contention of the trustee be correct, a different asset would have to be administered when an administration of an insolvent debtor's estate takes place in the Chancery Division and when an administration of such an estate takes place in the Court of Bankruptcy, for in the one the estate bound by the execution would be what was to be administered, and in the other the estate freed from the execution would be the available asset. It is not disputed that if the estate of the deceased insolvent debtor were being administered in the Chancery Division the estate bound by the execution would be what was to be administered, and it has been held by the court, in the case of *In re Withernsea Brickworks*, 29 W. R. 178, 16 Ch. D. 337, that under section 10 of the Judicature Act, 1875, which imported some of the bankruptcy rules in the winding up of companies, the rule as to execution being avoided where the goods had been seized but not sold was not imported into the winding-up proceedings.

As before stated, if the appellant's contention be correct the estate which would have to be administered would depend upon which tribunal happened to have the administration, and I cannot think that this is correct.

Moreover, it has been held by Cave, J., in the case of *In re Gould*, 19 Q. B. D. 92, at p. 93, that section 47 of Part III. of the Act of 1883, which deals with the avoidance of voluntary settlements, was not applicable to section 125, and he gives fully his reasons for so holding. I do not repeat them, for they will be found in the report of his judgment. He also said, though this was *obiter*, that section 45 did not apply. Upon appeal (*ibid*, p. 98) his decision as to section 47 was upheld in this court, and Lord Esher stated that he agreed with every reason given by Cave, J. The groundwork of the decision of the Court of Appeal, which will be seen especially from Fry, L J.'s, judgment, was that section 125 dealt with the mode of administration and not with the subject-matter to be administered, and that it dealt with the deceased debtor's estate and nothing else.

Although in *In re Gould* it was the property of third persons—namely, the trustees of the settlement, which was attempted to be dealt with under section 125, yet the reasoning to be found in that judgment appears to me to apply to this case—namely, that rights of third parties are not to be affected unless the intention is expressed in plain terms; and surely this cannot be found in section 125.

Mr. Chitty for the execution creditor pointed out that, with the judgments in *In re Withernsea Brickworks*, and those of Cave, J., and the Court of Appeal in 1887 in *In re Gould* standing unimpeached, the Legislature in the year 1890 passed sub-sections 1 and 2 of section 11 of the Bankruptcy Act, 1890, wherein it expressly dealt with the duties of sheriffs as regards goods taken in execution both before and after sale, and that there is in these sections no indication that the Legislature desired to alter what had been said and held in the prior cases, for it again dealt with the effect of receiving orders and petitions in bankruptcy and with them alone, and not with the effect of orders of administration under section 125.

In my judgment, if an order for administration under section 125 is to be the equivalent of a receiving order or a petition in bankruptcy or an act of bankruptcy, it is for the Legislature and not for a court of law to say so.

I am aware that there are *dicta* of Vaughan Williams, L.J.—then Vaughan Williams, J.—in *Watkins* v. *Barnard*, 46 W. R. 156, [1897] 2 Q. B. 521, which indicate his dissent from what Cave, J., has said and held—affirmed as it was in this court in the case of *In re Gould*—and he pointed out what he should do when occasion arose, though he decided that in the circumstances of the case before him neither section 45 of the Act of 1880 nor section 11 of the Act of 1890 were applicable to section 125 of the Act of 1883. For the reasons above I think the judgment of Wright, J., should be affirmed, and this appeal dismissed with costs.

A. L. SMITH, L.J., then, by consent of counsel, read the following judgment of the late CHITTY, L.J.: I am of the same opinion. The question is whether the order for the administration of the deceased debtor's estate under the 125th section of the Bankruptcy Act, 1883, has taken away the right which, apart from that section, the execution creditor possessed to have the goods in the hands of the sheriff sold and applied in payment of the judgment debt It is not a question whether the property in the goods passed to the trustee under the administration order, but a question whether they passed free from the right of the execution creditor.

The state of the law prior to the passing of the Act of 1883 was this. Before the Judicature Act, 1875, the personal estate of a deceased debtor which fell to be administered under an administration decree was the estate which vested in the legal personal representative of the deceased. All subsisting liens, charges, and rights, whether legal or equitable, remained undisturbed. Then came the Judicature Act, 1875, which by the 10th section imported certain bankruptcy rules into the administration of the estates of deceased insolvent debtors and the winding up of insolvent companies. The section was ill-framed, and there was much difference of judicial opinion as to its true effect. Ultimately it was decided that the section did not enlarge the estate of the deceased insolvent debtor, or of the insolvent company in the winding up. It will suffice to refer to two authorities, both decided before 1883. In *In re Withernsea*

Brickworks (decided in 1880) the question was whether the then existing bankruptcy rule avoiding an execution, where the goods had been seized but not sold, was imported into the winding up of an insolvent company, and it was held by the Court of Appeal that it was not. In *In re D'Epineuil*, 30 W. R. 423, 20 Ch. D. 217 (decided in 1882), the question was whether the rule avoiding an unregistered bill of sale in bankruptcy was imported into the administration of the estate of a deceased insolvent debtor, and it was held that it was not. Such, then, was the known state of the law when the 125th section of the Act of 1883 was passed.

The question turns on the true construction of the 125th section. The appellant relies on the 6th sub-section. It is very loosely worded. Instead of pointing out, as might have readily been done, what provisions of Part III. are to be applied, it leaves it to the court to discover which of the provisions are applicable. The precise question is whether section 45, which occurs in Part III., is applicable. Now, apart from the 6th sub-section, I think it is clear that the subject-matter dealt with by the 125th section is the estate of the deceased debtor in the sense in which that term is invariably used—namely, the property to which he was entitled at the time of his death so far as it has not been lawfully dealt with since his death, before the order for administration is made, and subject to all liens, charges, and rights subsisting in other persons. The 1st, 2nd, 4th, 5th, and 8th sub-sections all speak of the deceased debtor's estate as that which is to be administered under the order for administration. The term "property of the debtor" also occurs in the 5th, 6th, and 7th sub-sections; but, in my opinion, that term is obviously employed in the same sense as estate. The provision for vesting is contained in the 5th sub-section. It enacts that, upon an order being made for the administration of a deceased debtor's estate, the property of the deceased debtor shall vest in the official receiver of the court as trustee thereof. The effect of this enactment on the personal estate of the debtor is to divest out of the legal personal representative the personalty vested in him at the time of the order and to vest the same in the official receiver. In support of this view I refer to the 3rd sub-section, which prohibits the making of an administration order until the expiration of two months from the grant of probate or letters of administration except with the concurrence of the legal personal representative, or unless the debtor committed an act of bankruptcy within three months prior to his decease. This sub-section has been in part repealed by section 21, sub-section 1, of the Bankruptcy Act, 1890, which in effect strikes out the period of two months. But the enactment as it stood, by postponing the jurisdiction to make the administration order for two months after probate or letters of administration, a period which might not expire until many months or even years after the debtor's decease, affords a strong reason against the incorporation of the 45th section. In ordinary course an execution would be completed long before the expiration of two months. Reverting to the vesting sub-section, I think that the ordinary rules of construction would not justify us in holding that it passed the goods seized freed from the rights of the execution creditor. What the trustee is by that sub-section directed to realize and distribute is the property of the deceased debtor, and nothing more. Then I come to the 6th sub-section itself. I think that the words "relating to the administration of the property of a bankrupt" mean what they say—that is, the property of the bankrupt, and not the property of third persons which is by express provisions swept into the fund distributable under a bankruptcy for the benefit of the creditors. Further, I think that the objections to holding that the provisions of the 45th section are applicable to an administration order under section 125 are insuperable. To hold that they are is to import into the 125th section words which are not there. I look in vain for any words which show that the administration order or any of the proceedings thereunder are, or are to be deemed to be, an equivalent for a receiving order, or for a bankruptcy petition, or an act of bankruptcy of the deceased. I concur entirely in the observations which A. L. Smith, L.J., has made on these points.

On the construction of the 125th section I think that the provisions of the 45th section are not imported into the 125th section, and that they are not applicable. To take away a right such as that of the execution creditor, plain words manifesting the intention of the Legislature are required, and I am unable to find them.

The contrast between the language of the 125th section and of the 18th section, sub-section 13, the authority of *In re Gould*, the *dicta* in *Watkins* v. *Barnard*, and the bearing of the 11th section, sub-sections 1 and 2, of the Bankruptcy Act, 1890, have already been dealt with so fully that I cannot usefully add anything on those points, save this: By the 21st section of the Act of 1890 the Legislature dealt expressly with the 125th section, and made certain amendments therein, but left *In re Gould* and the principle of that authority untouched. It also enacted by section 3, sub-sections 16 and 17 (I state the enactment shortly), that if under a composition a trustee is appointed, section 27 and Part V. of the principal Act should apply as if the trustee were a trustee in bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication" included respectively a composition, a compounding debtor, and an order approving the composition, and that Part III. of the Act of 1883 should, so far as the nature of the case and the terms of the composition admit, apply thereto, the same interpretation being given to the words "trustee," "bankrupt," and "order of adjudication," as above stated: yet no corresponding amendment was made in the 125th section.

It is plain that if the order for administration had been made in the Chancery Division the rights of the execution creditor would have remained unaffected. It would be a strange result if her rights depended on the court in which the administration takes place. The 4th sub-section of section 125 barred the right to present a petition under that section where proceedings in any court of justice for the administration of the deceased debtor's estate had already been commenced, but conferred on that court a discretionary jurisdiction to order a transfer of the proceedings to bankruptcy where the estate is insolvent. No jurisdiction was given to the court exercising jurisdiction in bankruptcy to order the transfer. This seems to show that the Legislature considered it immaterial in which court the administration took place, and that the rights of persons interested would be dealt with on the same footing whichever tribunal controlled the administration. These observations are adverse to the appellant.

For these reasons I agree that the appeal ought to be dismissed.

The Earl of HALSBURY, L.C., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Goldbergs & Langdon.*

Solicitors for the defendant, *Thomas White & Son.*

From Q. B. Div.
(Lord Russell of Killowen, C.J., and A. L. Smith and Collins, L.JJ.) Feb. 24.

In the Matter of AN ARBITRATION BETWEEN GEORGE AND THE GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION. (*a.*)

Insurance — Burglary and housebreaking — "Actual forcible and violent entry"—Entry by opening unlocked door—Breaking open inner door of shop-front.

A policy of insurance on a jeweller's stock-in-trade recited that the assured was desirous of effecting an insurance against "loss or damage by burglary and housebreaking as hereinafter defined." and in its operative part it insured him against loss of the property therein described "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." In the proposal for the insurance the assured stated that the premises were a shop, warehouse, and dwelling, and that they were protected by wood shutters and iron bars, and iron plates inside. The policy contained a condition that the assured should take all due precautions for the safety of the property insured as if the same were not insured as regards, inter alia, *securing all doors, windows, and other means of entrance. During the temporary absence of the porter, who was taking down the shop shutters in the morning, the front door being shut, but neither locked nor bolted, a thief opened the door by turning the handle and entered the shop, and, having forcibly wrenched an iron plate and padlock off an inner door of the shop-front, stole therefrom part of the insured jewellery.*

Held, that the loss was not covered by the policy.

Decision of Wills *and* Kennedy, JJ. (46 *W. R.* 557, [1898] 2 *Q. B.* 136), *reversed.*

Appeal from the judgment of a Divisional Court (Wills and Kennedy, JJ.) on a special case stated by an arbitrator: reported 46 W. R. 557, [1898] 2 Q. B. 136.

On the 24th of December, 1891, the respondent, A. A. George, who carried on business as a jeweller and pawnbroker at 78, Strand, effected a policy of insurance on his stock-in-trade with the appellants, the Goldsmiths and General Burglary Insurance Association (Limited). The policy recited that the assured was desirous of effecting an insurance "against loss or damage by burglary and housebreaking as hereinafter defined," and in its operative part it insured him against loss of the property therein described "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." Certain conditions were indorsed on the policy, the second of which was as follows: "It is a condition of this policy that the assured shall take all due precautions for the safety of the property insured as if the same were not insured, as regards selection and supervision of employés, securing all doors, windows, and other means of entrance or otherwise." The proposal for the insurance signed by the respondent, which was agreed to be the basis of the contract, contained answers to certain questions. The answer to a question as to the nature of the premises was "shop, warehouse, and dwelling." The answer to the question, "How are the premises protected on basement, ground floor, and roof lights?" was "Wood shutters and iron bars, and iron plates inside."

On the morning of the 12th of March, 1897, the policy being still in force, in the temporary absence of the porter in charge of the premises, who was engaged in removing the shutters of the shop to the rear of the premises, the front door being shut, but neither locked nor bolted, a thief opened the door by turning the handle and entered the shop, and, having forcibly wrenched an iron plate and padlock off an inner door of the shop-front, stole therefrom part of the insured jewellery.

The respondent having claimed under the policy to recover from the appellants the value of the jewellery so stolen, the matter was referred to arbitration, and the arbitrator made his award in the form of a special case for the opinion of the court. The Divisional Court gave judgment in favour of the respondent.

Tindal Atkinson, Q.C., Bray, Q.C., and *C. L. Attenborough,* for the appellants.

Joseph Walton, Q.C., and *A. T. Lawrence, Q.C.,* for the respondent.

Cur. adv. vult.

Feb. 24.—Lord RUSSELL OF KILLOWEN, C.J.—This is an appeal from a judgment of a Divisional Court, by which it was determined that the respondent was entitled to recover from the appellants a sum of money, being the amount of a loss within the terms of a policy effected by him with them. The respondent carried on business as a jeweller and pawnbroker in premises at 78, Strand. The entrance to that part of the premises which was devoted to the jewellery business was by means of a door leading straight from the Strand, the entrance to the pawnshop was in a side street, and was towards the back of the premises. The policy was effected on the 24th of December, 1891, and on the 12th of March, 1897, soon after 8.30 in the morning, a thief entered the shop by the front door, which was then closed—that is to say, it was put to, but it was capable of being opened by turning the handle. Having so entered, he took advantage of the absence of the porter, who was putting away the shop shutters, to break into a showcase or partition, in which was placed a quantity of jewellery, with which he made off. The question is whether such theft was one for the consequences of which the appellants are liable under the policy. The learned judges in the Divisional Court held that the appellants were liable. I desire to say that no question of principle or general interest is involved in this case; the question is simply as to the true construction of this particular contract.

Two propositions were put forward on behalf of the respondent. The first was that an entry effected by the exercise of any force was sufficient to constitute an entry within the meaning of the policy. It was said that pushing a door open if it was ajar or turning the handle of a door if it was shut but not locked, would be sufficient to bring a case within the policy. The second was that even if this was not so, if the original entry was not effected by force within the meaning of the policy, yet, inasmuch as the thief, having entered without force, prized off the iron plate and padlock which secured the shop-front within, the terms of the policy were satisfied. The first of these propositions was adopted by the Divisional Court, and on the second they offered no opinion.

The policy recites that the assured is desirous of effecting an insurance "against loss or damage by burglary and housebreaking as hereinafter defined." The risk to be guarded against by this insurance therefore is not burglary and housebreaking as defined by the criminal law, but as defined by the parties in this policy. It proceeds to make the proposal and answers on which the policy was effected part of the contract. Then comes the operative part of the policy, which says that "if at any time after the date hereof, and during the continuance of this

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

policy, the property above described or any part thereof shall be lost by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate," then the assured shall be entitled to be indemnified. The second condition indorsed on the policy has some importance. The effect of it seems to be that if the loss had happened in the night-time and in consequence of the assured not having taken due precautions for the safety of his property, he could not recover under the policy. That seems to show that the parties had in view the risk of a forcible burglarious entry by night or of a forcible entry in the day-time under such circumstances that in the absence of due precautions such an entry might be effected.

Now, taking the words of the policy, that the assured is to be protected against loss "by theft following upon actual forcible and violent entry upon the premises," could anyone in good sense apart from technicalities of the law as to burglary, and applying its ordinary meaning to ordinary language, suppose that an entry by turning the handle of the shop door was a forcible and violent entry within the meaning of the policy? It seems repugnant to common sense to say so. I think that the view of the learned judges in the Divisional Court was that it was intended to guard the assured against loss by burglary and housebreaking in the technical and often subtle senses in which the criminal law uses those terms. The fault of that appears to me to be that it is a restricted view, and one which fails to give the controlling words "as hereinafter defined" the effect which they ought to have. I think that the parties to this contract did not desire to involve themselves in the subtleties of the criminal law as to burglary and housebreaking, but that they intended to cover a theft following upon entry effected by violence, not by stealth.

The argument on the part of the respondent was put in two shapes. It was said in the first place that the effect of the words "actual forcible and violent entry" is to be found in the word "actual," and and that the intention was to prevent the policy covering an entry effected by fraud, as constructive forcible entry. The word "actual" may have that effect, but it seems to me that what is contemplated is an entry not by technical violence, but by real violence. It was said that any force was sufficient, and that if the door was closed, and it was only necessary to turn the handle in order to open it, such turning of the handle was sufficient. To carry the case further, if the door was ajar and it was pushed open, would that be sufficient to constitute actual forcible and violent entry? Or again, if the door was partly open so that a boy or a thin man could enter without moving the door, but a fat man could not, would the question whether it was an actual forcible entry depend on the particular person who entered? Such considerations show that the line of reasoning adopted by the respondent is not satisfactory. In my opinion the policy is directed to insuring against an entry effected by real violence in contradistinction to an entry effected by stealth and without violence, as I think this was. Secondly, it was said that an unlawful entry was enough to satisfy the words of the policy, although there was no violence. I think that argument cannot be accepted. It would make the policy include the case of a man entering a shop in broad daylight without any impediment with intent to commit a felony, and then effecting a theft while the shopman was at a distant part of the premises.

As regards the second proposition the argument is this, that assuming that the entry by turning the handle of the door was not an "actual forcible and violent entry" within the meaning of the policy, what followed did constitute such an entry. The man, having entered by stealth, proceeded to prize off the iron plate and padlock which secured the shop-front, and so got possession of a quantity of jewellery and made off with it. In my judgment that was not an entry upon the premises within the meaning of the policy. The policy speaks of an entry upon the premises wherein the property insured is situate—*i.e.*, the premises, 78, Strand. The second condition shows more clearly what is meant by the premises, for it provides for due precautions being taken by the assured for securing doors and windows and other means of entrance. I think entrance means entrance into the shop from outside. The answers contained in the proposal form support this view. I have come to the conclusion that the respondent has not by either of his contentions made out that his loss comes within the policy, and that the appeal must therefore be allowed.

A. L. SMITH and COLLINS, L.JJ., concurred.

Appeal allowed.

Solicitors for the appellants, *Attenborough & Sons.*

Solicitor for the respondent, *Stanley J. Attenborough.*

From Q. B. Div. (Bkcy.) (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 10.

In re J. S. BEESTON.

Ex parte THE BOARD OF TRADE. (*a.*)

Bankruptcy—Sheriff—Possession for fifteen months—Act of bankruptcy, when committed—Possession money—Consent of execution creditor and execution debtor—"Costs of execution"—Order of 31st of August, 1888, *under Sheriffs Act,* 1887 (50 & 51 *Vict. c.* 55)—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11 (2).

Where the sheriff seizes goods and remains in possession for a period greatly exceeding twenty-one days (e.g., *fifteen months*) *there is, under section* 1 *of the Bankruptcy Act,* 1890, *one act of bankruptcy, which is committed at the expiration of twenty-one days, but not a continuing act of bankruptcy or a succession of such acts.*

In such a case, therefore, if both execution creditor and execution debtor assented to the sheriff retaining possession, he will be entitled, under section 11 *of the Bankruptcy Act,* 1890, *to possession money for the whole time he remained in possession, notwithstanding that the debtor has been made a bankrupt on a petition presented more than three months after the expiration of the twenty-one days. The only cases in which the sheriff would not be so entitled are cases coming within the provisions of the Bankruptcy Act,* 1883, *as to reputed ownership and the relation back of the trustee's title, and cases to which the Act* 13 *Eliz. c.* 5 *applies.*

In re Hurley, 41 *W. R.* 653, 10 *Morrell* 120, *approved.*

Appeal from Wright, J.

On the 27th of July, 1896, the sheriff levied execution on goods belonging to the debtor for a judgment debt of £90 17s. 6d. At the request of the debtor, and with the consent or at least by the connivance of the creditor, the sheriff remained in possession till the 27th of October, 1897. Before the end of 1896 the whole of the judgment debt, except a small balance of less than £4, had been paid. On the 27th

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

of October, 1897, a receiving order was made against the debtor on his own petition, and on the 28th the sheriff sold the goods. The sheriff's costs, as allowed on taxation, amounted to £105 18s. 6d., the greater part of which consisted of possession money. The Board of Trade applied to review the taxation, and contended that the sheriff had remained an unreasonably long time in possession, and that possession money for the whole of such a period could not be included in the "costs of the execution," which are a charge on the debtor's goods under section 11 of the Bankruptcy Act, 1890. Wright, J., decided that, as no bankruptcy could now relate back to the act of bankruptcy constituted by the seizure and holding for twenty-one days by the sheriff, *In re Hurley*, 41 W. R. 653, 10 Morrell 120, governed the present case, and the possession money must be allowed.

The Board of Trade appealed.

Sir Richard Webster, A.G., and *Muir Mackenzie*, for the appeal, contended that *In re Hurley* was wrong, and that after the expiration of the first twenty-one days, so long as the sheriff remained in possession, there was a continuing act of bankruptcy; or alternatively, that there was a succession of acts of bankruptcy, a new act of bankruptcy being completed every twenty-one days.

They also referred to the order of the 31st of August, 1888, made under the Sheriffs Act, 1887 (Annual Prac. 1899, pp. 236-239); section 1 of the Bankruptcy Act, 1890; section 45 of the Bankruptcy Act, 1883, and section 11 of the Act of 1890; *Masters* v. *Lowther*, 11 C. B. 948; *Underden* v. *Buryess*, 4 Dowl. 104; *Levy* v. *Champneys*, 4 A. & E. 365; *Kirk* v. *Purchase*, 32 L. R. Ir. 359, 41 W. R. Dig. 221; *In re Finch, Ex parte Sheriff of Essex*, 40 W. R. 175, 8 Morrell 284.

Herbert Reed, Q.C., and *P. Rose-Innes*, for the sheriff, cited *Barker* v. *St. Quintin*, 12 M. & W. 441, at p. 450; *Ex parte Lithgow, In re Fenton*, 26 W. R. 834, 10 Ch. D. 169; and *In re Hurley*.

Sir Richard Webster, A.G., replied.

LINDLEY, M.R.—I do not think that when this case is thrashed out, as it has been, there is any real difficulty in coming to a proper conclusion; and the conclusion which Wright, J., came to appears to me to be the proper one.

It appears that a writ of *fi. fa.* upon a proper judgment was executed against the judgment debtor, who is now bankrupt, on the 27th of July, 1896, and for twenty-one days after that the sheriff was in possession and nothing was done. Under section 1 of the Bankruptcy Act of 1890 that was an act of bankruptcy, and, if within three months after that the debtor had become bankrupt, the consequence would have been that the title of the trustee in bankruptcy would have related back, and, unless the transaction could have been protected, he would have been in a far better position than in the circumstances the trustee in this bankruptcy is.

There was no act of bankruptcy within the three months. That depends, of course, on the true construction of section 1 of the Act of 1890; but that is the view that I take of it for the reasons which I will give. There being no act of bankruptcy, the execution debtor and the execution creditor were in the position of ordinary execution debtors and execution creditors, and there was no right of the trustee or of any other creditors which had to be considered in determining how long the sheriff should remain in possession or how soon he should go out. If the execution debtor chose, for his own convenience, to consent to the sheriff retaining possession, the possession money would as against the execution debtor be costs of execution. I do not mean to say it would be as against other people—the execution creditor, for instance, if he did not consent—because no arrangement between the sheriff and the execution debtor could deprive other people who did not consent to it of their rights; but, as regards the execution debtor, the costs of the continued possession would be costs of execution. I have not the slightest doubt about that.

If that is so, in what better position is the trustee in the bankruptcy of the debtor? On general principles applicable to bankruptcy, the trustee in bankruptcy is in no better position than the bankrupt, except, so far as I know, in three classes of cases. He has under the reputed ownership clause a right to override transactions which the bankrupt could not impeach; he has under those sections which introduced the doctrine of relation back, a right to impeach transactions which the bankrupt could not; and, of course, under the statute of 13 Eliz. c. 5, the trustee in bankruptcy can impeach transactions on the ground that they are frauds against creditors, which the bankrupt cannot impeach. But, eliminating those classes of cases—and we have nothing to do with them here—the trustee in bankruptcy is in no better position than the bankrupt himself. The consequence of that is that the trustee in this bankruptcy is not in a position to say that this possession money is not, as against him, what it would be as against the bankrupt—namely, costs of execution.

That is the short answer which I give to this case. That is the view, as I understand it, on which the case of *In re Hurley* proceeded. Of course the consent to continued possession might be impeached on the ground that the trustee was not bound by it, either because his title related back, or because of the statute of Elizabeth, but, unless he can impeach it, the possession money does not cease to be as against him what it would be as against the debtor.

The two sections of the Bankruptcy Act, 1890, which it is important to consider are the 1st and the 11th. Section 1 would avail the trustee if it could be read so as to make the act of bankruptcy come down to October, 1897, or within three months of it. But the dates are important. The *fi. fa.* was executed, and the sheriffs took possession on the 27th of July, 1896, and twenty-one days after that would expire on the 17th of August, 1896, and the receiving order, the title of the trustee, did not occur until October, 1897. Is it possible fairly to construe section 1 so as to make a continued possession for more than twenty-one days either a continued act of bankruptcy, or, if there should be a succession of periods of twenty-one days, a succession of acts of bankruptcy? I do not think that is consistent with the language. We know perfectly well that acts of bankruptcy have to be regarded critically and carefully. Nothing is an act of bankruptcy except what the statute declares to be one; and when the statute says that an act of bankruptcy is committed if an execution has been levied by seizure and the goods have been either sold or held by the sheriff for twenty-one days, that means that the seizure and the holding for twenty-one days are essential for the constitution of an act of bankruptcy. It seems to me that it would be straining this section beyond all reason to say that there was a succession of as many acts of bankruptcy as there were periods of twenty-one days, or that there has been one continued act of bankruptcy running over a year and a-half. That appears to me not to be the true construction of the section. There is, therefore, no act of bankruptcy under which the title of the trustee can relate back; a most important point, to my mind.

because, if the trustee's title related back, we should have to consider the matter on totally different grounds.

The other section of the Act of 1890 material to be considered is section 11. Both in sub-section 1 of that section, which does not relate to this case, and in sub-section 2, which does, there is the same expression, "costs of the execution." Here the sheriff has sold the goods, and he has deducted, as costs of the execution, the whole of his possession-money. The answer to any objection as to that is, that he could have done it as against the debtor in the circumstances of this case, and the trustee is in no better position. It appears to me, that is the short answer to this case; and for these reasons I think that the appeal should be dismissed.

RIGBY, L.J.—I am of the same opinion. The case turns on the question of what costs are costs of execution. To my mind those are costs of execution which would have been costs of execution if certain circumstances had actually happened. I do not think that by the statute it was intended to depart from that.

Reference was made to the practice in interpleader cases, but that practice is founded upon the fact that the interpleader order really puts an end to the execution, and the sheriff thenceforth holds, if he holds at all, on the terms contained in the interpleader order. It seems to me that the costs of execution must be, unless impeached before the taxing-master, as they may well be on some proper ground, the costs of execution as between the parties I say nothing about other people being bound. In certain cases clearly they would not be, as, for instance, where the receiving order was made within three months, and it turned out that the debtor had been dealing with property which no longer belonged to him, but was dealing with other people's property. That, however, is a very different case.

In the circumstances of this case I cannot see my way to limiting the words "costs of execution" contained in the Act in the way which has been suggested.

VAUGHAN WILLIAMS, L.J.—I entirely agree. There can be no doubt whatsoever that these costs of possession, apart from the act of bankruptcy or the making of a receiving order, would be costs which the sheriff would be entitled to take out of the proceeds of the levy. Of course I am speaking of costs which are *bonâ fide* incurred in the course of levying the execution.

That being so, I agree with the Attorney-General that the right of the sheriff to these costs does not depend upon the ordinary statutes governing the right of the sheriff to his fees and costs, but depends upon section 11 of the Act of 1890. That section says that the costs of execution shall be a first charge on the goods or money delivered up to the official receiver, and the only question really that we have to decide in the present case is what costs are covered by or included in those words in this section, "costs of the execution"? Does that mean the same costs as would have been recoverable by the sheriff apart from the bankruptcy, or does it mean only a portion of those costs? Speaking for myself, I do not see a word in the section to lead one to suppose that the words "costs of the execution" there mean anything else than the costs of execution to which the sheriff would have been entitled apart from the bankruptcy. Of course, if there is an earlier act of bankruptcy prior to the realization of these goods under the execution, the goods would cease to be subject to execution, because they would cease to be the goods of the bankrupt, and the title by relation back, of the trustee in bankruptcy would prevail. But apart from that it seems to me perfectly clear on these words that the costs of execution cover all the ordinary costs which a sheriff would be entitled to if such costs were *bonâ fide* incurred in the course of execution.

I have only one word to add, and that is as to whether the act of bankruptcy here by seizure and the possession for twenty-one days is either a continuous act of bankruptcy for the whole term of possession, or an act of bankruptcy which will be repeated each time that there is a fresh period of twenty-one days of possession. I have no doubt myself that it is one act of bankruptcy. It is not a continuous act of bankruptcy, nor is it a repeated act of bankruptcy on the happening of each fresh period of twenty-one days. I know what has been said by the Master of the Rolls as to the words of the section, and I entirely agree with what he has said; but I wish to add one observation. Until the recent legislation there was no such act of bankruptcy as this act of bankruptcy constituted by seizure and remaining in possession for twenty-one days, or any other time. The act of bankruptcy was by execution for a certain amount followed by a sale, and it is that which has been extended. One finds in this section two things put together, and I have no doubt myself that if, as the Legislature intended, the act of bankruptcy defined in respect of the seizure and sale be one act, done at the instance of the execution creditor for the purpose of the realization of his security—a security gained by seizure—or in respect of the continuing possession, the act of bankruptcy takes its origin at the seizure, and whether the seizure be followed by sale or whether it be followed by possession for twenty-one days, there is only one act of bankruptcy, which dates from the seizure; and if there is no fresh seizure there is no fresh act of bankruptcy.

Appeal dismissed.

Solicitors, *Walter Murton; Alfred G. Dinn*, for *Wilson, Wright, & Wilsons*, Preston.

High Court of Justice.

Chan. Div. } March 21.
Byrne, J. }

In re TROTTER.
TROTTER *v.* TROTTER. (*a.*)

Will—Attesting witness taking benefit—Codicil—Republication—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 15.

The effect of a codicil to republish a will, and thus validate a gift under the will to a witness attesting such will, but not attesting the codicil, will not be rendered void by the attestation by such witness of a second codicil to such will, such witness being able to point to a proper instrument under which he takes the benefit, not attested by himself.

Summons.

This was a summons raising certain questions in the administration of the estate of Charles V. Trotter, deceased.

The following point alone calls for a report. By his will, bearing date the 6th of February, 1878, the said C. V. Trotter declared that John Trotter, a solicitor, one of the executors and trustees of the said will, should, notwithstanding his trusteeship, be

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

allowed all professional and other charges for his time and trouble, which, if employed as solicitor to his trustees without being himself a trustee, he would have been entitled to make. The said John Trotter attested the will.

On the 1st of May, 1881, testator added a codicil to to his will, wherein he referred to his will and made certain different dispositions of parts of his estate in no way affecting the benefit previously conferred on John Trotter. This codicil was not attested by John Trotter.

In November, 1881, testator added another codicil, whereby he again varied the disposition of certain parts of his estate; but not so as to affect the benefit previously conferred on John Trotter, and testator expressly confirmed his will and the first codicil thereto in every other detail and respect. This codicil was attested by the said John Trotter.

The question raised by the plaintiff was whether the defendant John Trotter had lost his right to the benefit conferred on him under the will by his attestation of such will, and of the second codicil thereto.

Levett, Q.C., and *H. Fellows*, for the plaintiff.—The authority to charge profit costs is practically a legacy, and it arises under a will which the legatee attested. It is true that if there had been no second codicil the defendant would have been entitled—under *Allen* v. *Maddock*, 6 W. R. 825, 11 Moo. P. C. 427; *Anderson* v. *Anderson*, 20 W. R. 313, L. R. 13 Eq. 381—but the effect of the second codicil is to deprive him of the right. If the will and codicils are regarded as one instrument, it is clear that he is not entitled. To hold that he is, is to treat the will as consisting of two instruments—one the will and the first codicil; secondly, the second codicil—which is impossible.

Theobald, Q.C., and *Fischer Williams*, for the defendant.—The fact that one codicil unattested by the witness intervenes, is sufficient to establish the gift, as the first codicil operated as a republication of the will, and the defendant's attestation of the second codicil will not deprive him of the benefit.

They referred to the cases above-mentioned, and *Gurney* v. *Gurney*, 3 W. R. 353, 3 Drew. 208, and *In re Marcus*, 57 L. T. Rep. 399, 36 W. R. Dig. 322.

Levett, Q.C., replied.

BYRNE, J. (after stating the facts).—Had the matter rested upon the will and the first codicil alone, it is clear, upon the authority of *Anderson* v. *Anderson*, that John Trotter would have been entitled to the benefit of profit costs. But the question remains whether he is so entitled, having regard to his execution of the second codicil. The ground of decision in the case of *Anderson* v. *Anderson* was, that, as had been held in *Allen* v. *Maddock*, the due execution by a testator of a codicil amounts to the republication of a former will, if the codicil refers to such former will, and that without any regard to the fact whether or not the paper referred to complied with the requirements of the law as to execution or attestation of such paper, and the Vice-Chancellor held that it would be as much beyond the provisions and the contemplations of the statutes as it would be opposed to good sense and reason to hold that the codicil duly executed and attested had not the effect of republishing the will and making it a new and original disposition by the testatrix at the date of the codicil of the estate of which she had dealt by the will. In *Gurney* v. *Gurney* the testator had given benefits by his will to two persons who did not attest the will, but who did afterwards attest two codicils. Kinderaley, V.C., decided that the word "thereby" in section 15 of the Wills Act must be construed to mean by the same testamentary instrument which is attested, and that it does not apply to the case where the legatee has not attested the same instrument by which he takes. This points to the will and codicil being treated as separate instruments for the purpose of ascertaining whether or not an attesting witness to either of such instruments can take. In *In re Marcus*, North, J., upon the authority of *Gurney* v. *Gurney*, held that a legatee who had witnessed a will and codicils could not take; but that another who had not witnessed the will by which the benefit was given, but who had witnessed the codicils could take, and the learned judge applies the same test which was applied in *Gurney* v. *Gurney* in reference to the legatee who witnessed the will and both codicils. He says: "As he cannot point to an instrument under which he claims, which he did not witness, I think he cannot take." *Allen* v. *Maddock* shows that an instrument invalid in itself as a will may be incorporated and rendered valid by a subsequent codicil duly and validly attested and referring to the will, the two documents taking effect as one instrument. *Gurney* v. *Gurney* and *In re Marcus* show that a gift by will not witnessed by a legatee is not rendered invalid as to the gift to such legatee, by reason of his attesting a subsequent codicil, and *Anderson* v. *Anderson* decides, upon the principle laid down in *Allen* v. *Maddock*, that a gift by will to the husband or wife of an attesting witness (which stands on the same footing as if the gift had been made to the attesting witness), though invalid if the will had stood alone, is valid by a subsequent codicil not attested by the husband or wife of the legatee, the testator having referred to his will in making his codicil, thereby incorporating and republishing his will with the new codicil. I think that these points in respect of wills made since the Wills Act have been established: (1) That a will invalid in itself may operate as a valid instrument when referred to and incorporated in or with a subsequent and validly executed codicil. (2) That a valid gift by will to a legatee is not rendered invalid by reason of his subsequently attesting a codicil, although the codicil has the effect of republishing and incorporating the will. (3) That although a gift by a valid will to an attesting witness is utterly null and void, such gift may be rendered effectual if the will is republished by a codicil referring to the will, but not attested by the legatee. (4) That the legatee must be able to point to an instrument giving him his legacy not attested by himself before he can establish his rights to his legacy.

Bearing in mind these principles the question appears to be, whether or not John Trotter can point to an instrument not attested by himself and giving him the benefit which he claims. It cannot be to the will alone, for though a valid instrument it is utterly null and void so far as the disposition in his favour is concerned. But just as, had the original will been altogether void, he would have been able to point to a codicil republishing and incorporating the whole of it, and as validating the whole of the dispositions intended to be made by the said will, so in like manner I think he can point to the first codicil—republishing and incorporating an instrument valid as to some of its dispositions, but invalid as to the dispositions in his favour—being the instrument under which he claims. I think that the true view is that where the original gift is by section 15 of the Wills Act utterly null and void, the will is *pro tanto* null and void, as it would have been if unattested null and void altogether, and that just as in the latter case the whole will would, if referred to in a duly executed and duly attested codicil, operate in its entirety as from

the date of the codicil, so where void in part as to its dispositions by reason of improper attestation, it will so far as void operate for the first time by the incorporation and republication effected by the due execution of the codicil. I think that John Trotter is entitled here to point to the first codicil as the instrument conferring upon him the benefit in question, inasmuch as the codicil incorporates the whole will, including the originally void disposition; and this being so, upon the authority of *Gurney* v. *Gurney* and *In re Marcus*, he has not lost the benefit by reason of his having subsequently attested the second codicil.

Solicitors, *Collyer-Bristow, Russell, Hill, Curtis, & Dods; Tarry, Sherlock, & King.*

Chan. Div.
Cozens-Hardy, J. March 16, 17.

HOPE *v.* WALTER. (*a.*)

Vendor and purchaser—Specific performance—Rescission—"Eligible for investment"—House used as brothel—Defect unknown to vendor.

If at the time of the contract the vendor himself was not aware of any defect in the estate, the purchaser must take the estate with all its faults.

Where a house, described in particulars of sale as an eligible property for investment, was, after the sale, alleged by the purchaser to have been used by the tenant as a disorderly house at and some time before the date of the contract, but neither the vendors nor the purchaser knew of such user at the time of the sale,

Held, on the above principle, that that circumstance—assuming it to be true in fact—did not give any ground for rescission, or even constitute a defence to the vendors' action for specific performance of the contract.

The observations in Lucas *v.* James, 7 *Hare* 410, at p. 418, *followed.*

Action by vendors for specific performance.

The property, the subject of the above action, was one of several lots put up for auction at the mart by the plaintiffs on the 1st of December, 1897, described in certain particulars of sale and subject to the conditions attached to such particulars. Lot 1, being the property in question, was described in the particulars of sale as "eligible freehold property for investment, comprising brick-built corner house and shop," and was stated to contain (*inter alia*) "on the ground floor double-fronted shop," and to be "let on a quarterly tenancy under agreement dated the 20th of July, 1895, at a rent of £55 per annum," as was the fact. This agreement contained a covenant by the tenant not to keep the house as a disorderly house, and a power of immediate re-entry on breach of any of the covenants.

The defendant bought lot 1 at the auction, and paid a deposit, and signed a memorandum in the usual way. By the fourth condition of sale each lot was sold subject to the existing tenancies, and by the third condition of sale, after stating that counterparts or copies of the leases or agreements of tenancy might be inspected for five days prior to the sale, it was provided that each purchaser should be deemed to purchase with notice of and to take subject to the terms of all tenancies and the state of the property, notwithstanding any partial or incomplete statement in the particulars. The purchase was to be completed on the 8th of February, 1898, at the office of the vendors' solicitors. It appeared that the premises prior to and at the date of sale were used as a coffee tavern.

On the 20th of December, 1897, the defendant's solicitors sent a letter with their requisitions on title suggesting that the house was used for an immoral purpose, and that the defendant might therefore refuse performance of the contract. The plaintiffs denied knowledge of any such user as was alleged by the defendant. On the day fixed for completion the defendant's solicitors wrote that he had determined not to purchase owing to the alleged immoral user of the premises. The writ in the above action was thereupon issued. The defendant counterclaimed for rescission of the contract and return of his deposit.

Astbury, Q.C., and *Yardley*, for the plaintiffs, stated the contract.

Eve, Q.C., and *Tomlin*, for the defendant.—Since the contract the defendant has ascertained that the tenant was convicted at a police court in January, 1897, of keeping the premises as a disorderly house, and the court ought not to force the contract on the purchasers. [*Astbury, Q.C.*, referred to *Lucas* v. *James*, 7 Hare 410, at p. 418.] The *dictum* in that case is wrong. Beside it does not apply here. The property not being an eligible investment, as both sides thought at the sale, the case is one of mutual mistake, and not of a mere defect in the property. *Durham* (*Earl*) v. *Legard* 13 W. R. 959, 34 Beav. 611, shows that this entitles the purchaser to rescind. The case would be one of such hardship that equity would not enforce the contract: *Wedgwood* v. *Adams*, 6 Beav. 600, at p. 604, approved in *Falcke* v. *Gray*, 7 W. R. 535, 4 Drew. 651, 659. The purchaser will be placed under a criminal liability by the Criminal Law Amendment Act, 1885, s. 13 (3)—*Gully* v. *Smith*, 12 Q. B. D., 121, 32 W. R. Dig. 88—unless he turns the tenant out. *Clay* v. *Yates*, 4 W. R. 557, 1 H. & N. 73, shows that where by reason of circumstances unknown at the date of this contract a party might be involved in an illegal act, he is not bound.

No reply was called for.

COZENS-HARDY, J., after reading the description in the particulars of sale, continued: Now, every word of that description is true. This case has been argued on the assumption, and I shall assume, but, of course, for the purpose of this case only, that at and some time before the date of the contract the house was used as a disorderly house, and that the tenant was convicted at the police-court of keeping the house as a disorderly house. It is not contended that the vendors knew this at the time of the sale, it was in fact admitted by the purchaser that the plaintiffs were as ignorant of the circumstances as the purchaser. But it is said: First, that this circumstance is a ground for rescinding the contract; and secondly, if that is not so, that specific performance should be refused. There has, it is said, been a mutual mistake, and the contract ought therefore to be rescinded; and, again, there would be such hardship in enforcing the contract that at any rate specific performance ought not to be enforced. In my opinion all these contentions fail. At an early period of the case the attention of counsel was called to a passage in *Lucas* v. *James*, 7 Hare 410, at p. 418. The contract there was for the sale of a house in which the defendant intended to reside, and which proved not to be suitable for a residence for his family. Wigram, V.C., there stated it as settled law "that if the vendor, at the time of the contract, does not know of the existing defect in the estate, the court will enforce the contract." It is true that in that case the nuisance was in the adjoining houses, but the Vice-Chancellor treated the law as perfectly

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

settled in the case where the nuisance existed without the knowledge of both parties in the house itself the subject of the contract. I cannot treat the matter on the footing that there was a mutual mistake in regard to the subject-matter of the contract. It is not unimportant to observe that the property is described to be and is let on a quarterly tenancy, and the tenant can be turned out at once. There is, then, no ground for rescission. Is there any ground for refusing specific perform ance? A strong and clear case is required for that purpose. That the defendant as an honourable and respectable man may have to turn out the tenant at once is not sufficient to constitute such a case. The plaintiff therefore succeeds on the claim and the defendant fails on his counterclaim.

Judgment for the plaintiffs.

Solicitors, *Shoubridge & May; Attree, Johnson, & Ward.*

Chan. Div. }
Wright, J. } Jan. 24.

In re MERCHANTS FIRE OFFICE. (*a.*)

Company — Winding up — Private examination under section 115 *of the Companies Act,* 1862—*Subsequent proceedings—Interrogatories—Right to inspect depositions—Companies Act,* 1862 (25 *&* 26 *Vict. c.* 89), *s.* 115—*Companies (Winding-up) Rules, November,* 1895.

A witness is not now entitled as of right to see the depositions of his examination under section 115 *of the Companies Act,* 1862, *but must obtain the leave of the court to do so; and even if the court considers that the witness ought to be allowed to see his depositions, it does not follow that such leave will be granted to him at any moment which he may choose, but the court will consider the circumstances of each case.*

This was a summons by Mr. Duncan Davidson, one of the directors of the company, for leave to inspect and take an office copy of the depositions taken in December, 1897, at his private examination, under section 115 of the Companies Act, 1862, before having to answer interrogatories which had been administered to him in an action commenced by the liquidator of the company against Davidson and his co-directors for alleged misfeasances. The directors had put in separate defences.

By rule 11 of the Companies (Winding-up) Rules, 1892, all "depositions . . . and other proceeding of the High Court in a winding-up matter" were to be kept on the file, and were, by rule 32, open to the inspection of anyone who had been a director of the company, who might also take an office copy of them at the same time.

The Companies (Winding-up) Rules, November, 1895, however, by rule 1, order that "the notes of the depositions of a person examined under section 115 of the Companies Act, 1862, shall not be placed on the file of proceedings or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the court shall so direct, and the court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies of or of extracts therefrom."

W. F. Hamilton, for the applicant.—It was held *In re Standard Gold Mining Co.,* 44 W. R. 63, [1895] 2 Ch. 545, that the rule of 1862 gave an absolute right to inspect the depositions made under section 115 of the Companies Act, 1862, but the rule of November, 1895, took away the absolute right but gave the court a discretionary power. The application should be granted. In *Ex parte Pratt,* 31 W. R. 189, 21 Ch. D. 439, the Court of Appeal granted leave in a bankruptcy case, and *In re Beall,* [1894] 2 Q. B. 135, it was held that the bankrupt had the right under rule 12 of the Bankruptcy Act, 1886, to inspect depositions taken at a private examination. Here it is only fair that the applicant should have an opportunity of inspecting the deposition of an examination made more than a year ago. Both sides should have an equal opportunity of inspecting the deposition.

Daniel Jones, for the liquidator.—The rule of 1895 has restored the old practice, and in place of an absolute right to inspect has given the court a discretionary power. In this case it is most important that the applicant should not see his deposition, as his co-directors could also see it and so concert their answers to interrogatories.

Hamilton, in reply.—We will give you an undertaking not to reveal the deposition to the other defendants.

WRIGHT, J.—This is a case of considerable importance. Since rule 1 of November, 1895, it seems to me that, generally speaking, depositions taken under section 115 of the Companies Act, 1862, ought to be treated as private and ought not to be shown without some clear reason being given for it. I think the cases would be few in which it would be right to allow anyone to inspect the depositions generally. A separate case ought to be made for the inspection of each deposition, although, of course, the same reason might be sufficient in the case of two or more depositions. Here there is only one application, which is by Mr. Davidson for liberty to see his own deposition. The reason is that an action has been brought against him and the other directors, in which an order has been made that he should answer certain interrogatories, and before doing so, he is naturally desirous of knowing precisely what he said at his private examination. The examination was taken more than a year ago and related to matters which occurred at a still earlier date, and on the occasion of his examination he had no opportunity of making any note or taking a copy of what he said. In fact he would not, I presume, have been allowed to do so if he had wished. It is obvious that *prima facie* he ought to be allowed to see what he said. That was the view taken in 1882 in *Ex parte Pratt* by Sir George Jessel and Brett and Cotton, L.JJ., and in 1895 by Vaughan Williams, J., in *In re Standard Gold Mining Co.* I should have thought that, if that were all, it would be almost a matter of course to allow the applicant to see his deposition. I confess, however, that I was rather impressed with the argument on the other side. Of course it does not follow that because he is entitled to see his deposition he ought to be allowed to do so at any moment he may choose. And here it is said in substance that he ought not to be allowed to see his deposition until after he has put in his answers to the interrogatories. If he had not put in a defence, or had put in what might be called a blank defence to be filled up afterwards, I should be inclined to hold that the liberty to inspect ought to be postponed. But here the applicant has put in a defence to the action which does not appear in any way to be a blank defence, and in the circumstances he says that he is now entitled to see his deposition. Then comes the further objection from the liquidator that the

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

action has been brought against a number of directors, each of whom has put in a separate defence and been interrogated, and each of whom had previously been examined separately; that each of them is, therefore, very much in the dark as to what the others have said; and that there is more chance of the truth being arrived at and any falsehood detected if each of them has to answer the interrogatories before he sees what the others have said in their depositions. I feel there is very great force in that argument. In certain states of fact I am not sure that such an objection ought not to prevail, but I do not think that *primâ facie* it ought to do so, and I do not think it ought to prevail in the present case. If the applicant is *primâ facie* entitled to inspect his deposition, I do not think that the mere fact that he is charged with something in an action against himself and other persons ought to deprive him of his *primâ facie* right of inspection unless I can find a conspiracy to misrepresent the facts of the case. I do not see anything of the sort here, and I think I should be acting with too much suspicion if I held that none of the defendants should see the depositions until all had answered the interrogatories. I think, therefore, that the applicant must be allowed to see his own deposition. As the applicant has offered to give an undertaking to use his best endeavours to prevent the communication of the deposition to any other defendants or their solicitors or counsel, I think the undertaking may be accepted. The liquidator must pay the applicant's costs, and may retain the amount and his own costs out of the company's assets.

Solicitors for applicant, *Arnold Williams & Co.*

Solicitors for liquidator, *Murray, Hutchins, Stirling, & Murray.*

Privy Council.

(*From the Supreme Court of New South Wales.*)

Feb. 25.

NORTH SYDNEY INVESTMENT AND TRAMWAY CO. v. HIGGINS AND OTHERS. (*a.*)

Company—Shares—Contract—Paid-up shares—Payment—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.

The adoption and confirmation by directors of a contract made before the formation of a company by persons purporting to act on behalf of the company does not create any contractual relation between the company and the other party to the contract.

Where a sum is payable by a shareholder in cash to a company it is sufficient to satisfy the requirements of the 25th section of the Companies Act, 1867, *if the company agrees with the shareholder to accept, as a set-off and discharge, a like sum then payable by the company to the shareholder.*

Spargo's case, 21 *W. R.* 306, *L. R.* 8 *Ch. App.* 407, *approved.*

Larocque *v.* Beauchemin, 45 *W. R.* 639, [1897] *A. C.* 358, *followed.*

The facts are stated at length in their lordships' judgment.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Cozens-Hardy, Q.C., Grosvenor Woods, Q.C., and *Christopher James,* for the appellant.

A. T. Lawrence, Q.C., Compton-Smith, and *B. A. Hall,* for some of the respondents.

Swinfen Eady, Q.C., and *A. R. Kerly,* for other respondents.

The judgment of their lordships (Lords MORRIS and DAVEY and Sir RICHARD COUCH) was delivered by

Lord DAVEY.—This is an appeal by the officia liquidator of the North Sydney Investment and Tramway Co. (Limited) (now in liquidation) from an order of the Supreme Court of New South Wales in Equity made on the 8th of November, 1895, dismissing an application by the liquidator by way of summons that a call of £66 13s. 4d. be made on the contributories of the company. The real question involved is whether certain shares in the company held by and registered in the names of the respondents respectively had or had not been paid for in cash within the meaning of section 57 of the Companies Act of the Colony, which is substantially in the same terms as section 25 of the Imperial Companies Act, 1867.

The facts on which the answer to this question depends are somewhat complicated but are not in dispute.

By contracts made in March and April, 1888, one Charles Arthur Moresby Billyard contracted for the purchase of a tract of land in North Sydney. The aggregate purchase-money was £134,000, and of this amount it was agreed that £35,000 should be satisfied by partly paid-up shares of a company to be formed to work and acquire the property. Billyard's object was to sell the property to such a company at an enhanced price, and his ideas as to the profit obtainable seem to have grown from time to time as matters proceeded.

Shortly afterwards a prospectus was issued of a syndicate which has been called in the argument Syndicate No. 1. It is entitled "Syndicate prospectus of the North Sydney Investment Co. (Limited), capital £300,000, in sixty shares of £5,000 each, payable one-third in cash one-third months" (the words "in three" are accidentally omitted) "interest six per cent added. The balance is not likely to be required. Two and a-half per cent. upon the subscribed capital will be charged to cover all preliminary expenses in connection with the syndicate. Provisional directors, C. A. M. Billyard, J. W. Cliff, Alick Osborne." The prospectus then states that the syndicate is formed for the purpose of acquiring the lands described, being those comprised in Billyard's contracts, and after stating the character and advantages of the property and other details not material for the present purpose concludes thus: "The terms of purchase are as follows: Total purchase-money, £300,000, payable one-third in cash, one-third by promissory note at three months, with six per cent. added, balance can remain for three years at the lowest bank rate of interest if required, and the owner will join in the conveyance of any portion sold. Immediately the full number of shares has been subscribed it is proposed to place the property in the English market and it is thought that with the names associated and the soundness of the undertaking there will be no difficulty whatever in disposing of the property at a sum decidedly not less than half-a-million."

This syndicate was not registered as a joint-stock company with limited liability. The whole of the shares were subscribed by various persons, including

Higgins and Hogan, two of the respondents, who paid in cash one-third of the amount of three shares, and gave promissory notes for another third with 6 per cent. interest added. The receipt given to the respondent Higgins is headed "North Sydney Investment Co. (Limited)," and the sum of £1,666 13s. 4d. is thereby stated to have been paid as a deposit on one share in the above company—*i.e.*, in the company to be registered with limited liability. The promoter determined to change the name of the intended company and to increase the nominal capital and the amount of the purchase-money. Accordingly he shortly afterwards issued another prospectus of what has been called Syndicate No. 2. This document is in the following terms: "Syndicate prospectus of the North Sydney Investment and Tramway Co. (Limited), to be registered under the Companies Statute, 1871. Capital, £500,000 in 100 shares of £5,000 each, one-third payable in cash, one-third in three months, interest six per cent. added; the balance is not likely to be required. Two and a-half per cent. upon the subscribed capital will be charged to cover all preliminary expenses in connection with the syndicate." The names of the provisional directors and description and particulars of the property and the terms of purchase (substituting £500,000 for £300,000) are then set forth as in the former prospectus. It then states: "The contract with the vendors and the memorandum and articles of association may be inspected at the office of the solicitor to the company." Attached to the second prospectus was a form of receipt. The form filled up and given to the respondent Allcock was as follows:

"Received the sum of ten thousand pounds, being first and second payments (latter with interest deducted) for three shares in within syndicate as per prospectus. This receipt to be returned upon receipt of share certificate in limited company from Jas. Service & Co. (Signed) J. Woolf, solicitor for the Melbourne portion of the syndicate and (by his request) for the vendor."

No doubt the arrangements for obtaining the share capital of the company were not made so carefully or skilfully with a view to the exigencies of the law as they might have been. But on a careful consideration of the language of these documents their lordships come to the conclusion that both prospectuses were and were intended to be an invitation to subscribe for shares in a joint-stock company then about to be registered with limited liability, the memorandum and articles of association of which were offered for inspection in the second prospectus with a view to the purchase by that company of the property in question, and that consequently the money paid by the subscribers on the terms of the prospectuses was intended to be applied in payment up of shares in the company when formed, and further, that the promoter who issued the prospectuses and received the money of the subscribers was bound so to apply the amounts paid by them and to procure share certificates to be issued to the several subscribers in exchange for the receipts held by them. The subscribers on the first prospectus might have raised, and (as will presently appear) did raise questions as to their position under the second prospectus, but (as will also appear) they accepted the position of shareholders in the company and for valuable consideration waived any such questions.

A contract purporting to bear date the 26th of March, 1888, was made between one John William Cliff, described as the vendor, and certain persons described as "trustees for the company hereinafter mentioned," whereby after reciting that a company with limited liability was about to be formed having for its objects, amongst other things, the purchase of the lands in the schedule (being those purchased by Billyard) under the name of the "North Sydney Investment and Tramway Co. (Limited)," it was agreed that the vendors should sell and the company should purchase the lands in question for £512,500, to be paid as follows—viz., £171,100 in cash on the signing of the agreement, a further sum of £171,000 at three months from the date of this agreement with interest at 6 per cent. per annum, and the remaining sum of £170,500 to remain on security of the property with interest at the same rate. Cliff (who was named as one of the provisional directors in both prospectuses) was admittedly the nominee and agent of Billyard, the vendor and promoter. The addition of £12,500 to the purchase-money obviously represents the 2½ per cent. charged for the expenses of the syndicate. Mr. Cozens-Hardy contended that the contract was not executed until after the date which it purports to bear. This may very likely be so, but in the view which their lordships take the point is immaterial.

On the 5th of May, 1888, the North Sydney Investment and Tramway Co. (Limited) was registered with the object (amongst other things) of adopting and carrying into effect the contract dated the 26th of March, 1888, and with a capital of £1,000,000 divided into 200 shares of £5,000.

The first meeting of the directors of the company was held on the 22nd of May, 1888. The secretary placed before the meeting a document signed by Cliff which is of the greatest importance. This document is in the following terms:

"North Sydney Investment and Tramway Co. (Limited). I, John William Cliff, the vendor in contract dated the 26th day of March, 1888, hereby acknowledge to have received from each of the following shareholders in this company the respective sums of ( ) amounting in all to £333,333 6s. 8d." Then follows a schedule of the subscribers to the syndicate (including the present respondents) in alphabetical order with denoting numbers against their several names of their shares, amounting in all to 100 shares, and showing the number of shares subscribed for by each of them.

The minutes of the directors' meeting record that "The secretary reported the present position of the company and exhibited the vendor's receipt to the shareholders for the sum of £3,333 6s. 8d. per share, making in all a payment of £333,333 6s. 8d., which was accepted by the board and initialled by the chairman." The contract of the 26th of March, 1888, was then "adopted and confirmed." Two directors and the secretary were directed to sign "the share certificates," and an appointment was made for their so doing on the following day, also for the affixing of the company's seal thereto. And the secretary was directed before issuing the share certificates to obtain from each shareholder his syndicate receipt and also to obtain his signature to the articles of association. But no allotment was made by the directors in express terms of any shares in the company.

The secretary proceeded to act on these resolutions. All the respondents received in exchange for their syndicate receipts certificates of the corresponding shares in the company which were certified as paid up to the amount of £3,333 6s. 8d. per share. And the names of the respondents were severally entered in the register as holders of their shares (described as allotted on the 22nd of May) with that amount paid. The acceptance by the respondents of the shares removes any difficulty as to Cliff's authority to apply for shares in their names or in consequence of the increase of the nominal capital to £1,000,000, or as to the directors'

authority to allot them. Their lordships are disposed to think that Cliff had an implied authority to apply for shares in the names of the subscribers, but it is not necessary to decide the point.

In October, 1888, each of the shares of £5,000 was subdivided into fifty shares of £100 each with £66 13s. 4d. per share paid thereon. Calls to the amount of £16 and £17 6s. 8d. have been paid before and since the liquidation, and the demand of the liquidator is therefore for the sum originally credited on the shares, which he contends has not been paid in cash as required by the statute.

The learned judge in the court below has on these facts decided in favour of the respondents, holding, 1st, that by the directors adopting and confirming the contract of the 26th of March the company made it their own contract; 2nd, that the acceptance by the company of Cliff's receipt amounted to an acknowledgment that the money had been paid to the company in cash; 3rd, that there was on the 22nd of May a present debt due to the company, and also a present debt due by the company which could be set off one against the other in such a way as to support a plea of payment in law. For the reasons presently stated their lordships do not differ from the conclusion of the learned judge although they cannot assent to the grounds of his judgment. Their lordships do not think that the adoption and confirmation by directors of a contract made before the formation of the company by persons purporting to act on behalf of the company creates any contractual relation whatever between the company and the other party to the contract or imposes any obligation whatever on the company towards that party. They think the proposition maintained by the learned judge is opposed both to principle and authority, and that the judgment in the case of *In re Johannesburg Hotel Co.*, 39 W. R. 260, [1891] 1 Ch. 119, referred to by the learned judge is to the contrary effect. Nor can their lordships hold that the acceptance by the directors of Cliff's receipt was an acknowledgment of payment of cash, and even if it were, the question under the statute is whether cash has been paid, not whether a receipt has been given or payment has been acknowledged.

The inaccuracy of Cliff's document and the irregularity of the directors' proceedings are patent. Cliff had not received the money of the subscribers as vendor to the company, but he or his principal, Billyard (the promoter), had received it on the terms of the prospectus—*i.e.* (as their lordships have already said) for the purposes of the subscribers becoming shareholders of a company which should acquire the property, and obtaining for the shareholders share certificates in exchange for their syndicate receipts. Nor could Cliff retain the subscribers' money in part payment of the purchase-money payable by the company (if they should purchase) because it was not the company's money, and would not become so until the shares were allotted and the money paid or properly credited to the company in payment up of the shares. Looking at the facts by the light of the previous documents and dealings and the relation of the parties to each other, their lordships think that Cliff's document was in substance and effect an application for and on behalf of the persons named in the schedule for shares, and that the directors acted upon and accepted that application by putting the names of those persons on the register and giving them notice they had done so, which superseded the necessity for any formal allotment. Their lordships also think that Cliff's document was an acknowledgment that he had received £333,333 6s. 8d. from the subscribers appropriated to the payment up of their shares in the company, but he was wrong in stating that he had received that sum as vendor or in claiming to retain it as part of his purchase-money as against the company who had not at that time entered into any contract with him or his principal, Billyard. Their lordships do not think that in these circumstances Cliff's acknowledgment of having received the £333,333 6s. 8d. amounted to payment in cash to the company, and consequently the directors were wrong in crediting the shareholders with the payment of that amount on their shares as on the 22nd of May. But their doing so was evidence of the amount to be paid on the shares on allotment.

However, on the 29th of September, 1888, the property was conveyed to the company by four documents of that date. The purchase-money of £512,500 was paid and discharged by the appropriation and retainer of £333,333 6s. 8d. in Cliff's hands and two mortgages dated the 1st of October, 1888, and the 22nd of October, 1888, made by the company to Billyard and Cliff for £149,166 13s. 4d. and £30,000, making together £179,166 13s. 4d. The two sums of £333,333 6s. 8d. and £179,166 13s. 4d. make together £512,500. In other words the company gave credit to Cliff and his principal Billyard for the £333,333 6s. 8d. in Cliff's or Billyard's hands specifically appropriated to the payment up of the subscribers' shares in the company, and got credit for that amount of the purchase-money. Their lordships think that this transaction was a payment in cash on the subscribers' shares on that date, which would satisfy the statute in accordance with the decisions of the English courts in *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. App. 407, and *Ferrao's case*, 22 W. R. 386, L. R. 9 Ch. App. 355, and the decision of this board in *Larocque* v. *Beauchemin*, 45 W. R. 639, [1897] A. C. 358. There was a sum payable by Cliff to the company for the specific purpose of paying up the shares, and there was a like sum payable to the vendor for purchase-money, and it was not necessary that the parties should go through the form of handing the money over and receiving it back, or giving cross cheques. It is sufficient if the shareholders can show that their shares are paid up to the extent of the money in Cliff's hands although the payment was not made at the time or in the manner erroneously imputed by the directors.

One other point which was made by counsel should be mentioned. It appears that in the year 1889 certain of the subscribers on the terms of the prospectus of Syndicate No. 1, including the respondents Higgins and Hogan, claimed to participate in the enhanced price obtained by Billyard above £300,000. This claim was compromised by the payment of a sum of money and the transfer of certain shares in the company by Billyard to the objecting shareholders. A release was executed in which the members of the syndicate in some respects treated themselves as vendors to the company. Mr. Cozens-Hardy argued that this document was evidence of the true position of the parties and that they were precluded by it from saying that the moneys paid by them were paid as a deposit on the shares in the company to be registered. The release, however, was certainly not an estoppel as between the respondents parties to it and the liquidator, and their lordships do not think that they are precluded by the form of the release from showing the terms upon which they really paid their money as appearing from the receipts given and the other documents. The compromise was subsequent to the completion of the purchase and the payment up of the shares, and was in truth *res inter alios acta*.

Their lordships will therefore humbly advise Her

Majesty that the appeal must be dismissed. The appellants must pay the costs of it, but there will be only one set of costs between all the respondents.

Solicitors for the appellant, *Kimbers & Boatman.*

Solicitors for the respondents, *H. A. Graham; Blyth, Dutton, Hartley, & Blyth.*

Court of Appeal.

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) April 29.

JONES v. OCEAN COAL CO. (LIMITED). (a.)

Master and servant — Employer's liability — Accident to workman—Amount of compensation — "Average weekly earnings" — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., cl.* 1 (b).

By Schedule I., clause 1 (b), *of the Workmen's Compensation Act,* 1897, *the compensation under the Act shall be,* "(b) *where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding* 50 *per cent. of his average weekly earnings during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.*"

A workman was injured by an accident arising out of and in the course of his employment. During the year preceding the accident the workman went out on strike, and his employment was thereupon terminated. After the strike was over he went back into the employment of the same employer under a new contract of employment, and remained there until the accident happened.

Held, that, in ascertaining the average weekly earnings for the purpose of assessing compensation, inasmuch as the employment before the strike was terminated, the period of employment subsequent to the strike could alone be considered.

Appeal from the award of the judge of the Merthyr Tydvil County Court upon proceedings to assess compensation under the Workmen's Compensation Act, 1897.

The appellant, Thomas Jones, was a workman in the employment of the respondents, the Ocean Coal Co. (Limited), on the date of the accident, the 3rd of October, 1898. The appellant had for some months prior to the 1st of April, 1898, including the month of October, 1897, worked for the respondents under an agreement of the 1st of January, 1892. This agreement was terminated by six months' notice given by the men under a clause to that effect in the agreement, and the individual contracts between the employers and workmen were terminated by notice given by the employers under another clause in the agreement, which notice expired on the 31st of March, 1898. The South Wales strike or lock-out then intervened, and lasted from the 1st of April, 1898, to the 5th of September, 1898. The appellant resumed employment with the respondents on the 12th of September, 1898, under a new contract containing new terms, and signed the contract book. The appellant having been injured by an accident on the 3rd of October, 1898, arising out of and in the course of his employment, the respondents contended that in order to ascertain the appellant's average weekly earnings the two periods of employment before and after the strike during the twelve months preceding the accident must be taken together, upon which basis the award would be 8s. 6d. a week. The appellant contended that the period from the 12th of September, 1898, to the date of the accident should be taken, upon which basis the award would be 15s. 9d. a week.

The county court judge adopted the respondents' contention, and assessed the compensation at 8s. 6d. a week.

Cripps, Q.C., and *W. D. Benson,* for the appellant.—Schedule I., clause 1 (*b*), contemplates continuous employment. The word "period" is in the singular, and the twelve months' period means a period of twelve months' continuous or consecutive employment, and the less period also means a period of continuous or consecutive employment. In the present case the employment before the strike was terminated, and a new employment on new terms began after the strike. The appellant might have got employment elsewhere, and need not have returned to the respondents' employment. It was not a mere break in the employment caused by the workman taking a holiday, as in *Keast* v. *Barrow Hematite Co.*, 15 Times L. R. 141. The average weekly earnings must therefore be taken during the period from the 12th of September to the 3rd of October, 1898.

They also referred to *Price* v. *Marsden & Sons*, ante p. 274, [1899] 1 Q. B. 493.

Ruegg, Q.C., and *Arthur Lewis,* for the respondents.—If the employment has been with the same employer during the twelve months preceding the accident though the workman may have ceased to work during part of that period, the number of weeks during which he has been at work during that period must be the factor for arriving at the average weekly earnings. The average weekly earnings are not to be calculated upon a small period of exceptional earnings. The appellant here always intended to resume employment with the respondents when the strike was over and was not engaged during the strike in any other employment. The county court judge was therefore right.

A. L. SMITH, L.J.—This case raises a short point upon Schedule I., clause 1 (*b*), of the Workmen's Compensation Act, 1897. Prior to the 1st of April, 1898, the appellant was in the employment of the respondents under the terms of an agreement of the 1st of January, 1892. The county court judge has found as a fact that this agreement was terminated by six months' notice given by the men, and the individual contracts between the employers and workmen were terminated by notice given by the employers, which notice expired on the 31st of March, 1898. In face of that finding we cannot hold that there was a continuous employment from the 3rd of October, 1897, to the 3rd of October, 1898. When the men went out on strike, the appellant and the other men need not have come back to the same employers again, but might have got other employment. The employment was therefore terminated on the 31st of March, 1898, and the appellant remained out on strike until the 5th of September, 1898, and on the 12th of September was taken back again into the respondents' employment under a new contract containing new terms. The accident happened on the 3rd of October following. The amount of compensa-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tion payable depends upon Schedule I., clause 1 (b). In my judgment, "during the previous twelve months" means a continuous employment during that period. So also with regard to the other limb of the clause, "for any less period during which he has been in the employment of the same employer," the employment must be continuous. The appellant has not been in the employment of the respondents continuously from the 3rd of October, 1897, to the 3rd of October, 1898, but only from the 12th of September to the 3rd of October, 1898, and this latter is the period over which the average weekly earnings are to be taken. The appeal must, therefore, be allowed, and the award must be amended by inserting 15s. 9d. for 8s. 6d.

VAUGHAN WILLIAMS, L.J.—I agree. The facts of this case make the case easy of decision. I do not know whether, in what I am going to say upon the general construction of the enactment, I may or may not take a view somewhat different from that of my brother A. L. Smith. It seems to me to be a difficult Act to construe, and as I have not until the present sittings been called upon to construe the Act, and as my brother has been a party to all the decisions upon it from the beginning, I should be sorry to differ from him, more especially as I should regret if there were any breach in the continuity of those decisions. I should like first of all to say a few words upon the facts as I understand them. The appellant was employed at the commencement of the strike under an agreement of the 1st of January, 1892, which, as I understand it, contained the general terms of the contract agreed upon between the masters and men, such as the rate of wages, and that agreement could be put an end to by a six months' notice. I do not, however, understand that the agreement of the 1st of January, 1892, governed the actual employment, which was a weekly or a monthly employment. The effect of giving the six months' notice was that the agreement came to an end, but I do not understand that a six months' notice was necessary to determine the employment of the individual workmen. Now, upon the facts before us there was a period during the twelve months preceding the date of the accident when the appellant did not choose—to my mind it is immaterial whether it arose from a strike or from some other cause—to work for the respondents. After that period was over the appellant came back and again entered into the respondents' employment under a new contract, and a few weeks afterwards the accident happened. The question before us is whether the average weekly earnings are to be calculated during the period of employment subsequent to the 12th of September, 1898, or whether the two periods of employment during the previous twelve months before and after the strike are to be taken together so as to arrive at the average weekly earnings. We have arrived at the conclusion that the last period of employment from the 12th of September to the date of the accident is to be treated as the period during which the average weekly earnings are to be ascertained.

I proceed now to state the reasons which have induced me to arrive at that conclusion. I understand Schedule I., clause 1 (b), to mean that, whether one is dealing with a period of twelve months or a less period, in either case the employment must be a continuous employment with the same employer. The employment, however, need not, in my opinion, be a continuous employment without any break in point of time. In nearly every employment there must be some break in time. The question is whether the relation of master and servant substantially existed during the whole period, whether the period be twelve months or less. If the state of work were such that the master could only give three days' employment in each week to his men, it would still be true to say that the employment was continuous during the period because the relation of master and servant existed during the whole time. The question is whether there has been any break in that relation. To answer that question, one must test it thus: Are the facts such that if called upon the workman is willing to work, and if the workman asks for work the employer, if he has it to give, is willing to give it. If there is a time during which that cannot be affirmed, the relation of master and servant has not during that time existed. The relation will in such a case have been broken. The present does not seem to me a case where for a time there was no work for the men to do, but during a certain time the relation of master and servant ceased, because the employers were not willing to employ the men and the men were not willing to work. The conclusion, therefore, at which I have arrived is that in ascertaining the appellant's average weekly earnings only that period of employment subsequent to the strike can be taken into consideration, because when the strike commenced the relation of master and servant came to an end.

ROMER, L.J.—I agree with the view expressed by A. L. Smith, L.J., with regard to the construction of clause 1 (b) of Schedule I. I will first take that part of the clause which deals with the period of twelve months, if the workman has been so long employed. It seems to me to be reasonably clear that the employment therein referred to means a substantially consecutive or continuous employment—that is to say, the workman must have been in a substantial sense in the employment of the same employer for the period of twelve months. For instance, if at the commencement of the twelve months the workman had worked for a time for an employer, and had then gone for a time into the employment of another employer, and had towards the end of the period returned to his former employer, the employment could not be said to have been continuous during the twelve months. Now I come to the second part of the clause, which deals with employment for any less period during which the workman has been in the employment of the same employer. In my opinion that also means a period during which the workman has been substantially in the continuous employment of the same employer up to the time of the accident. The word "period" is used in the singular. One is not to go back to a former period of employment which has been put an end to and add it to the period of employment immediately preceding the accident. This second part of the clause means that if the workman has not been in substantially the same consecutive employment for the twelve months preceding the accident, then the average weekly earnings must be calculated upon the period less than twelve months during which he has been in substantially the same consecutive employment. I think that the word "substantially" is important. I agree with my brother Vaughan Williams in regard to that. If, for instance, holidays intervened, the employment would not thereby cease to be substantially consecutive. If, again, the workman could not for some time get work from his employer on account of the slackness of trade, though willing to work, I should not let that circumstance weigh with me in deciding whether the employment was or was not consecutive. In the present case, during the strike the appellant was in no sense in the employment of the respondents.

Appeal allowed.

Solicitors for the appellant, *Riddell, Vaizey, & Smith*, for *Walter Morgan, Bruce, & Co.*, Pontypridd.

Solicitors for the respondents, *W. & L. Simons*, Pontypridd.

Appeal.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) April 22.

HALL v. SNOWDON, HUBBARD, & CO. (No. 2). (a.)

Master and servant—Employers' liability—Accidental injuries—Factory—Wharf—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2—*Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *s.* 68—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *ss.* 18, 23.

A workman was killed by an accident which happened in a public street just outside his employers' wharf, while he was leading a horse and cart out of the wharf in the course of his employment. The wharf was a simple yard by the side of a canal, and no machinery of any kind was used on it.

Held, that the wharf was not a factory within the meaning of the Workmen's Compensation Act, 1897, *for it did not come within the definition of "factory" in section* 7, *sub-section* 2, *as being a wharf to which any provision of the Factory Acts was applied by the Factory Act*, 1895.

The provisions of section 18 *of the Factory Act*, 1895, *with respect to accidents were not applied to it by section* 23 *of that Act, for no accident had occurred on the wharf; neither were the provisions of section* 68 *of the Factory Act*, 1878, *with respect to the powers of inspectors thereby applied to it.*

Appeal from the decision of the judge of the Bloomsbury County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was the sole dependant of Charles Hall, who had met with his death in consequence of accidental injuries while in the employment of Snowden, Hubbard, & Co. The employers were contractors, and were the occupiers of a wharf called Platt's Wharf abutting on the Regent's Canal, which they used for the purpose of loading liquid mud and road sweepings into barges lying in the canal. The wharf was simply a yard, and no machinery of any kind was used on it. Access to the wharf was obtained from the King's-road through a gateway. Opposite the gateway on the other side of the King's-road was one of the entrances to the St. Pancras Electric Lighting Station. At the time of the accident another firm of contractors, Read Brothers, were engaged in laying down water pipes between the canal and the electric lighting station, and these pipes passed through the gateway and across the wharf.

Snowden, Hubbard, & Co. had entered into a contract with Read Brothers to remove the loose earth which was dug up in the course of making the trench in which the pipes were laid. The deceased, who was a carter, was engaged in the work of removing this earth. He had loaded one of his employers' carts with earth on the wharf, and was leading the horse and cart through the gateway into the King's-road, and was himself walking backwards. A trolly laden with water pipes was standing in the road, but the deceased, not observing this, continued walking backwards and came against the pipes, and was crushed and killed.

The county court judge held that the accident arose out of and in the course of the employment of the deceased, but that Platt's Wharf was not a factory within the meaning of the Workmen's Compensation Act. He accordingly decided that the applicant was not entitled to compensation.

The applicant appealed.

C. A. Cripps, Q.C., and *Bailhache*, for the appellant.—This wharf is a factory within the meaning of the Act. By section 7, sub-section 2, "In this Act 'factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." This leads us back to section 23, sub-section 1, of the Factory and Workshop Act, 1895, which enacts as follows: "The following provisions, namely: (i.) Section eighty-two of the principal Act; (ii.) the provisions of the Factory Acts with respect to accidents; (iii.) section sixty-eight of the principal Act with respect to the powers of inspectors; (iv.) sections eight to twelve of the Act of 1891 with respect to special rules for dangerous employments; and (v.) the provisions of this Act with respect to the power to make orders as to dangerous machines shall have effect as if—(a) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . were included in the word factory." The provisions contained in sub-headings (i.), (iv.), and (v.) would not apply to any wharf on which there was no machinery and on which no dangerous employment was carried on. But the provisions contained in sub-headings (ii.) and (iii.) are just as applicable to an ordinary wharf as to a wharf to which dangerous machinery is attached. This wharf, therefore, is a wharf to which some of the provisions of the Factory Acts are applied by section 23 of the Act of 1895, and it is consequently a factory within the meaning of the Workmen's Compensation Act. Secondly, on the true construction of section 7, sub-section 2, the words "to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895," refer only to "machinery or plant," and the words "any dock" include every dock.

Bray, Q.C., and *Herbert Smith*, for the respondent.—This wharf is not a factory within the meaning of the Act. Section 7, sub-section 2, does not make "factory" include every wharf, but only certain wharves—viz., any wharf to which any provision of the Factory Act is applied by the Factory Act, 1895. It is said that by section 23 of the Factory Act, 1895, the provisions of the Factory Acts with respect to accidents are made to apply to every wharf. The provisions with respect to accidents are now to be found in section 18 of the Act of 1895, and that section only deals with the case of an accident occurring "in a factory or workshop;" it does not extend to the case of an accident occurring in or about a factory or workshop. In this case the accident did not happen on the wharf, but just outside the wharf. Therefore it cannot be said that this is a wharf to which the provisions of the Factory Act with respect to accidents are applied. Neither is section 68 of the principal Act with respect to the powers of inspectors applicable to this wharf. It is absurd to suppose that an inspector could enter and examine this wharf under that section.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

A. L. SMITH, L.J.—The county court judge held that this wharf was not a factory within the meaning of the Workmen's Compensation Act. It was an ordinary wharf by the side of a canal, used for the purpose of loading barges. No machinery of any sort was used on it. The deceased met with his death not on the wharf but just outside it, as he was going from the wharf into the street. If the wharf was a factory, and if we had to determine the question whether the accident could rightly be said to have happened "on or in or about" the wharf, I should be inclined to think that the place where the accident happened was sufficiently contiguous to the wharf to bring the case within the Act. But we need not determine that question. The question is, Was the wharf a factory within the meaning of the Act? Section 7, sub-section 2, gives a definition of "factory," and makes it include "any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." I think that the words "to which any provision, &c.," apply to the whole budget of words that go before, and not merely to machinery and plant. This wharf was not a factory *per se*, and it can only be brought within the meaning of "factory" by showing that some of the provisions of the Factory Acts are applied to it by the Factory Act, 1895. It is said that provisions with regard to two matters are made applicable to it by section 23 of the Factory Act, 1895. In the first place it is said that the provisions of section 18 of the Act of 1895 with regard to accidents are so made applicable to it. I think that a good answer was given to this—viz., that the provisions of that section only come into operation when an accident has occurred in a factory. Here no accident happened on the wharf. Then it is said that section 68 of the Act of 1878, which deals with the powers of inspectors, is made applicable to this wharf. I cannot see that that section has any application to such a place as this wharf. I therefore think that the county court judge was right.

COLLINS and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Riddell, Vaizey, & Smith.*

Solicitors for the respondents, *Marshall & Pridham.*

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) March 25.

SEATON *v.* HEATH.
SEATON *v.* BURNAND. (*a.*)

*Insurance—Guarantee of solvency—Doctrine of concealment—*Uberrima fides.

The doctrine as to the concealment of material facts applies to all contracts of insurance, and not merely to marine, fire, and life insurances.

Per Romer, L.J.—*Where a contract may with equal propriety be called a contract of insurance or a contract of guarantee, the question whether it is a contract requiring* uberrima fides *depends upon its substantial character and how it came to be effected.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Application for a new trial or judgment in two actions tried together before Bigham, J., and a jury.

The actions were brought against two underwriters at Lloyd's on a contract whereby they had guaranteed the solvency of Sir Frederick Seager Hunt to the extent of a promissory note for £15,000 drawn by Major-General Barwell in favour of the plaintiff, payment of which had been guaranteed by Sir Frederick Seager Hunt. The circumstances under which the contract was underwritten are set out in the judgment of A. L. Smith, L.J. The promissory note was not paid at maturity, and Sir Frederick Seager Hunt had been obliged to call a meeting of his creditors.

The defence was that the contract was a policy of insurance, and that the defendants had been induced to subscribe it by misrepresentations of fact and concealment of material facts.

At the trial the following questions were left by the learned judge to the jury: (1) Was the guarantee transaction one of exceptional risk? (2) Did the plaintiff and those acting for her know it to be so? (3) Did the conduct of the plaintiff amount to a representation that it was not a transaction of exceptional risk? (4) Did the defendants in taking the risk act upon that representation? The jury answered the first question in the negative. The fourth question was also put to them, and they answered that, assuming any representation to have been made, the defendants relied both on that representation and on information which they themselves procured from a banker.

Bigham, J., directed judgment to be entered for the plaintiff.

The defendants applied for a new trial or judgment. The main question argued was whether the contract sued upon was one to which the doctrine of concealment applied.

Sir R. T. Reid, Q.C., Lawson Walton, Q.C., Carson, Q.C., and *T. W. Chitty,* for the appellants.

Sir Edward Clarke, Q.C., Joseph Walton, Q.C., and *Scrutton,* for the respondent, the plaintiff.

Cur. adv. vult.

March 25.—A. L. SMITH, L.J., read the following judgment: This is an action against underwriters at Lloyd's to recover the sum of £15,000 underwritten by them, and they seek to have a verdict which has passed against them set aside and judgment entered for them, or a new trial, on the ground of misdirection and that the verdict was against the evidence. As, for the reasons I am about to give, the case will have to be retried, I will touch as lightly as possible upon the undisputed facts so as not to prejudice the re-trial, but I must refer to some of the facts in order that I may explain the reason why I have arrived at the conclusion which I have. It will be sufficient to state that it appears from the undisputed evidence that in the month of December, 1897, the plaintiff, who is a married lady, advanced by way of loan to Major-General Barwell the sum of £12,375 in cash, taking from him his promissory note at six months for £15,000, and that at this time the credit of the major-general was such that she not only charged him between 39 and 40 per cent. interest for the loan, but in addition thereto she took the guarantee of Sir F Seager Hunt to secure its repayment. This loan was composed of the £12,375 cash and £2,625 interest, making £15,000 in all. Not content with this promissory note of the major-general and the guarantee of Sir F. Seager Hunt (in neither of which was the amount of interest she was charging mentioned), the plaintiff proceeded to insure with underwriters at

Lloyd's the solvency of Sir F. Seager Hunt to the extent of £15,000. For this purpose she employed a Mr. Lion to act on her behalf and to get a policy effected for her at Lloyd's undertaking the risk. She told him nothing as to the interest she was charging for the loan to the major-general, nor as to the way the £15,000 was made up. Mr. Lion accordingly saw some leading underwriters upon the matter, and one thing he said to them—and this is undisputed—was that Sir F. Seager Hunt was a man of wealth, and that the money was being advanced by a lady who was a friend of his, and this he no doubt honestly believed, though as a matter of fact upon the 11th of March, 1898, about three months after the policy was effected, Sir F. Seager Hunt called his creditors together and failed for a very large sum of money. Now, this case must be dealt with as if Mrs. Seaton had gone herself direct to the underwriters at Lloyd's to effect this insurance knowing right well the way the £15,000 was arrived at, and that, with the additional security of Sir F. Seager Hunt's guarantee, she would only lend money to the major-general at just under 40 per cent., and had herself stated to the underwriters what Mr. Lion stated to them. Upon these facts, and they are not in dispute, it appears to me that the following, amongst other questions, certainly ought to have been left to the jury—viz., whether, taking into account the statement made to the underwriters, it was a concealment of a material fact not to disclose to them the circumstances in which the loan to the major-general had been made and the rate of interest which was demanded and obtained. That these facts were known to the assured and not to the underwriters is beyond dispute. It is said on behalf of the plaintiff that the document sued on is not a policy of insurance, but a guarantee, and that different considerations arise, and that the non-disclosure of material facts forms no defence to an action upon a guarantee, even although it be a guarantee of the kind contained in the document now in suit. In the view I take of this case I do not propose to discuss this point which was so much debated at the bar, though I do not desire to be thought as agreeing to the proposition, for I have no doubt that the document taken from the underwriters is a policy of insurance, and that the principles applying to all policies of insurance apply to the present case. The parties to the contract (for they are many) have throughout dealt *inter se* as though the document was a policy of insurance. Moreover, it guarantees no debt, for it only covers the risk of Sir F. Seager Hunt becoming insolvent. Although, if neither the major-general nor Sir F. Seager Hunt repaid the loan, that would not affect the underwriters unless the latter became insolvent, yet the circumstances attending the loan to the major-general might well be material for the underwriters to know, for if the major-general or Sir F. Seager Hunt was a person likely to repay, and did repay, the loan, that would end the matter so far as the underwriters' liability was concerned. In form, too, the document is that of a policy of insurance, and the cases of *Dane* v. *Mortgage Insurance Corporation*, 42 W. R. 227, [1894] 1 Q. B. 54, and *Finlay* v. *Mexican Investment Corporation*, [1897] 1 Q. B. 517, 45 W. R. Dig. 76, show that it is so. Now, the plaintiff by her agent applied direct to the underwriters at Lloyd's to underwrite the risk she desired to cover, and the underwriters in the ordinary course first initialled a slip and then followed it up by the policy, the underwriters thereby accepting the separate risks of their respective lines in consideration of the premiums paid by the plaintiff. In the circumstances it was argued on behalf of the plaintiff that, though this might be a policy of insurance, yet it was not a marine, fire, or life policy, and that it is only in actions upon such policies that the defence of concealment of a material fact avails an underwriter. I do not understand the validity of this argument, or why, when a person insures his ship, or his house, or his life, he should be bound to disclose material facts of which he is cognizant and the underwriter is not, and yet not be bound to disclose such facts when an underwriter is asked to take a risk upon, say, the soundness of a racehorse; and indeed from what Lord Cranworth said in *Dalglish* v. *Jarvie*, 2 Mac. & G., 231, at p. 243, and Sir George Jessel in *London Assurance* v. *Mansel*, 27 W. R. 444, 11 Ch. D. 363, there does not appear to be any such distinction as is now contended for. The well-known case of *Carter* v. *Boehm*, 3 Burr. 1905, is very instructive upon this matter. The question which was left in the present case by the learned judge to the jury—viz., was the guaranteed transaction one of exceptional risk—appears to me not to adequately cover the case, and it apparently was framed upon the assumption that the document was a guarantee, not a policy of insurance, and is taken from what is to be found in the case of *Hamilton* v. *Watson*, 12 Cl. & F. 109. If the document were a guarantee and not a policy of insurance, I should have to discuss the question as to whether, upon such a guarantee as this, non-disclosure of material facts may not afford a defence to a surety, but, however that may be, there still would remain the objection to the direction taken by the defendants' counsel, that the learned judge did not expound to the jury the meaning of the term "exceptional risk." If the term means a risk not often accepted, and the jury had answered as they did, "No," I can understand the answer; but if it means a risk which in the circumstances in which it was tendered to the underwriters was exceptional in the sense that it in fact differed materially from what the underwriters on the facts disclosed might naturally suppose it to be, and the jury said "No," that is an answer which upon the facts appears to me to require reconsideration. I have now dealt with this case sufficiently to show why I think that it must go down for a new trial. I cannot enter judgment for the defendant, as I have been invited to do; for whether the non-disclosure of the circumstances attending the loan to the major-general was material or not to the risk underwritten is a question of fact which a jury must determine, and not of law; and, moreover, as to this there must be taken into consideration by the jury what the underwriters did when they applied to Mr. Shand, of Parr's Bank, for information as to what he knew of Sir F. Seager Hunt's paper, as it is called, being afloat, and also the materiality of the loan not having been made at the time the policy was effected, if a representation to that effect were proved. In my opinion the questions which should be left to the jury should embrace the following considerations: Whether, taking what was stated with what was left unstated, there was a concealment designed or undesigned varying materially the risk understood to be run; whether there was any misstatement of a material fact, and, if so, were the defendants influenced by such misstatement in underwriting the policy. The costs of the first trial must abide the event of the second trial; and as the defendants did not protest, but rather acquiesced in the question being left to the jury by the learned judge in the way it was, I think that the costs of this appeal should also abide the result of the second trial.

COLLINS, L.J., concurred.

ROMER, L.J., read the following judgment: I agree that in this case there should be a new trial. Upon

the special circumstances I do not think it necessary to add anything to what has been said by A. L. Smith, L.J. But I desire to make some remarks upon the question of general importance raised in this case with reference to the contract of insurance or guarantee. There are some contracts in which our courts of law and equity require what is called *uberrima fides* to be shown by the person obtaining them; and as that phrase is short and convenient I will continue to use it. Of these, ordinary contracts of marine, fire, and life insurance are examples, and in each of them the person desiring to be insured must, in setting forth the risk to be insured against, not conceal any material fact affecting the risk known to him. On the other hand, ordinary contracts of guarantee are not amongst those requiring *uberrima fides* on the part of the creditor towards the surety; and mere non-communication to the surety by the creditor of facts known to him affecting the risk to be undertaken by the surety will not vitiate the contract, unless there be fraud or misrepresentation, and misrepresentation undoubtedly might be made by concealment. But the difference between these two classes of contract does not depend upon any essential difference between the word "insurance" and the word "guarantee." There is no magic in the use of those words. The words, to a great extent, have the same meaning and effect; and many contracts, like the one in the case now before us, may with equal propriety be called contracts of insurance or contracts of guarantee. Whether the contract be one requiring *uberrima fides* or not, must depend upon its substantial character and how it came to be effected. There is no hard-and-fast line to be drawn between contracts of insurance and contracts of guarantee for the purpose for which I am now considering them; and certainly the rule as to contracts of insurance is not limited, as contended, to the three forms of marine, life, and fire insurance: see the observations of Jessel, M.R., in *London Assurance* v. *Mansel*. Now, when contracts of insurance are considered it will be seen that, speaking generally, they have in common several features in their character and the way they are effected, which distinguish them from ordinary contracts of guarantee. Contracts of insurance are generally matters of speculation, where the person desiring to be insured has means of knowledge as to the risk, and the insurer has not the means or not the same means. The insured generally puts the risk before the insurer as a business transaction, and the insurer on the risk stated fixes a proper price to remunerate him for the risk to be undertaken; and the insurer engages to pay the loss incurred by the insured in the event of certain specified contingencies occurring. Now, on the other hand, in general, contracts of guarantee are between persons who occupy, or ultimately assume, the positions of creditor, debtor, and surety, and thereby the surety becomes bound to pay the debt or make good the default of the debtor. In general, the creditor does not himself go to the surety, or represent or explain to the surety the risk to be run. The surety often takes the position from motives of friendship to the debtor, and generally not as the result of any direct bargaining between him and the creditor, or in consideration of any remuneration passing to him from the creditor. The risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself. In all the reported cases of guarantees that I have been able to find in which it has been held that the party guaranteed owed no duty to the guarantor as to disclosure of material facts, the contracts, when examined, are found to have in substance, though, of course, not in every detail, the characteristics which distinguish contracts of guarantee from contracts of insurance, as above stated by me. Applying the above considerations to the contract in the case before us, it appears to me that the contract is one which required *uberrima fides* on the part of the insured.

Order for new trial.

Solicitors for the plaintiff, *Thomas Cooper & Co.*

Solicitors for the defendants, *Morten, Cutler, & Co.*

High Court of Justice.

Chan. Div. Stirling, J. — April 14, 21.

COOTE v. FORD. (a.)

Practice — Payment into court — Denial of liability — Acceptance by plaintiff — Admission — R. S. C., ord. 22, rr. 1, 5, 6, 7.

The object of payment into court, where all liability is denied, is to enable a defendant to deny a plaintiff's right to sue, yet to offer a sum as the price of peace and for the prevention of further litigation. Such an offer is not an admission of the plaintiff's title, and cannot be converted into such by the plaintiff accepting the sum paid in.

If the entire claim or cause of action is satisfied by payment into court, it would seem that the proceedings are not available for a plea of res judicata, *but if either party were to attempt to reopen the matter, the appropriate defence of the other would be an application to the court to stay proceedings either under rule 6 of order 22 or as an abuse of the process of the court.*

This was a motion to discharge an order made in chambers in the above action.

The action was brought by the plaintiff against nine defendants for trespass.

The statement of claim, paragraph 1, stated the title of the plaintiff to a close of land called Martin Down, part of the waste of the manor of Martin. It then continued:

"(2) On the 1st of September, 1898, the defendants wrongfully broke and entered the said close or piece of land in pursuit of game and rabbits, and did there kill game and rabbits.

(3) The defendants respectively wrongfully claimed to be entitled to enter upon the said close or piece of land and there to pursue and kill game and rabbits, and they respectively still persist in the said claim, and threaten and intend to repeat the acts complained of."

The plaintiff claimed damages and an injunction.

Paragraph 1 of the defence admitted the plaintiff's title to the land in question.

"(2) The copyholders of the said manor in right of their respective tenements are, by the custom of the manor, entitled to the right and privileges for themselves and their tenants in occupation of the said tenements to kill and take rabbits on and from the said lands by themselves or their servants, and their tenants or the servants of such tenants. Alternatively the tenants of copyhold tenements for the time being have the said right and privilege by virtue of their tenancy.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

(3) The said copyholders and their tenants, and the respective predecessors in title of the said copyholders in their respective tenements, have exercised and enjoyed the right and privileges aforesaid from time immemorial, and also for the respective periods of thirty and sixty years without interruption before the commencement of this action."

The defence went on to allege that two of the defendants were tenants of copyholders, and two others servants of tenants of copyholders. Four of the defendants went on the land and killed rabbits, two as tenants of copyholders and two as servants of tenants of copyholders. All other allegations of the statement of claim were denied, and then by paragraph 7 it was pleaded that, "denying liability, each of the defendants brings into court the sum of 1s. and says that the same is sufficient to satisfy his liability to the plaintiff (if any) in respect of the matters complained of." Then the two defendants who were tenants of copyholders by a counterclaim repeated paragraphs 2 and 3 of the defence and asked for a declaration that they had in respect of their occupation of their copyhold tenements the rights and privileges in the said paragraph 2 mentioned, and an injunction.

The sum of 9s. was paid into court, and was taken out by the plaintiff, who gave notice, dated the 22nd of February, 1899, that he accepted the sum paid in satisfaction "of the claim in respect of which it is paid in." Subsequently an application was made in chambers to strike out the references in the counterclaim to paragraphs 2 and 3 of the defence on the ground that "they raise again upon the counterclaim matters already disposed of upon the claim."

The application was refused in chambers, and the present motion was made.

Butcher, Q.C., and *Terrell*, for the motion.—Our contention is that the payment into court by the defendants and acceptance by the plaintiff, amount to an admission of the plaintiff's right. [STIRLING, J.—The question is whether your entire claim and cause of action is satisfied?] We submit that it is.

They referred to *Wheeler* v. *United Telephone Co.*, 33 W. R. 295, 13 Q. B. D. 597, and *Goutard* v. *Carr*, 32 W. R. 242 (13 Q. B. D. 598, in note).

Duke, Q.C., and *D. M. Kerly*, *contra*.—Payment into court can only be in respect of debt or damages. The real question is whether payment into court if accepted by a plaintiff amounts to a estoppel by way of record.

He referred to *Steavenson* v. *Corporation of Berwick*, 1 Q. B. 154; *Hennell* v. *Davies*, 41 W. R. 284, [1893] 1 Q. B. 367; *Kingham* v. *Robins* 5 M. & W. 94. [STIRLING, J., referred to *Emden* v. *Carte*, 30 W. R. 17, 19 Ch. D. 311.]

Butcher, Q.C., replied.

Cur. adv. vult.

April 21.—STIRLING, J., stated the facts and continued: The point which I have to decide is the effect of the acceptance of a sum paid into court with a denial of liability. The practice of pleading a payment into court with a denial of liability is of recent origin. It first arose under order 30 of the orders in the schedule to the Judicature Act, 1875. That order did not expressly permit a payment into court where there was a denial of liability, but the practice was established by the decision of the Court of Appeal in *Berdan* v. *Greenwood*, 26 W. R. 902, 3 Ex. D. 251. The grounds on which it was allowed are to be found at pp. 257 and 259 of the judgment delivered by Thesiger, L.J. [His lordship read the judgment, and continued:] It is admitted by the passage I have read, and was subsequently remarked that there is a want of logical consistency in allowing a defendant to say in one and the same breath that the plaintiff has no claim and yet to offer a sum in satisfaction.

In truth the practice is a concession to practical convenience at the expense of logic, and in such circumstances difficulties may easily arise as to the effect of it. In endeavouring to solve such difficulties recourse must be had to the rules on the subject, to be found in order 22 of the orders of 1883, which vary from those of 1875. Rule 1 shows that it only applies to actions to recover a debt or damages. If there is no denial of liability the rule expressly provides that the payment into court "shall be taken to admit the claim or cause of action in respect of which the payment is made." These words are new, and are not found in the rule of 1875. In such a case, under rule 5, the money in court may on his request be paid out to the plaintiff, unless the court otherwise orders. If the liability of the defendant is denied, then the payment into court is subject to rule 6, of which clause (*a*) is that which is material in the present case. This clause is not found in the rules of 1875. The consequence of acceptance is that "all future proceedings in respect of such claim or cause of action" (*i.e.*, the claim or cause of action in respect of which the payment into court has been made) "except as to costs shall be stayed." It is to be observed that this provision differs very materially from that of rule 1 as to the effect of a payment into court without denial of liability. Under rule 1, a defendant making the payment is to be taken to admit the claim and cause of action; under rule 6 there is nothing said about any admission by the defendant, but it is provided that upon acceptance by the plaintiff all further proceedings in respect of the claim or cause of action are to be stayed, except as regards costs. Under rule 7, if the entire claim or cause of action is satisfied the plaintiff may proceed to tax his costs, and in case of non-payment of the costs for forty-eight hours after taxation may sign judgment for the costs so taxed. It is, therefore, clear that the defendant by promptly paying the costs may prevent judgment against him appearing on the record. I think the adoption of the course pointed out in this part of the rules is not intended to lead to any adjudication by the court, but on the contrary to prevent the necessity of any such adjudication. Under these circumstances I do not see how any such proceedings could ever be available as a ground for a plea of *res judicata*. If either party were to attempt to reopen the matter, the appropriate defence of the other would seem to be not a plea of *res judicata*, but an application to the court to stay proceedings either under the rule or as being an abuse of the process of the court; though I am not to be understood as saying that such a point could not be raised by a defence.

This being the general nature of the rules, how do they apply to the present case? The first point to be determined is in respect of what claim or cause of action the payment into court was made. The language of the defence in respect of the matter complained of is somewhat vague; but remembering that the payment can only be made in respect of damages, it seems to me that the matters referred to are those stated in paragraph 2 of the statement of claim. It is impossible, regard being had to the other allegations of the defence, to treat the payment in as intended to be a satisfaction of those alleged in paragraph 3, in respect of which the pleadings disclose the existence of a continuing cause of action. In support of that view I refer to *Moon* v. *Dickinson*, 38 W. R. 278, 63 L. T. Rep. 371.

It follows that the entire cause of action is not

satisfied. There is nothing to prevent the plaintiff from proceeding to trial of his action as regards the matters alleged in paragraph 3 of the statement of claim. This being so, is the plaintiff prejudiced and embarrassed? He alleges that he is, because he says the counterclaim raises afresh matters disposed of on the claim. This contention is based on the ground that, having accepted the money paid into court, the plaintiff is entitled to treat the payment as an admission by the counterclaiming defendants that the plaintiff had a good cause of action as regards the matters complained of in paragraph 2 of the statement of claim, and consequently that the rights claimed by paragraphs 2 and 3 of the defence do not exist.

I do not think that the plaintiff is entitled to treat the payment into court as an admission of his title. The rules do not provide that the defendants should be deemed to have made any such admission: they appear to me studiously to avoid imposing any such obligation. The object of the rule is, in the language of Thesiger, L.J., to enable a defendant to deny a person's right to sue, yet to offer a sum as the price of peace, and for the prevention of further litigation. This object would be defeated by a provision that acceptance of the offer should be deemed to convert it into an admission of the right. All that can fairly be inferred is that as regards the matters complained of in paragraph 2 of the statement of claim both parties are willing that no further litigation should take place, but that at the same time the plaintiff insists on his right to relief in respect of the matters complained of in paragraph 3, while the defendants insist by way of defence on the right pleaded, and seek to establish that right by their counterclaim.

If, however, I am wrong in this, and the defendants are to be treated as having made some admission, I do not think it goes to the extent contended for by the plaintiff. It appears to me that all that ought to be inferred would be an admission, not that the right on which the defendants rely by way of justification is non-existent, but that notwithstanding its existence it for some reason fails to protect them on the particular occasion referred to in paragraph 2 of the claim. This may perfectly well be in many ways; for example, the right pleaded is only available for copyholders and their tenants and the servants of such. Five of the nine defendants are not shown to be such; presumably, therefore, they had no right to do what they are alleged to have done, but they may have been brought on the lands by the other defendants, who may be answerable for their acts. Or again, some of the acts complained of may turn out to have been done on land which is not subject to the rights of the copyholders. I do not think it necessary to discuss minutely the cases cited, because they all turned on the order of 1875, which does not contain the provisions found in those of 1883 on which I base my decision.

The result of what has been done is, in my opinion, that the matters stated in paragraph 2 of the claim have been taken out of the litigation and that between the parties peace with regard to them must prevail, but that this result has been attained in such a way that the plaintiff is not entitled to rely on it as an admission which affects that portion of the litigation which has not been put an end to—viz., the cause of action stated in paragragh 3 of the statement of claim and the rights stated in paragraphs 2 and 3 of the defence, and referred to in the counterclaim. In my judgment, therefore, the motion fails and must be refused.

I desire, however, to point out that my opinion turns upon the construction which I have placed on paragraph 7 of the defence, and which I understand to be the construction intended to be placed on it by the defendants. This, however, is less precise than could be desired, and I think that it should be amended or treated as amended by expressly limiting its operation to matters stated in paragraph 2 of the claim. If the plaintiff has been misled, then I think he ought to have an opportunity of replacing the money in court and withdrawing his notice. I also think that it would be desirable to get rid of the defendants other than those who counterclaim.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Fulton & Pye-Smith*, Salisbury; *Horne & Birkett.*

Chan. Div. }
Kekewich, J. } March 15, 22.

In re G. (INFANTS) (*In Camerâ*). (*a.*)

Infants—Direction to mother to maintain, educate, and bring up — Immoral home — Adultery of mother— Control of court.

A testator bequeathed the residue of his estate to his trustees upon trust to pay the income to his wife during her widowhood, "she maintaining, educating, and bringing up" unmarried infant sons and unmarried daughters.

The widow, while duly maintaining and educating the infant children, lived in adultery with a married man in the home which she provided for them.

Held, that the widow was not properly performing the obligation imposed upon her, and that, in the circumstances, the court had power to administer the fund.

Summons.

By his will a testator gave the residue of his estate to his trustees in trust for conversion and investment, with provision for a reserve fund to meet loss, and subject thereto "upon trust to pay the annual income of my trust estate to my said wife during her life if she shall so long continue my widow, she maintaining, educating, and bringing up such of my children as shall be under the age of twenty-one years and shall not have been married, and also maintaining such of my daughters as, being of the age of twenty-one years, shall not be or have been married." Subject thereto the trust estate was to be held in trust for the sons who attained the age of twenty-one years and the daughters who attained that age or married as tenants in common.

The testator appointed his said wife, two of his brothers, and his eldest son (on attaining twenty-one) executors and trustees of his will. The testator died on the 26th of August, 1894, leaving seven children, aged, at the date of the summons, 20, 19, 17, 16, 14, 11, and 7 years respectively. The said will was duly proved. The widow, while duly maintaining and educating the children, was living in adultery with a married man in the home she provided for them.

On the 14th of January, 1899, the brother trustees and the five younger children, by those trustees as their next friends, took out the present summons against the widow and the two elder children, asking (*inter alia*) for the removal of the mother from the office of guardian of the five younger children and the appointment of a proper guardian, or alternatively the appointment of a joint guardian, proper provisions for custody, liberty to the brother trustees to retain out of income and apply such

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

sum as the court should allow for the maintenance and education of the five younger children, and so far as necessary administration of the trusts of the will. The three elder children were fully aware of all the circumstances, and the two elder children were strongly opposed to any interference with their home. All the children, except the third eldest—a son, who was not allowed to live at home—were on extremely affectionate terms with their mother and her paramour, the latter of whom they treated as their step-father.

The judge desired, before making any order, that the question of his power to deal with the fund, which produced about £417 a year net, should be argued.

Martelli, for the plaintiffs.—The will clearly imposes on the widow a trust which the court can administer: *In re Booth, Booth* v. *Booth*, 42 W. R. 613, [1894] 2 Ch. 282; *Castle* v. *Castle*, 5 W. R. 643, 1 De G. & J. 352, which also was a case of misconduct; and *Longmore* v. *Elcum*, 2 Yo. & Coll. Ch. 363.

P. F. S. Stokes, for the defendants.—The mother is properly maintaining, educating, and bringing up the children, and the court cannot interfere with her discretion merely on account of her immorality. She has a discretion as to the quantum and mode of maintenance, and she is not liable to account: *Lambe* v. *Eames* 19 W. R. 659, L. R. 6 Ch. App. 597; *Thorp* v. *Owen*, 2 Hare, 607; *Jodrell* v. *Jodrell*, 14 Beav. 397. I admit an obligation to maintain. [KEKEWICH, J.—This is equivalent to a trust. Might the mother exercise her discretion by bringing the children up as thieves?] She is not bringing them up to immorality. The present case differs from those cited against me because here there is no abandonment, and the mother is still willing to maintain the children.

Martelli, in reply.—The fact that the two elder children approve of their home tends to show that the mother is not bringing up the children properly, and the court ought to interfere.

Cur. adv. vult.

March 22.—KEKEWICH, J., after reading the trusts of the will above set out, continued as follows: It was urged on behalf of the children, and not denied on behalf of their mother, that the language just quoted imposes on the latter an obligation enforceable in this court, but the precise character of that obligation requires to be examined and defined. The question is, what is the nature and extent of the obligation, and that gives rise to some serious considerations. First comes the question what meaning is to be attributed to the expression "maintaining, educating, and bringing up"? I entirely agree that, although it of course includes providing such an adequate supply of house-room, food, and clothing as can reasonably be expected from a mother, having regard to the station in life of herself and children and the means available for the purpose, it cannot be restricted to that; and indeed this is sufficiently shown by the use of the word "educating," which must be taken to mean that the children are also to have a "proper" education—that is, "proper," having regard to the same circumstances as are regarded with reference to food and clothing. It is difficult to give any definite additional meaning to the words "bringing up," yet in common parlance they are taken to denote something not covered by "maintenance and education," which latter word is generally used in the limited sense. The sense, I mean, of such instruction as is given at school, or by those who occupy the position of schoolmaster at home in that character. But whether it depends on "bringing up" or not, I have no doubt that the clause must be read as if the word "properly" were there, and that, again, "properly" must be construed with regard to the position in life of those to whom reference is made. I ventured during the argument to illustrate this by saying that a mother would not be bringing up her children properly if she were teaching them to be thieves. That seems to me to be obviously clear. I think it is equally obvious and clear that the bringing up need not be such as to introduce the children to the criminal class in order to offend against the obligation imposed by the will. In my opinion a bringing up directly tending to make the children familiar with immorality and with familiarity to induce a fondness for and practice of it would be equally objectionable. Here on the mother's own confession we know that she is not only living with a man to whom she is not married, but that she is continuing to do so after she has discovered that he has a wife of his own. I am not sitting as a court of morals, nor am I exercising punitive jurisdiction, and there is no occasion to use words of censure or reproof, but I distinctly hold that a woman thus living in adultery cannot be treated as properly bringing up her children, however much she may do in the way of making them a comfortable home and giving them a proper education. The answer is, that only the three elder children know the real facts, and that the two elder of these are content, while the four younger children have been taught to regard the man as their stepfather and believe him to occupy that position, and have the affection for him which, as he apparently returns it, is natural in such circumstances. The answer does not satisfy me. I do not think that even if they are kept in ignorance, and the affection continues, the mother can be regarded as fulfilling her obligation. But there is a strong probability that they will sooner or later discover the truth, and I am invited to believe, and indeed to hope, that as and when they do they, like the two elder children, will be content to live in a home of immorality such as I have mentioned. My duty is to regard and, so far as possible, to provide for the welfare of the children, and I cannot think that I should be performing that duty if, any alternative being possible, I allowed these consequences to ensue. This conclusion is founded on principle and common sense, and does not require the support of authority; but one authority was cited which deserves notice—namely, *Castle* v. *Castle*. A careful examination of that case shows that the court was only dealing with the provision commencing with the words, "that if from any cause it should be necessary or advisable to discontinue the business of the said hotel," and read in that light the strong remarks in the judgments have a direct bearing on the case in hand. They show that in determining what is for the welfare of those whose welfare the court has to protect, moral considerations have weight, and the social misconduct of a mother in charge is a reason for interfering with her.

Here follows a question of greater difficulty and not less serious practical importance—namely, what is the beneficial interest which is thus placed under the control of the court to be administered by it instead of by the mother for maintaining, educating, and bringing up the children? The father left his whole estate to his wife during life or widowhood, and the annual income of that estate, which is proved to be now £417, is not, I conclude, likely in the future to exceed that sum. The widow has not apparently any other income. Can the whole of this be properly taken from her and applied for the benefit of the children elsewhere? In the other cases in which the jurisdiction now invoked has been exercised there have been words to express the intention of the testator that the person on whom the obligation of

maintaining others is cast is herself intended to derive a personal benefit. The language has been "she maintaining thereout," or as in *Booth* v. *Booth* and *Longmore* v. *Elcum*, "for her use and benefit and for her maintenance," &c., from which there was a slight variation in *Castle* v. *Castle*, where the mother was allowed to retain one-third, though the other two-thirds were appropriated to the children. Such words are absent here; but I cannot doubt that the effect of the gift is the same as if they were present. The gift is to the widow coupled with an obligation; but it would, I think, be making that obligation too extensive to hold that it can be enforced even to the exhaustion of the beneficial character of the gift. It may be observed that in marrying again she loses all, but then, of course, it is assumed that she will be maintained by her husband, and, on the other hand, as the children attain majority and the daughters marry, the obligation diminishes, and ultimately she is given the whole income for her own benefit. What proportion of the income is to be retained by her and what applied for the benefit of the children must be carefully considered with other details of a scheme for the future maintenance, education, and bringing up of the children. But I intend to distinctly hold that, assuming the custody of all the children to be taken from the mother by reason of her misconduct, and their maintenance, education, and bringing up to be provided for elsewhere than under her roof, she will still be entitled to receive so much of the income as—as between her and her children, and having regard to the social position of the parties and the amount of available fortune—is adequate to her own personal maintenance and support.

Solicitors, *Gush, Phillips, Walters, & Williams; M. A. Orgill.*

Chan. Div.
Romer, J.

Feb. 25.

JONES *v.* BARNETT. (*a.*)

Vendor and Purchaser—Sale under order of court—Purchaser for value without notice—Equitable execution—Judgments Act, 1864 (27 & 28 *Vict. c.* 112)—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70.

No estate or interest will be bound by section 70 *of the Conveyancing Act*, 1881, *which estate or interest would not, apart from such section, have been bound by an order of court dealing with such estate or interest, having regard to the terms of such order and the proceedings in which and the circumstances under which it was made.*

Trial of action.

This was an action in which the plaintiff claimed, *inter alia*, possession of certain freehold and leasehold premises and a declaration that the premises were not liable to be taken in execution under a judgment of the High Court bearing date the 26th of February, 1895, in an action entitled *Barnett* v. *Jones*.

The facts of the case were these: By his will dated the 1st of August, 1886, John Williams, of Tymaen, Pyle, Glamorganshire, appointed his wife Elizabeth, his nephew Philip Jones—not the husband of the plaintiff—and his brother-in-law Edward Thomas executors and trustees thereof, and devised and bequeathed his real estate not thereby otherwise disposed of to his trustees upon trust to permit testator's wife to receive the rents thereof, and after her death, testator bequeathed his leasehold house and shop and devised his freehold cottages at Aberavon aforesaid to his nephew Isaac Jones, one of the defendants. Testator died the 18th of October, 1886, and his will was duly proved by his executors above named. At the date of the indenture next mentioned Isaac Jones was indebted to Philip Jones, husband of the plaintiff Mary Jones, in the sum of £350. By an indenture bearing date the 31st of May, 1894, and made between the said Isaac Jones of the first part, Philip Jones, husband of Mary Jones, of the second part, and Mary Jones of the third part, it was witnessed that in consideration of the sum of £350 so owing as aforesaid by the said Isaac Jones to the said Philip Jones, the said Isaac Jones as beneficial owner thereby assigned unto the said Mary Jones, and the said Philip Jones thereby confirmed all the share, right, title, and interest to which the said Isaac Jones in his right was then or should or might thereafter be entitled under the will of the said John Williams, to hold the same unto the said Mary Jones absolutely. The circumstances incidental to the execution of this indenture are stated in the judgment. On the 26th of February, 1895, Sol. Barnett, one of the defendants, obtained judgment in the said action of *Barnett* v. *Jones*, an action assigned to the Queen's Bench Division, against the said Isaac Jones for the sum of £450 6s. By an order in the action bearing date the 14th of March, 1895, a receiver was appointed of the reversionary interest of the said Isaac Jones in the leasehold and freehold premises aforesaid expectant on the death of the said Elizabeth Williams. But, and it was thereby provided, the receiver was not to sell the said property or any part thereof.

On the 10th of July, 1895, the said Sol. Barnett filed a petition in the Chancery Division (Chitty, J.), setting forth the proceedings last mentioned, and praying a sale of the interest of the said Isaac Jones in the said premises, and for the application of the money so arising in payment of the judgment debt, and for all proper accounts and inquiries.

On the 24th of July, 1895, Chitty, J., ordered the following accounts and inquiries:

(1) An account of what was due to the petitioner under the said judgment of the 26th of February, 1895.

(2) An inquiry what interest or interests of the defendant Isaac Jones had been delivered in execution by the appointment of a receiver under the order of the 14th of March, 1895.

(3) An inquiry whether there were any and if so what liens, charges, or incumbrances upon the said interest or interests in land of the said Isaac Jones, or on any and what part or parts respectively, and what were the priorities of such incumbrances and what was due on account thereof respectively, and in making such inquiries to ascertain which, if any, of the said liens, charges, and incumbrances had been created, prior to, and which, if any, subsequent to the order of the 14th of March, 1895, and as to those created subsequent to the said order, which of them were before the registration of the said order created in favour of a purchaser for value, and it was ordered that the said Isaac Jones should pay what should be certified to be due by the chief clerk's certificate within a month after the date thereof, and in default that the interest or interests in land which should have been certified to have been delivered in execution should be sold with the approbation of the judge free from all liens, charges, or

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

incumbrances which had been created subsequent to the said order of the 14th of March, 1895, except such as were created in favour of a purchaser for value before the registration of the said order.

By his certificate filed the 20th of January, 1896, the chief clerk certified (1) that there was due to the said Sol. Barnett the sum of £509 19s. 0d. (2) That the interest or interests in land of the said Isaac Jones consisted in his reversionary interests in the freehold and leasehold premises above mentioned expectant on the death of the said Elizabeth Williams. (3) That there was not any lien, charge, or incumbrance upon the said interest or interests in land of the said Isaac Jones, or any part thereof respectively.

No payment was made in respect of the debt, and the said Sol. Barnett having obtained an order authorizing him to bid at the sale, purchased the premises for the sum of £375, and one John Thomas, under an order of the 19th of February, 1897, conveyed the premises to him by a deed dated the 4th of March, 1897. Until April, 1897 Sol. Barnett was unaware of the existence of the indenture of the 31st of March, 1894. The widow of the testator died on the 16th of March, 1897, and the said Sol. Barnett took possession of the premises.

The plaintiff, Mary Jones, shortly afterwards commenced this action for recovery of the premises, making the said Sol. Barnett and the said Isaac Jones defendants.

The defendant Sol. Barnett in his defence submitted, *inter alia* that the indenture of the 31st of May, 1894, was void under 13 Eliz. c. 5 as a fraudulent preference of one creditor, the said P. Jones, and counterclaimed, *inter alia*, to have the indenture set aside. The court, holding on the facts mentioned in the judgment that the assignment of the 31st of March, 1894, was *bonâ fide* and for value, the question was argued whether, although the plaintiff had the prior legal title, such title had been destroyed as against the defendant Barnett under the operation of section 70 of the Conveyancing Act, 1881, the premises having been sold under an order of the court.

Neville, Q.C., W. F. Phillpotts, and *R. B. Phillpotts*, for the defendant Barnett.—The defendant has obtained a good title under section 70 of the Conveyancing Act, 1881, and this title cannot be invalidated by the non-concurrence of the plaintiff: *In re Hall Dares', Contract*, 30 W. R. 556, 21 Ch. D. 41; *Mostyn* v. *Mostyn*, 42 W. R. 17, [1893] 3 Ch. 376.

Farwell, Q.C., and *Napier*, for the plaintiff.—A judgment creditor cannot obtain by his judgment an estate, which it is not his debtor's to give. The effect of section 70 cannot be to transfer the legal estate, and it must be construed to be based on the assumption that all persons interested are as a matter of fact before the court. If the other construction is adopted a man may be deprived of his estates by an action of which he has never had any notice: *Whitworth* v. *Gaugain*, 1 Ph. 728; *Baroness Wenlock* v. *River Dee Co.*, 38 Ch. D. 534, 37 W. R. Dig. 43: *In re National Debenture and Assets Corporation*, 39 W. R. 707, [1891] 2 Ch. 505. Further, the sale was made subject to prior incumbrances.

Neville, Q.C., in reply.—The defendant Barnett is *bonâ fide* purchaser for value without notice, and possesses the legal estate. The plaintiff's rights under the conveyance do not constitute an incumbrance.

ROMER, J.—No real difficulty arises with regard to the facts of the case. I am satisfied that Philip Jones, the plaintiff's husband, did contract to buy from Isaac Jones the property, the subject of this action, subject to the then existing prior life interest for the sum of £350, which was then due from Isaac Jones to P. Jones on an account settled between them, and this property was intended to be and was assured to the plaintiff by the deed of the 31st of May, 1894, and this deed was duly executed and delivered, and passed to her the legal estate in the leaseholds, and also in the freeholds, at anyrate for her life. I have further come to the conclusion that this transaction was entered into in good faith and for full valuable consideration, and was not a fraudulent preference of P. Jones or executed to defeat creditors to the knowledge of P. Jones or of the plaintiff, and it is not void as against the defendant either under the statute 13 Eliz. c. 5, or otherwise. It is true that I. Jones had refused to join in the transaction, or to let P. Jones have the property, unless it was (as P. Jones expressed it) settled upon the plaintiff, who was I. Jones's sister, so as to benefit her and her children. But when the transaction is rightly understood, I am convinced that it was not a part payment by P. Jones for the property, and a voluntary settlement by Isaac Jones in favour of his sister. I have had the advantage of seeing in the box P. Jones, who gave me the impression of being an honest witness, though of humble position and not acquainted with English legal terms, and the conclusion I have come to upon the evidence as a whole is that the transaction on his part was a purchase in good faith for full consideration, and not the less so because he was quite willing to let his purchase become his wife's property as desired by her brother. If a man offers to buy a property for a sufficient and proper price and the owner expresses his willingness to sell for that price, provided that the purchaser will let the conveyance be to the purchaser's wife, who is related to the owner, and the purchaser, for reasons of his own, is willing to let the purchased property be so conveyed, and a bargain is thus made and is carried out, such a transaction is not a voluntary settlement in any true sense, or anything but a sale and purchase for value and in good faith, and in my opinion the case before me, when properly appreciated, is in substance one of this kind. Notice of the sale and assurance to the trustees of the will under which I. Jones was entitled was, of course, not necessary to complete the plaintiff's title, but there was, in my judgment, no intentional abstaining by P. Jones or the plaintiff from giving such notice. Indeed, though it is not necessary to determine on the evidence, it appears to me that one of the trustees was informed of the transaction. The fact is that P. Jones knew nothing of law and left it to his solicitor to carry out the transaction properly. Nor is there any real ground for the suggestion on the defendant's behalf that the plaintiff or I. Jones knew of the later proceedings under which the defendant purported to buy the property and have it assured to him, and abstained from informing the defendant of the plaintiff's prior title; on the other hand, it is not proved to my satisfaction that the defendant bought with notice of the plaintiff's title.

On these findings of fact the question is reduced to one of law, whether the defendant has a better title than the plaintiff, although the plaintiff had a prior legal title. The only ground on which it can be suggested that the defendant has a better title is that by virtue of section 70 of the Conveyancing and Law of Property Act, 1881, the plaintiff's prior title was destroyed as against the defendant because the property was sold and assured to him under orders of this court. Those orders came to be made in the following circumstances: The defendant as judgment creditor of Isaac Jones obtained equitable execution as

against Isaac Jones's then interest in this property by the appointment of a receiver then made although there was then nothing to receive, inasmuch as the prior life tenant was then living and in receipt of the rents and profits. The defendant then proceeded under the Judgments Act, 1864, and obtained the usual order under which the debtor's interest so delivered in execution was ordered to be sold, and the usual inquiries were directed to ascertain the nature and extent of that interest. The order was dated the 24th of July, 1895. The inquiries thereby directed were proceeded with, and as Isaac Jones did not appear and no one before the court knew anything about the assurance to the plaintiff, naturally enough, in answer to the inquiries, the chief clerk, by his certificate in finding that the interest delivered in execution was the reversionary interest under the will, made no reference to the plaintiff's rights or title or to any incumbrance on that reversionary interest. The sale directed by the order was then proceeded with, and the debtor's interest as found by the chief clerk's certificate was offered for sale by public auction subject to certain conditions of sale. At that sale the defendant, having obtained leave to bid, was declared the purchaser, and was subsequently allowed to set off the purchase-money against a corresponding part of the larger judgment debt due to him. And then by an order dated the 19th of February, 1897, the court being of opinion that it was expedient for the purpose of carrying the sale directed by the order of the the 24th of July, 1895, into effect, that a person should be appointed to convey the said interest of Isaac Jones, ordered that one J. Thomas should be appointed to convey the said interest to the defendant as purchaser or as he should direct. And accordingly by deed dated the 4th of March, 1897, the said interest was assured by J. Thomas to the defendant.

Now, in these proceedings it is clear that the court by the order of the 24th of July, 1895, was only ordering the sale of the debtor's interest as delivered in execution by the appointment of the receiver, and that the order of the 19th of February, 1897, was made for the purpose of carrying out the sale directed under the order of the 24th of July, 1895. In these circumstances it is very startling to be told that by virtue of section 70 of the Act of 1881 the plaintiff has been deprived of her title, although that title existed prior to the equitable execution and she was a complete stranger to the proceedings, and the court could never have contemplated or intended to bind or affect her. And when the argument of defendant's counsel upon section 70 is fully developed, it is found of necessity to lead, if sound, to very astonishing conclusions. It is contended that, since section 70 came into force, when any property is sold by the court in any proceedings before it, an indefeasible title is acquired by the purchaser, because all persons interested are bound, even though they may be perfect strangers to the proceedings, and not in the contemplation of the court at all when it made the order for sale. And it would follow, if such a contention were correct, that the practice of the court in selling under proper conditions of sale has been quite wrong since section 70 came into force, for if all persons interested in the property are bound by the order for sale, the purchaser need not look beyond that order. It would certainly be extraordinary if the effect of section 70 was to change to such an extent the well-understood scope and object of orders of sale made by the court. Take, for example, the case of an action to adminster the estate of a testator in which some property is ordered to be sold as part of that estate. Apart from the section, the sale would never be held to bind or affect persons claiming, not under the will of the testator, but against him and against those claiming through him. Yet, according to the contention, the section has had the effect of making the sale quite different in its scope by binding all such persons. And similar considerations would apply to orders of sale made in partition actions, and foreclosure and redemption actions, and numerous others. And the effect of the section cannot be limited to orders for sale. In terms, the section applies in favour of a purchaser, to any order of the court. And "purchaser" includes by the Act's interpretation clause (section 2, viii.) a lessee or mortgagee or an intending purchaser, lessee, or mortgagee, or other person who, for valuable consideration, takes or deals with any property. And, with certain express exceptions, section 70 applies to all orders made before or after the commencement of the Act. If the contention before me be correct, the section has indeed made a wonderful change. An owner of an estate might suddenly find himself wholly deprived of it by an order of court in some proceeding he never heard of, and without any intention on the part of the court to affect him, and then be told that he had no remedy except possibly to follow (if he could) any moneys that might have been paid by a purchaser. But I need not enlarge upon the results to which such a construction of the section would lead. In my opinion the section was not intended to have, and has not, such a wide effect. It is a useful section, and I should be sorry to limit its utility. But I think due effect can be given to it without yielding to such an extravagant contention as that before me. I shall not pretend to define all the cases to which the section can properly be held to apply or not to apply.

But in my judgment the following proposition is correct: If an order of court dealing with property, having regard to its terms and the proceedings in which and the circumstances in which it was made, would not be held, apart from section 70, to be intended to bind any particular estate or interest in the property, then that estate or interest would not be bound by the order, by reason or virtue of the section. And I may point out that the section only speaks of orders of court not being invalidated as against a purchaser with or without notice on certain specified grounds, and that, as a rule, a stranger to an action may assert his rights without being obliged to invalidate any orders that may have been made in such action.

The cases cited in support of the defendant's contention do not warrant it. With regard to *In re Hall Dare*, all I need say is that there the parties whose concurrence to the order for sale was dispensed with were clearly intended to be bound by the order, and that if the section did not apply to that case I do not know to what case it could be held to apply. As to *Mostyn* v. *Mostyn* I feel more difficulty. So far as the actual decision in that case is concerned it was only one determining a question of form of conveyance which had arisen in an administration action as between vendors and purchasers. But one reason given for their decision by the Lords Justices undoubtedly was that certain puisne mortgagees who were strangers to the action were bound under the section by the order for sale. Speaking with all respect I do not clearly see how they arrived at that conclusion, especially as they also held that the first mortgagees, who had agreed to join in the sale, were not bound by the order, and that as those mortgagees were not before the court or parties to the contract for sale, the court had no power to compel them to submit to the purchasers' requirements. I gather, however, that the court, having regard to the conditions of sale and other circumstances of the case, came to the conclusion that the court by its orders did intend to bind, and

had bound, the puisne mortgagees and their interests in the property ordered to be sold, though those puisne mortgagees were strangers to the action. This being so, that case is quite distinguishable from the case now before me, where, having regard to the fact that the sale was ordered under the provisions of the Judgments Act, 1864, and was clearly intended to be a sale of the debtor's interest of which the creditor had obtained equitable execution, I am satisfied that the plaintiff's interest in the property was not intended to be, and was not in fact bound. And, in particular, on examination of the order of the 24th of July, 1895, it will be seen that the sale was intended to be subject to all incumbrances on the property existing at the date of the equitable execution, except those of such incumbrancers as should consent to the sale. It is said that the plaintiff's estate was not an "incumbrance" properly so-called. I am not satisfied even of that. In Wharton's Law Lexicon I find "incumbrance" defined as being "a claim, lien, or liability attached to property," and this definition is wide enough to cover the plaintiff's claim. But even supposing that the plaintiff's right was not an incumbrance strictly so-called, yet the wording of the order as well as the general provisions of the Judgments Act, 1864, make it clear, in my opinion, that the court was not intending to bind any right or estate in the property existing at the date of the equitable execution which was binding on the judgment debtor and could not be displaced by him. A sale by order of court under that Act would not bind such a right or estate, and the owner of that right or estate could enforce it, notwithstanding the court's order of sale, as against a purchaser under that order, though the purchaser at the time of his purchase had no notice of the existence of such right or estate. And, moreover, in my opinion, before enforcing such right or estate the owner would not be bound to invalidate the order of the court. He could leave the order standing and say that it did not concern or affect him. See, as bearing on the point, the case of *Whitworth* v. *Gaugain* with reference to the position of judgment creditors under the Act 1 & 2 Vict. c. 110, and *Godfrey* v. *Poole*, 13 App. Cas. 497, 36 W. R. Dig. 65, a case which concerned a New South Wales Act corresponding to the Judgments Act, 1864, and where it was pointed out that a sale at the instance of an execution creditor could not pass to the purchaser a greater interest than the debtor possessed at the time of the execution.

For these reasons it appears to me that section 70 does not enable the defendant to resist the plaintiff's claim, and that the plaintiff is entitled to recover possession of the property. As to costs, seeing what is the nature of defendant's defence and counterclaim, I think he must pay the plaintiff's costs, except so far as those costs have been increased by the plaintiff's attempt to prove that the defendant purchased with notice of the plaintiff's right.

Judgment for the plaintiff.

Solicitors, *Riddell, Vaizey, & Smith*, for *J. L. Howell*, Swansea; *Richard White*, for *D. Seline*, Swansea.

IN BANKRUPTCY.

Q. B. Div.
Wright and Bigham, JJ. } March 27.

In re RAYNES PARK GOLF CLUB (LIMITED).
Ex parte THE OFFICIAL RECEIVER. (a.)

Company—Winding-up—Costs—Order against official receiver personally—County Court—Right of appeal.

An appeal will lie against an order on an official receiver or liquidator to pay costs personally, for such an order is equivalent to a declaration that such official has been guilty of misconduct.

Appeal by the official receiver from part of an order of his Honour Judge Lushington, made in the county court of Croydon, directing the official receiver personally to pay the costs of a motion.

The official receiver was *ex officio* liquidator of a company in liquidation called the Raynes Park Golf Club (Limited). This company was in arrears with its rates at the date of the winding-up order, and the overseers of Merton, the parish in which the company's property was situated, applied, subsequently to the date of the winding-up order, to the official receiver for payment of the same as a preferential claim within section 1 (*a*) of the Preferential Payments in Bankruptcy Act, 1888. The official receiver admitted that the rates were a prefrenetial claim, but as he did not pay them over so soon as the overseers desired, the latter proceeded against him by motion in the county court. The judge ordered him to pay over the rates and to pay the costs of the motion personally.

The official receiver appealed against the order for costs, and the appeal was heard (by special leave) by the Divisional Court sitting in Bankruptcy.

Muir Mackenzie, for the appellant.—The motion was quite unnecessary and ought never to have been brought, and the court has no jurisdiction to order an official receiver to pay costs personally unless he has been guilty of misconduct.

Archer M. White, for the respondents.—No appeal lies on a question of costs alone.

Muir Mackenzie, in reply.—*In re Silver Valley Mines*, 31 W. R. 96, 21 Ch. D. 381, shows that a liquidator is entitled to appeal against such an order as this.

WRIGHT, J.—The ordinary rule is that appeals lie only on matters of law, and do not lie on a question of costs unless a question of principle is involved. I think, however, that the present appeal may be treated as one on a matter of law, for a order against an official receiver to pay the costs of any proceeding personally is equivalent to a declaration that he has been guilty of misconduct, of which, in this case there is no evidence.

BIGHAM, J., concurred.

Appeal allowed.

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

Solicitors for the respondents, *Bryson & White.*

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). March 20.

LACEBY v. LACON & CO. (LIMITED). (a.)

Licensing law — Licence — Order for new licence on condition of surrendering other licence—Removal—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.

The appellant was the holder of an off-licence of a public-house, and duly applied for a renewal at the general annual licensing meeting, and this was granted. He also duly applied for and obtained a new licence of an adjoining house, on the condition of giving up the licence of which he had just obtained the renewal.

Held, that the justices had not exceeded their jurisdiction, as this was not a removal of a licence, and therefore section 50 *of the Licensing Act*, 1872, *requiring notice to the owner of the premises, had no application.*

Decision of the Court of Appeal (Reg. *v.* Thornton, Ex parte Lacon & Co., 46 *W. R.* 241, [1898] 1 *Q. B.* 334) *reversed.*

This was an appeal from an order of the Court of Appeal (A. L. Smith, Chitty, and Collins, L.JJ.), reported *sub. nom. Reg.* v. *Thornton*, 46 W. R. 241, [1898] 1 Q. B. 334, affirming a judgment of the Divisional Court (Cave and Ridley, JJ.) granting a writ of *certiorari* to bring up and quash an order made by licensing justices.

In March, 1897, G. C. Laceby was the holder of a licence in respect of the "Five Alls" public-house at Battersea for the sale of beer, wine, and spirits to be consumed off the premises, and he was also the holder of a similar licence in respect of the cellar of the adjoining premises, No. 2, Abercrombie-street. It appeared that in 1890 the then holder of the licence for the "Five Alls," finding his premises insufficient, arranged to take the cellar of No. 2, Abercrombie-street, and obtained a separate licence in respect thereof, and since that time the two licences had been renewed from year to year. Before the general annual licensing meeting for the Wandsworth Division, which was held on the 5th of March, 1897, Laceby gave notice of his intention to apply for renewals of the two licences, and also gave notice of his intention to apply for a licence for the whole of the house No. 2, Abercrombie-street. The justices having granted the application for renewals of the old licences the applicant proceeded to make his application for the new licence, which was adjourned. At an adjourned meeting the justices asked the applicant whether he would give up his licence for the "Five Alls" if they granted him the new licence. He agreed, and thereupon the justices made an order granting him a licence for the sale of beer, wine, and spirits, to be consumed off the premises, in respect of No. 2, Abercrombie-street, subject to the condition of his giving up the licence which he held in respect of the "Five Alls."

The Court of Appeal held that there was no jurisdiction to make this order, as the requirements of section 50 of the Licensing Act, 1872, had not been complied with.

The applicant appealed.

Bosanquet, Q.C., and *S. C. Earle*, for the appellant.

Lawson Walton, Q.C., Foote, Q.C. (*Travers Humphreys* with them), for respondents.

Earl of HALSBURY, L.C.—I am glad, out of respect to the two courts below, from whom this question has come, that the matter has been so elaborately and carefully argued; but I confess for myself I cannot, now that the matter is fully before me, entertain any doubt as to the conclusion at which your lordships ought to arrive. I quite admit that during a considerable part of the argument, before my mind was sufficiently alive to the provisions of the Act of 1872, I was very much impressed by the argument which seems to have found favour with the courts below, because the transaction looked to me, having regard to section 50, like, what I think two of the learned judges say it was, doing by an indirect performance that which the Legislature had prohibited—namely, the removal of a licence from a house occupied by a tenant, against the will of his landlord, to some other house where he could carry on his business at the sacrifice of the landlord's interest in the former house. Without such a careful examination of the Act of Parliament as we have now had, that would be the first impression of a person reading these sections: it might be considered that the Legislature had provided for the interest of the landlord by making the landlord's dissent an absolute bar to the proceeding by the magistrates by way of removal.

Upon a careful examination, however, of the statute it appears to me that section 50, upon which reliance is placed, is a section which, whatever may have been its original design, has under the statute no machinery and no provision which can effectually prevent the grant of new licences, and I do not believe that the Legislature ever contemplated that such a bar should be placed in the way of the jurisdiction and discretion of the magistrates as would be involved in permitting the mere refusal of the owner of the premises, as distinguished from the tenant of the premises, to prevent the magistrates exercising their discretion in the matter. I can well understand that, given a current licence and given some proceeding whereby the current licence should be removed to other premises, the Legislature would have prevented the tenant sacrificing his landlord's interest by a proceeding in which the landlord himself was not represented. That is on the one hand clear enough. When I find that the only application for a removal must be made at the general licensing sessions, and when I observe, what has been so often pointed out to us, the interval between that date, the 5th of March, and the 5th of April, when the new licence must begin, I confess I am wholly unable to see what useful object can be performed by that section, or what protection to anybody is thereby given.

But as regards renewals and new licences it is obvious that neither this court nor any other court can supply machinery or provisions which the statute itself has not enacted. If the Legislature intended that there should be some protection during the currency of the licence and intended that the landlord should be represented, all one can say is that no such provisions can be found in the statute, and your lordships have no jurisdiction to supply them. What is clear is that by this Act of Parliament, and by the others to which the learned counsel have called our attention from time to time, what the Legislature has ultimately done has been to give an absolute unfettered discretion to the magistrates. Certainly it would be a very singular result of that legislation if upon a new licence being applied for the magistrates being invested, as by the hypothesis they are, with an absolutely unlimited discretion, the mere veto of the person who owns the premises held by a licensed person, which licensed person was applying for a licence for other premises, should prevent the magistrates granting a perfectly new licence to new premises, and that that bar should exist because the applicant had before that held other premises under

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

another licence. That would be a very singular result indeed, and certainly, unless there was something very clear in the statute to compel me to come to such a conclusion, I should absolutely refuse to assume that the Legislature had done so.

But it is not necessary for your lordships to consider that, because the question here is whether or not anything has been done which the justices were not at perfect liberty to do; it must be made out before any such order could be made and maintained as has been made by both the courts below that the magistrates acted without jurisdiction.

Now, I quite follow what Mr. Lawson Walton and Mr. Foote have so ingeniously and earnestly pointed out, that the result arrived at may be the same as would have been arrived at by a "removal." Granted. But what then? The thing that the magistrates have done is not the thing which is contemplated by the 50th section—that is to say, not the same as regards the actual order. Whether it is the same thing in substance or not I will treat of in a moment, but it is not the thing. What they have done is, they have licensed premises, and that licence does not purport to be, and is not certainly upon the face of the instrument, the former licence which existed of the "Five Alls," but it is an absolutely new licence. What the Legislature meant by the "removal of the licence" I can only conjecture, but I should think it would mean that a licence which had existed in one house should be, as, indeed, the phrase implies (it is not a very happy one), removed to another house. If any order was asked for upon that subject it is to be remembered that whatever discretion the magistrates have they are limited in the orders they make by the language of the statute, and if they wanted to make such an order as that they must make the order accordingly. It is all very well to say that it may come to the same thing; but where the magistrates are fettered by a statute which enables them only to act in a particular way, they must abide by that way. Here the magistrates on the affidavit laid before us say they were not asked to make an order for removal, and did not suppose they were making an order for removal; and when we look at the document itself there is no such thing as an order for removal to be found in the whole course of the proceedings, and yet your lordships are asked to say that these proceedings are without jurisdiction; because, although everything that the magistrates did and everything that they intended to do was within their jurisdiction, it is said the effect produced is just the same as if they had made some other order which they never did make and never intended to make, and by this circuitous process of reasoning it is to be supposed the magistrates acted outside their jurisdiction.

The observation immediately arises that where you are dealing with a subject-matter of this sort the form is part of the substance. It is a delusion to suppose that magistrates may do what may be equivalent to this, that, or the other. They are within the iron framework of a statute, and they have no jurisdiction to go beyond it. All that they did do, and all that they intended to do, was that they licensed a person to occupy new premises for the purposes contemplated by the statute.

I decline to go into the question of whether or not, if there was anything erroneous in the order which the magistrates made, the proper form of remedying that error has been adopted. I confess I should require further argument before I hastily came to the conclusion that this was the proper form, but I decline to enter into the question or give any opinion upon the subject. If the question hereafter arises whether *certiorari* is the proper remedy or not, then will be the proper time to decide it; but inasmuch as upon any hypothesis it can only be by some error in the proceedings, and inasmuch as I am of opinion that there is no error here at all, but that the magistrates have proceeded strictly within their jurisdiction, I am of opinion that this order of the Court of Appeal, confirming the order of the court below, ought to be reversed, and I accordingly so move your lordships.

Lord WATSON.—The Legislature have enacted that the licensing justices shall not remove (whatever that may mean) a licence from one set of premises to another unless the owner of the house which is about to be deprived of the licence is called as a party to the proceedings for his interest, and unless he consents to the order being pronounced. In the present case I think the only question is whether such an order has been pronounced. I do not think it is enough to bring the case within the statutory requirement of the presence of the owner of the house that the proceedings of the justices shall be attended with precisely the same consequences as if they had been asked to make, and had in point of fact made, an order of removal. It is not enough to say, as some of the judges have said, that the two things are in substance the same. It is not enough to say that either directly or indirectly the result must be the same. The court must come to the conclusion, in order to bring the matter within the statutory prohibition, that what has been done is one of the things which the Legislature have prohibited.

Now, I need not repeat what has been already said by my noble and learned friend the Lord Chancellor, but in the present case it appears to me that in construing, as one must do, that clause, which is not easy of construction, the 50th section of the Licensing Act of 1872, an order of removal never was contemplated by any of the parties to this case. It was not applied for; it was not intended to be granted by the licensing justices; and where one examines what they have done it amounts to the case of the destruction (at least it was said to amount to destruction) of one licence and the continuance of another. That is, to my mind, entirely opposed to what is the plain meaning of the statute in using the word "removal," which means that a licence shall be transplanted from one set of premises and serve as a privilege and protection to another set of premises—it may be to another set of premises in a different licensing district. In those circumstances I do not think the respondents in this case were entitled to any remedy. I do not think that they have shown facts requiring any remedy, and therefore I think it quite unnecessary to discuss in what form the remedy ought to have been granted if it had been required.

Lord MACNAGHTEN.—I am of the same opinion.

Lord MORRIS.—I am of the same opinion. In this case an application is made for a *certiorari* on the part of the respondents to remove into the Queen's Bench Division an order for a licence of 2, Abercrombie-street, in order to have it quashed. The licence on the face of it is a perfectly valid licence because it is a licence granted by persons competent and having jurisdiction—it is a licence to carry on in the house, 2 Abercrombie-street the business of sale of liquor for consumption off the premises.

Then what is the objection to that licence which is good upon the face of it? It is said that although it is a licence on the face of it—a grant for a new licence—yet it amounts to an order for a removal. Sometimes it is said "in substance," sometimes it is said "in effect," and sometimes it is said "the consequences are the same," but the argument is that it amounts to a

order for a removal under section 50 of the Licensing Act. As I have said, on the face of it it does not purport to be anything of the sort; it purports to be what it is—a grant of a new licence. The Act of 1872 contemplates licences being obtained and granted in three sets of circumstances. By section 40 it contemplates the grant of renewals; by section 42 it contemplates the grant of new licences; and by section 50 it contemplates the grant of a "removal" of a licence, which I would understand from the use of the words "removal of the licence" to refer to a licence then *in esse*. In this case the proceedings have not been taken merely under section 50. The applicant never applied for a removal—he applied for a renewal—he also applied for the grant of a new licence to the entire of No. 2, Abercrombie-street. Why is he to be held as having applied for a grant of a "removal" when he did not do it? As a matter of fact he did not take the proceedings for that. There are three different applications dealt with by the statute. There are three different sets of notices to be given by the statute; there are three different results to be arrived at by the statute. The first is renewal, the second is a grant of a new licence, and the third is an order for removal. Why is it to be persevered in that he must be held to have applied for that which he did not apply for? Why is it to be held as against the magistrates that they made an order, which they did not make, for a removal under section 50 because, forsooth, the consequences may be practically the same if that proceeding had been taken? That is a matter for legislation. This House, as one branch only of the Legislature, is not entitled to legislate. If it is suggested that this protection to brewers and their houses should be extended to the case of renewals, and to the case of a grant of new licences, it is for the Legislature to say so. The Legislature have confined the protection to the case of removal. Suffice it to say that this is not a case of removal. If it were not for the very great respect which I have for the courts that have decided the opposite, I would have said that it was a very plain case indeed.

Order appealed from reversed with costs here and below.

Solicitors for appellant, *W. W. Young & Son.*

Solicitor for respondents, *Wellington Taylor.*

Court of Appeal.

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 25.

HODDINOTT *v.* NEWTON, CHAMBERS, & Co. (LIMITED). (*a.*)

Master and servant—Employers' liability—Accidental injuries—Building—Building exceeding thirty feet in height—Building being constructed or repaired by means of a scaffolding—Alteration of building—Scaffolding inside building—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-sections* 1, 2.

In an application for compensation under the Workmen's Compensation Act, 1897, *it appeared that the employers had undertaken to strengthen the structure of a recently-built stable by the insertion of iron stays, the building being twenty-eight feet high measured to the top of the upright walls, and thirty-six feet high measured to the top of the roof, and that the deceased workman, at the time of the accident, was standing on a temporary structure set up inside the building, consisting of three planks placed on two trestles, the planks being eight feet above the ground.*

Held, that the stable was a building which exceeded thirty feet in height within the meaning of section 7 *of the Act, but that it was not a building which was being either constructed or repaired by means of a scaffolding within the meaning of the section.*

Appeal from a decision of the judge of the Wandsworth County Court on an application for compensation under the Workmen's Compensation Act, 1897, made under section 1, sub-section 4, of the Act at the hearing of an action under the Employers' Liability Act. 1880.

The applicant was the widow of a workman who had died in consequence of accidental injury sustained by him in the course of his employment. The employers had undertaken to strengthen the structure of a stable, which had been recently built for the London General Omnibus Co. The work consisted of inserting some iron stays to fasten together the columns and girders of the stable. For the purpose of this work a temporary structure was set up inside the building, consisting of three planks placed on two trestles, the planks being eight feet above the ground. At the time of the accident the deceased was standing on the planks engaged in assisting to raise one of the iron stays. The building was twenty-eight feet high measured to the top of the upright walls, and thirty-six feet high measured to the top of the roof.

The county court judge held that the case came within section 7, sub-section 1, of the Workmen's Compensation Act, and made an award in favour of the applicant.

The employers appealed.

R. M. Bray, Q.C., and *G. Spencer Bower*, for the appellants.—This case does not come within section 7, sub-section 1. Firstly, the building did not exceed thirty feet in height. Inasmuch as nothing was being done to the roof, the height of the building must be measured, as in section 5 of the London Building Act, 1894, from the ground to the top of the parapet, and so measured it was less than thirty feet in height. Secondly, the building was not "being constructed or repaired by means of a scaffolding." The appellants did not undertake the construction or the repair of this building. The work they undertook was alteration work, and sub-section 1 does not include the case of a building being altered. In sub-section 2 "undertakers" are defined to be, in the case of an engineering work, "the person undertaking the construction, alteration, or repair"; and, in the case of a building, "the persons undertaking the construction, repair, or demolition." The Legislature has advisedly omitted the word "alteration" in the case of a building. Neither was there any scaffolding in this case. A temporary arrangement of planks resting on trestles inside a completed building does not constitute a scaffolding. What the Act contemplates is a building which is being repaired at a height of thirty feet by means of a scaffolding.

Ruegg, Q.C., and *Moyses*, for the respondent.—The building was being constructed. It had not been properly constructed before, and the insertion of the iron stays was necessary in order to maintain it as a building. If it was not being constructed, it was being repaired. And the work was being done by means of a scaffolding. All the witnesses spoke of the planks and trestles as a scaffolding. There may be a scaffolding inside a building as well as outside.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The Act does not say that the scaffolding must be thirty feet high.

A. L. SMITH, L.J.—The first question is, whether, for the purpose of satisfying the requirements of section 7, sub-section 1, of the Workmen's Compensation Act, the height of a building is to be measured to the top of the upright walls or to the top of the roof. I will not now consider the proper method of measuring underground buildings. As to this building, it is shown to be more than thirty feet in height to the top of the roof, and, that being so, I think the applicant has made out that it exceeds thirty feet in height within the meaning of this Act.

The next question is whether this building was being constructed or repaired by means of a scaffolding. The county court judge found as a fact that the arrangement of planks and trestles constituted a scaffolding. Although the mere fact that the witnesses called it a scaffolding does not make it a scaffolding, if it is not one in fact, I cannot say there was no evidence to support the finding of the county court judge. Speaking for myself, I think it is immaterial whether that which is alleged to be a scaffolding is inside or outside a building. Neither do I think that the scaffolding itself need be thirty feet in height. The Act does not say so. The words of the sub-section are, "any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding." The sub-section does not say by means of a scaffolding thirty feet in height.

I pass on to the question whether, assuming this to have been a scaffolding, the deceased man was employed by the undertakers on a building which was being either constructed or repaired by means of a scaffolding. "Undertakers" are defined in sub-section 2, and are stated to be, in the case of a building, the persons undertaking the construction, repair, or demolition. Here the building had been already completed, and was in actual use. After it was completed, something which was not in the original design was found to be necessary in order to strengthen it, and the employers of the deceased, who were ironmasters, were called in to put in iron stays for that purpose. Were these ironmasters, then, constructing the building? No; it had already been constructed. In my opinion it cannot be said that this was employment by the ironmasters on a building which was then being constructed. In the case of an engineering work undertakers are defined to be "the person undertaking the construction, alteration, or repair"; but when the section goes on to deal with the case of a building the word "alteration" is left out. Then was this a case of repair? Was anything out of repair? No; this was a new building, which wanted something to be added in order to strengthen it. That was not repairing. I think that the claim fails on the ground that this was not a case of employment on a building which was being constructed or repaired. The appeal must therefore be allowed.

COLLINS, L.J.—I am of the same opinion. I think it is necessary to look at the provisions of the Act as a whole to see what the Legislature means. The Act applies to employment by the undertakers as therein defined on any building which exceeds thirty feet in height, and is being constructed or repaired by means of a scaffolding, or being demolished. I think that scaffolding must have some relation to the height of the building. It must be interpreted by reference to the nature of the work for which the Legislature contemplated it was to be used—*i.e.*, in the construction or repair of a building exceeding thirty feet in height by an undertaker, who is defined to be the person undertaking the construction, repair, or demolition. This definition throws some light upon the question what sort of operation the Legislature was contemplating. It was the construction, repair, or demolition of a building, which would *primâ facie* suggest the building as a whole. And the operation to which scaffolding was contemplated as an essential would seem, therefore, to be *primâ facie* the work of constructing or repairing such a building as a whole, an operation to which a scaffolding is essential. It is not necessary, and it would be impossible, to define what is the exact legal meaning of scaffolding as used in this connection, nor is it necessary to decide whether something short of construction or repair of a building over thirty feet high as a whole, carried out by means of a scaffolding in the full sense of the term, such as might be used for dealing with a building over thirty feet high, might not be within the Act. But though definition is difficult or impossible, it is possible to say as to certain cases that they fall within or without the Act. It seems to me that the present case cannot be brought within the Act without straining the particular words at the expense of the general intention. It is impossible to suppose that the Legislature fixed thirty feet as an arbitrary line having no relation to the actual risk provided against, so that, when a building has once reached thirty feet high, any operation which can be called construction or repair of any part of the building inside or out, however near the ground, where the workman has to stand on an arrangement which may be termed scaffolding in order to reach it, will be within the Act and give him a remedy if he falls. Such an interpretation would give no reasonable ground for the introduction of thirty feet at all. It never can have been meant to cover the case of a man employed to put up a rod to hang pictures on in a drawing-room, though he supported himself on a platform, which could be called a scaffolding, in order to do it. It is obvious that the height of the house could have no bearing whatever on the risk of such an operation. It may be said that is not a case of repair, but no more is the case before the court. But the same observation would apply to whitewashing a ceiling. I come to the conclusion that the case does not come within any view which can possibly be taken of the intention of the Legislature.

ROMER, L.J., concurred.

Appeal allowed.

Solicitors for the appellants, *Ingle, Holmes, & Sons.*

Solicitor for the respondent, *C. F. Appleton.*

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 4.

MCNICHOLAS v. DAWSON & SONS. (a.)

Master and servant—Liability of master for accidents—Accident arising out of and in the course of the employment—"Factory"—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7.

A workman, who was employed at a steam-engine in a shed temporarily used in connection with the construction of a building close to, was killed by an accident while so employed. In proceedings to assess compensation under the Workmen's Compensation Act, 1897,

Held, that the shed was constituted a factory by section 23, *sub-section* 1 (b), *of the Factory and Workshop Act,*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

1895, *for the purpose of applying thereto the powers of the Act with reference to dangerous machines, and that therefore, by virtue of section* 7, *sub-section* 2, *of the Workmen's Compensation Act*, 1897, *the engine in the shed was itself a factory; and that, consequently, the deceased man was killed while employed "on or in or about a factory" within the meaning of section* 7, *and the employers were liable to pay compensation.*

Appeal from the decision of the Bradford County Court judge in proceedings to recover compensation under the Workmen's Compensation Act, 1897.

The appellant was the widow of a deceased workman named Patrick McNicholas, who at the time of the accident causing his death was a workman in the employment of the respondents, Messrs. Dawson & Son, who were builders engaged at the time in erecting a post-office. McNicholas was employed to look after a steam engine in an engine shed and a mortar-pan, his duty being to fire the boiler, to start the engine and oil it, and to oil and feed a mortar-pan, which was outside the engine shed in the open air. The engine was used for grinding mortar for the post-office, from which it was distant about twenty yards. Across the middle of the engine shed was a revolving shaft worked by the engine and placed about four feet from the ground. The engine shed had a full-sized door at the side furthest away from the mortar-pan, and there was a small door four feet high at the side of the shed nearest to the mortar-pan. This small door was sometimes used for ventilating the engine shed, and it opened from the inside, and the man working at the engine would have to pass under the shaft to go to this door. The deceased man had been forbidden to go out of the shed by this small door. Upon the morning of the 6th of August, 1898, at about 6.55 a.m., the deceased man called to an outdoor labourer named Smith, who was employed at the mortar-pan, asking him if he was ready, and upon being answered in the affirmative he started the engine, and about two minutes afterwards Smith heard a rattling noise, and upon going into the engine-shed he saw the deceased man, who died shortly afterwards, caught in the shaft. No one saw how the accident happened. It was the duty of the deceased man, after having started the engine, to go to the mortar-pan. The evidence showed that the proper way to the mortar-pan was by the main door. The oil-can used for oiling the engine was found on the shelf where it was kept when not in use, thus showing that the accident did not happen when the deceased man was oiling the engine. Two questions were raised. First, whether the accident arose out of and in the course of the employment, within section 1, sub-section 1, of the Workmen's Compensation Act, 1897; and, secondly, whether the steam engine was a "factory" within the meaning of section 7 of the Act. The county court judge held that the deceased at the time of his death was employed in a "factory"; that the deceased had not been guilty of serious and wilful misconduct; but that the evidence left it uncertain whether the accident arose "out of" the employment, though it probably arose "in the course of" the employment, and that the *onus* of proof being on the appellant, judgment must be entered for the respondents. The appellant appealed. The compensation, if any was payable, was agreed at £180.

By section 1, sub-section 1, of the Workmen's Compensation Act, 1897, "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman," his employer shall be liable to pay compensation. By section 7, sub-section 1, "This Act shall apply only to employment . . . on or in or about a railway, factory, . . ." By sub-section 2, "'factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. . . ." By section 23, sub-section 1, of the Factory and Workshop Act, 1895, "The following provisions—namely, . . . (v.) The provisions of this Act with respect to the power to make orders as to dangerous machines shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word factory. . . ."

Macaskie and *E. W. Perkins*, for the appellant.—The accident arose out of and in the course of the deceased man's employment. It took place when he was at work, at the place where he was at work, and by the machine on which he was at work. The facts and probabilities all show that the deceased was in the course of his employment when the accident happened. In *Smith* v. *Lancashire and Yorkshire Railway Co.*, *ante*, p. 146, [1899] 1 Q. B. 141, the workman was killed while jumping off the footboard of a train in motion on to which he had got for his own pleasure and not for any object of the defendants; and in *Lowe* v. *Pearson*, *ante*, p. 193, [1899] 1 Q. B. 261, the workman was injured when attempting to clean a machine with which he had nothing to do and which he was told not to touch. Those cases, therefore, are quite different from the present. Even supposing the deceased man in the present case had been endeavouring, contrary to his orders, to go to the mortar-pan by passing under the shaft and out of the small door, it would still be in the course of his employment, as it was his duty to go to the mortar-pan.

Ruegg, Q.C., and *A. Powell*, for the respondents.—The county court judge was right when he held that the appellant had failed to prove that the accident arose out of and in the course of the employment. The appellant had to prove this, and if she left it in doubt she failed. If the deceased was attempting to go out by the small door, he was doing that which he was forbidden to do, and in such a case the accident could not be said to have arisen out of and in the course of the employment. The whole of the circumstances were left in doubt, and the appellant must fail. Secondly, there was no "employment" within the Act. This is not a "factory" within section 7 of the Act of 1897. Sub-section 2 of that section defines "factory" as having the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. It is admitted that this shed is not a factory within the Factory Acts, 1878 to 1891. To make it a "factory" it must come within the second part of the sub-section, but that part obviously refers to section 23, sub-section 1 (*a*), of the Factory and Workshop Act, 1895, where the language is almost the same, and not to sub-section 1 (*b*), which relates to premises containing certain machinery. The material words in the definition of "factory" in section 7, sub-section 2, of the Act of 1897 are "machinery or plant," which refers to machinery or

plant described in section 23, sub-section 1 (*a*), of the Act of 1895—that is, machinery or plant used in the process of loading or unloading to or from a wharf, &c. [ROMER, L.J.—Section 23 of the Factory and Workshop Act, 1895, applies certain provisions as to dangerous machines as if (sub-section 1 (*b*)) any premises on which certain machinery was were included in the word factory. Does not section 7, sub-section 2, of the Act of 1897 make the machinery to which those provisions are applied a "factory"?] The machinery is machinery used in loading or unloading to or from a wharf, &c. That exhausts the machinery to which the definition applies. Nor was there a building being constructed on which machinery was being used within the latter part of section 7, sub-section 1, of the Act of 1897. The shed was not being constructed. The machinery must be on the building which is being constructed: *Mellor* v. *Tomkinson*, *ante*, p. 240, [1899] 1 Q. B. 374. The post-office was being constructed, but the machinery was not "on" it. The word "on" means something closer than "about": *Powell* v. *Brown*, *ante* p. 145, [1899] 1 Q. B. 157. These temporary sheds were never intended to be included in the section.

A. L. SMITH, L.J.—In this case the appellant is the widow of a deceased workman. The deceased man was employed by the defendants to work an engine which was used for grinding mortar in a mortar-pan close to the engine-house—the mortar being used in the erection of a post-office. What happened on the day in question was this: The deceased man went in the morning to start the engine, and his duty, after having done so, was to go to the mortar-pan. The deceased called out to a workman named Smith, who was at the mortar-pan, and asked him if he was ready, and upon being answered in the affirmative he started the engine, and in two minutes afterwards he was found caught in the shaft, and shortly afterwards he died. It is said that there was no evidence that the death was caused by an accident arising out of and in the course of the employment. In my opinion, anyone would say that the accident arose out of and in the course of the employment, because he started the engine, as it was his duty to do, and in two minutes afterwards he was found caught in the shaft. The county court judge said that it was consistent with the evidence that the deceased man might have been attempting to go out of the small door which he was forbidden to do, and, therefore, it was not proved that the accident arose out of the employment. I cannot agree with that view. That proposition comes to this, that when a workman goes by a wrong way from one part of his work to another, and is injured while doing so, the injury would not arise out of and in the course of his employment. The learned judge felt himself pressed by the decision in *Smith* v. *Lancashire and Yorkshire Railway Co.* In that case the deceased man was collecting tickets from a train, and after having finished doing so he jumped on to the footboard of the train when it was in motion, and in getting off he was killed. The judge there found that "the deceased was not actually engaged in any act of service at the time of the accident, and did not get on the footboard for any object of his employers, but for his own pleasure." That was a finding of fact with which this court had to deal. Upon that finding we held that the accident did not arise out of the employment. We could have come to no other conclusion in face of that finding. In the present case, assuming the facts most hostilely to the appellant, assuming that the deceased man was on his way out of the small door, which was a wrong way for him to go out by, and that he acted rashly and negligently, that would not absolve the employer unless the workman was guilty of serious and wilful misconduct. The judge here has negatived serious and wilful misconduct. Therefore, putting the case most favourably for the employers, the accident arose out of and in the course of the employment.

I come now to the second point, which is an important one, and I agree with the decision of the judge upon this. It is said that the employment in which the deceased man was engaged was not an employment within the Act of 1897. Section 7, sub-section 1, defines the employments to which the Act applies, and the word "factory" is the material word in that definition. It is said that the employ- in this case was not in a "factory" within the meaning of that word. Now, "factory" is defined in sub-section 2 as having the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also as including any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. Reading only that part of the definition which is material to the present case, it runs thus: Factory includes any machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. Turning now to the Act of 1895, section 23 of that Act provides, by sub-section 1, that, amongst other things, the provisions of the Act with respect to the power to make orders as to dangerous machines shall have effect as if "(*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building" were included in the word factory. It seems to me that the Act treats the things mentioned in clauses (*a*) and (*b*) as included in the word "factory," to which the provisions of the Act with respect to the power to make orders as to dangerous machines are to apply. Turning back again to section 7, sub-section 2, of the Act of 1897, "factory" is defined as including any machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. Why does not that apply to the machinery mentioned in section 23, sub-section 1 (*a*) and (*b*), of the Act of 1895?

Supposing a machine described in clause (*b*) were defective, would not justices have power to deal with that machine and to make an order in regard to it? To my mind they clearly could under section 4 of the Act of 1895. Therefore I think that the machinery in clauses (*a*) and (*b*) is brought within the Act of 1897 as a "factory," and the shed in this case comes within clause (*b*) as being "premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building." Therefore this engine, which was worked by steam, and which was temporarily used for the purpose of grinding mortar for the purpose of structural work in connection with a building, was machinery to which the provisions of the Factory and Workshop Act, 1895, with respect to the power to make orders as to dangerous machines applied, and was consequently itself a "factory" within the meaning of section 7 of the Act of 1897. Upon this point, therefore, I agree with the learned county court judge, though as we differ from him on the other point the appeal will be allowed.

COLLINS, L.J.—I am of the same opinion. The

evidence showed that the deceased man's duty was to fire the boiler of the engine, to start the engine, to oil it, possibly to open the small door for ventilating purposes, and then to go out to the mortar-pan. The evidence showed that on the morning in question he started the engine, and about two minutes afterwards he was found involved in the machinery. The question is, Do these facts amount to evidence that the accident arose out of and in the course of the deceased man's employment? I agree that the onus of proving that lies upon the applicant. The question comes to this, Was there evidence to go to a jury that the accident arose out of and in the course of the employment, because, as it seems to me, the county court judge did not decide upon the evidence, but said that there was no evidence fit to leave to a jury that the accident so arose. In my opinion there was evidence. The highest that the case can be put against the deceased man is that he was going out of the shed after having started the engine by a dangerous way under the shaft. But it is plain that it was just as much part of his duty to go out of the shed as to go into it, and he was acting in the course of his employment in doing either. It must be remembered that the right of a workman to compensation under the Act of 1897 does not depend upon his proving negligence in the employer or in anyone for whose act the employer is responsible; nor is it any answer to a claim for compensation to prove that the workman has himself been guilty of negligence. If a workman shows that the accident arose out of and in the course of an employment within the Act, then the employer, to escape liability to pay compensation, must show that the injury was attributable to the serious and wilful misconduct of the workman. Negligence, therefore, is out of place in this consideration, and the applicant will recover if he can show that the accident arose out of and in the course of the workman's employment, even though the workman may have been guilty of negligence. I do not wish to say that there may not be such a negligent act causing the accident so entirely outside the employment that it could not be said that the accident arose out of and in the course of the employment at all. But here the accident arose out of and in the course of the employment, and if the deceased man was negligent at all, the negligence occurred in the course of the employment, and can be no answer to the claim.

I now come to the second point. Section 7, sub-section 1, specifies the employments to which the Act applies. There was no scaffolding used here, and I should have some difficulty in bringing this case within the words "any building . . . on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction" thereof. It is not necessary to decide that question, because I have come to the conclusion that the case is covered by another part of the sub-section. By the sub-section the Act is to apply to employment on, in, or about a "factory." The question is whether this machine in this shed is a "factory" within the meaning of section 7. That leads us to examine this very extraordinary method of legislation. Section 7, sub-section 2, provides that "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891"—it is admitted that that part of the definition does not apply—"and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895," &c. That brings me to section 23 of the Factory and Workshop Act, 1895. That section applies to certain subject-matters some of the provisions of the Factory Acts, including the provisions of the Act of 1895 with respect to the power to make orders as to dangerous machines. The principle is that it treats certain things as factories for certain purposes, among other things, machinery used for loading or unloading to or from a dock, &c., is to be included in the word factory, and clause (*b*) includes in the word factory something else, which is not machinery alone—namely, premises on which machinery is temporarily used for a particular purpose. At first sight I was inclined to think that the premises must be constituted a factory within the Act of 1897, before the provisions of that Act can be applied to them. But as has been pointed out by Romer, L.J., though clause (*b*) does not constitute the machinery on the premises there specified a factory, it is an enactment applying the provisions of the Act as to dangerous machines to the machinery therein, as if the premises containing the machinery were themselves a factory. That explains why one must first get the factory before considering the machinery. That legislation leads to this result. By section 7, sub-section 2, of the Act of 1897, the word "factory" includes any machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. In the Act of 1895 I find an enactment that premises on which certain machinery is are included in the word factory for the purpose of applying certain provisions of the Act to the machinery. To that machinery, therefore, certain provisions of the Act of 1895 are applied, and therefore the machinery itself becomes a "factory" within the definition of that word in section 7 of the Act of 1897. We have, therefore, a factory within a factory. By this indirect legislation this machinery in this shed, which is included in the word factory for certain purposes, is itself a factory. The deceased man, therefore, was at the time when he met the accident employed on or in or about a factory within the meaning of section 7 of the Act of 1897.

ROMER, L.J.—I am of the same opinion. Part of the deceased man's duty was to attend to the engine, and probably it was his duty to clean it. I infer from the circumstances of this case that in going under the shaft the deceased man was acting in the course of his employment. Clearly it would be so if he went there to clean the engine. I think it would be so if he was on his way towards the small door, though he was told not to go out by that door, inasmuch as it was his duty to go to the mortar-pan. In doing so he was certainly not acting for his own pleasure. I have therefore come to the conclusion that the accident arose out of and in the course of the employment.

Upon the second point I will only add a few words. Section 7, sub-section 1, of the Act of 1897 includes within the Act employment on or in or about a "factory." Turning to the definition of a factory in sub-section 2 I find that it includes machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. Turning to the Act of 1895, I find that premises on which machinery worked by steam, water, or other mechanical power is temporarily used in connection with a building are included for some purposes in the word factory. This engine shed was under that provision constituted a factory because it was being temporarily used for the purpose of the construction of a building, seeing that its principal if not sole existence was for the purpose of making mortar for the construction of the building. If that is so, the shed is a factory for the purpose of the application of some of the provisions of the Factory Acts, and it follows that the machinery in it was machinery to which the

provisions of the Act of 1895 with respect to the power to make orders as to dangerous machines applied. The chain is complete, and the result is that this engine was a "factory" within section 7 of the Act of 1897.

Appeal allowed, and judgment entered for the appellant for £180, the agreed amount of compensation.

Solicitor for the appellant, *F. Hatton*, for *Fox & Crabtree*, Bradford.

Solicitors for the respondents, *W. Hurd & Son.*

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 25.

REES v. THOMAS. (a.)

Master and servant—Employers' liability—Accidental injuries—Accident arising out of and in the course of the employment—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the workman, who was a fireman employed in a mine, while in the course of his employment saw a horse belonging to his employer running away, and tried to stop it, and in so doing was knocked over and killed.*

Held, that this was a case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master, and as such was within section 1, *sub-section* 1, *of the Workmen's Compensation Act.*

Appeal from an award of the judge of the Bridgend County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was the widow of the injured workman, who was a fireman in the employment of a mine-owner. One of his duties was from time to time to examine the mine and report as to its condition. On the day of the accident he had examined the mine and found it to be in a proper state, and it was then his duty to go to an office, which was half-a-mile distant from the pit's mouth, and there make a report in writing. Some trucks loaded with ashes were just about to start from the pit's mouth along a tramway in the direction of the office. The workman, contrary to one of the rules of the mine, got upon one of the trucks for the sake of a ride towards his destination. During the journey the horse which was drawing the trucks took fright and bolted. The workman jumped off the truck, and tried to stop the horse, and in so doing he was run over and killed.

The county court judge found that the accident was not attributable to any serious and wilful misconduct on the part of the workman within section 1, sub-section 2 (c), of the Workmen's Compensation Act, and held that the accident arose out of and in the course of the employment of the workman within sub-section 1, and he made an award in favour of the applicant.

The employer appealed.

Ruegg, Q.C., and *Sankey*, for the appellant.—The accident did not arise out of and in the course of the employment of the deceased. He saw a horse belonging to his master running away, and he very properly tried to stop it; but he could not do so at his master's expense, for he was not under any legal obligation to try to stop it. The risk he incurred was not a risk arising out of his employment. He acted as a mere volunteer. The applicant is bound to show that the accident arose out of work which, as between himself and his master, he has been engaged to perform and has contracted to perform.

They cited *Lowe* v. *Pearson*, *ante*, p. 193, [1899] 1 Q. B. 261. [A. L. SMITH, L.J., referred to *McNicholas* v. *Dawson*, *ante*, p. 500, [1899] 1 Q. B. 773.]

C. A. Cripps, Q.C., and *W. D. Benson*, for the respondent, were not called upon to argue.

A. L. SMITH, L.J.—The deceased was a fireman in a pit. On the day of the accident he had to take a report from the pit's mouth to the office of his master. He got on to a truck which was going along a tramway, which he had no right to do by the rules of the colliery; but the county court judge has found that in so doing he was not guilty of serious and wilful misconduct. While he was riding on the truck the horse ran away. He jumped off and tried to stop the horse, but he did not succeed, and he was killed. Did the injury arise out of and in the course of his employment? I am of opinion that it did. He was clearly in the course of his employment in taking his report to his master's office. It is said, however, that the injury did not arise out of the employment, because in trying to stop the runaway horse he was doing a voluntary act which he was under no legal obligation towards his master to do. I think this was a case of an emergency. The point was touched on in *Lowe* v. *Pearson*. In that case the claim to compensation was made by a boy, who was employed in the mere manual labour of making balls of clay and handing them to a woman who was working at a machine. He was expressly forbidden to touch the machinery, but he meddled with it and was injured. We held that that case was not within the Act, but I said this: "I wish to emphasise what the appellant's counsel said about this case not being one of an emergency. It is not the case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master. I reserve the question what our decision in such a case ought to be till it arises." The question has arisen now, and, in my opinion, this case is within the Act.

COLLINS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *T. J. Hughes*, Bridgend.

Solicitors for the respondent, *Riddell, Vaizey & Smith*, for *Walter Morgan, Bruce, & Co.*, Pontypridd.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 18.

WOOD v. WALSH & SONS. (a.)

Master and servant—Employers' liability—Accidental injuries—Employment—Building being "repaired by means of a scaffolding"—Painting outside of house by means of ladders—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.

By section 7, *sub-section* 1, *of the Workmen's Compensation Act*, 1897, *the Act is to apply to employment*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

on, in, or about any building exceeding thirty feet in height which is either being "constructed or repaired by means of a scaffolding."

Held, that painting the outside of a building by means of ladders, including the preparation of the surface for painting, is not "repairing" the building by means of a "scaffolding" within the meaning of section 7, sub-section 1, of the Act.

Appeal from the decision of the Leeds County Court judge upon a case stated by an arbitrator appointed to settle a claim for compensation under the Workmen's Compensation Act, 1897.

The claimant, the respondent, was the widow of a deceased workman who, at the time of the accident, was in the employment of the appellants, who were painters and decorators. The deceased man was employed with several other workmen in preparing the outside of a house, over thirty feet in height, for painting by removing the dirt and blisters, and making good the woodwork with putty and the stonework with hall-plaster or cement, and afterwards in painting the surface. Nothing was being done to the building except preparation for painting and the actual painting. There were five or six ladders on the job. On one of the ladders a plank was fixed with one end resting on a window-sill of the building and the other end upon a rung of the ladder and tied to the ladder, and one of the workmen used this plank to stand upon when at work. The deceased man did not stand upon this plank. The deceased man was standing upon a rung of one of the ladders, 33 feet long, which was resting against the wall, and was engaged in painting and puttying, when the rung broke, and he fell down and was killed. The compensation, if any, was agreed at £237 17s. The arbitrator held that the deceased man was not employed on, in, or about a building which was "either being constructed or repaired by means of a scaffolding" within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897, the painting not being repairs, and neither the ladders alone nor the arrangement of ladder and plank constituting a scaffolding within the meaning of the Act. He accordingly made his award in favour of the employers subject to two questions of law which he submitted for the decision of the county court judge: (1) Whether the building was being "repaired" within the meaning of the Act, and (2) if so, whether it was being repaired by means of a "scaffolding" within the meaning of the Act.

The county court judge reversed the decision of the arbitrator upon both points, and made his award in favour of the claimant for £237 17s.

The employers appealed.

C. A. Russell, Q.C., and *Clarke Hall*, for the appellants.—Ordinary painting is not repairing within the meaning of section 7, sub-section 1, of the Act of 1897. The words of that sub-section are "repaired by means of a scaffolding." That shews that the kind of repairs intended are repairs of a structural character, and not repairs of a merely decorative character. The words "constructed or repaired by means of a scaffolding" occur in the schedule to the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), and in the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 23, sub-section 2 (*a*). Secondly, the ladders were clearly not "scaffolding" within the meaning of the Act. Nor was the arrangement of ladder and plank a "scaffolding": see 1 Parker's Glossary of Architecture, "scaffold"; Century Dictionary, "scaffolding." In so far as these are questions of fact, the arbitrator has found as a fact that neither the ladders nor the arrangement of ladder and plank constituted a "scaffolding." Even if the arrangement of ladder and plank was a "scaffolding," the mere fact that one small part of the building was being repaired by means of what might be called a scaffolding did not show that the building was being repaired by means of a scaffolding. The decision of the county court judge was therefore wrong.

Robert Wallace, Q.C., and *Horace Marshall*, for the respondent.—"Repair" within the meaning of this Act means the restoration of a house to a condition fit for use and occupation. Here the painting was not of a mere decorative character. The woodwork and stonework were being repaired, and the building was being restored to its proper condition. This work was necessary to prevent the woodwork from decaying, and would be required under a covenant in a lease to repair and keep in repair. Secondly, the ladders were a "scaffolding" within the meaning of this Act. A scaffolding means anything used outside a building for the purpose of construction or repair. The word is used in its popular and not in its technical sense. If the thing is necessary and suitable for the purpose it is a scaffolding. Section 23, sub-section 2 (*a*), deals with dangerous employments, and it is immaterial in this connection whether ladders are used or a regular scaffolding. If, however, the ladders are not a scaffolding, the arrangement of ladder and plank was. A painter's boat would be a scaffolding within the meaning of this Act. The learned judge was therefore right.

A. L. SMITH, L.J.—An argument has been frequently used in these cases that if we do not give a certain interpretation to the Act the effect will be to shut out a number of workmen from its benefits. That may or may not be so. All we have to do is to construe the Act according to the language used in it. But this I may say, that the Act on its face does not intend to include all workmen in its scope. Only certain workmen are brought within its scope, and the rest are left outside. What we have to consider is, whether the present case comes within the Act. The deceased man was employed in painting the outside of a house, and the work of painting was being done by means of ladders. In one case a plank was fastened at one end to a ladder and the other end rested on a window-sill, but the deceased man did not use this plank for doing his work. He was standing on the rung of one of the ladders, when the rung broke and he fell and was killed.

Now, I can entertain no doubt that the Legislature, when it passed this Act, knew well what was conveyed by the words "ladder" and "scaffolding." Nor can I have any doubt that they knew well what was conveyed by the terms "painting" and "repairing." To my mind, though section 7, sub-section 1, of the Act is in many ways a very difficult section to construe, it presents no difficulty in the present case. The house which was being painted was over thirty feet in height, and so far came within the section. The first question we have to consider is whether it was being "constructed or repaired." Is painting the outside of a house construction or repair? Clearly it is not construction. Is it, then, repair? In my opinion ordinary outside painting is not repairing. The arbitrator has stated in the case that nothing was being done to the building except preparation for painting and the actual painting. If the Legislature had intended to include ordinary painting, it would have said so in clear language. On the contrary, the Legislature has used language which seems to me to be perfectly clear—namely, "constructed or repaired," and to my mind painting cannot be brought within those terms. The

next question is as to the meaning of the word "scaffolding." Can it be said that the ladders which are used in the work of painting constituted a scaffolding within the meaning of the Act? To my mind no one would say that repairs which were done by means of ladders were done by means of a scaffolding. Again I say that if the Legislature had intended any such thing it would have said so. It has confined the enactment to repairs done by means of a "scaffolding," and I cannot think that repairs done by means of ladders come within that term. It was then said that the arrangement of the ladder and the plank constituted a scaffolding. That seems to me to be a question of fact. As I foresee that many appeals will be brought before us raising the question as to whether a particular structure is or is not a scaffolding, I think it best not to attempt to define the meaning of the word "scaffolding." In this case the arbitrator has found upon the facts that this arrangement of ladder and plank is not a scaffolding. That disposes of that point. For these reasons I do not think that this building was being either constructed or repaired by means of a scaffolding within the meaning of section 7, sub-section 1, of the Act, and the decision of the county court judge must therefore be reversed, and the award of the arbitrator restored.

COLLINS and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitors for appellants, *Lawson, Coppock, & Hart*, Manchester.

Solicitor for respondents, *A. W. Willey*, Leeds.

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 11.

LOWTH *v.* IBBOTSON. (*a.*)

Master and servant—Employers' liability—Accidental injuries—Employment on or in or about a factory—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.

In an arbitration under the Workmen's Compensation Act, 1897, *it was proved that the applicant sustained personal injury in the course of his employment as a carter whilst delivering sacks of flour a mile and a-half away from his employers' factory.*

The county court judge held that the employment of the applicant at the time of the accident was not "on or in or about a factory" within section 7, *sub-section* 1, *of the Workmen's Compensation Act*, 1897.

Held, that the decision of the county court judge must be affirmed.

Powell *v.* Brown, ante, *p.* 145, [1899] 1 *Q. B.* 157, *referred to.*

Appeal from the decision of the judge of the Sheffield County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant sustained personal injury in the course of his employment as carter for the respondents, who were millers, while he was delivering sacks of flour taken from the respondents' factory on their dray. The accident happened at a distance of a mile and a-half from the respondents' factory. The county court judge held that the employment was not on, in, or about a factory at the time of the accident within the meaning of section 7 of the Workmen's Compensation Act, and adjudged that the applicant was not entitled to compensation.

The applicant appealed.

Arthur Sims, for the applicant.—The word "about" in section 7, sub-section 1, of the Workmen's Compensation Act is not limited to mere physical proximity: *Powell* v. *Brown*, *ante*, p. 145, [1899] 1 Q. B. 157. It bears the meaning of "relating to." The Act applies to employment on or in or relating to a factory.

Ruegg, Q.C., and *Arthur Powell*, for the employers, were not called upon to argue.

A. L. SMITH, L.J.—This seems to me to be a plain case. The Workmen's Compensation Act has limitations, though it has conferred enormous benefit on employés at the expense of their masters. Section 7, sub-section 1, says that the Act shall apply only to employment on or in or about a railway, factory, &c. Here the employment at the time of the accident was a mile and a-half away from the factory. Is that about a factory? I adhere to what I said in *Powell* v. *Brown* that the word "about" means that the employment may be in close propinquity to the factory, and whether that was so in any particular case is a question of fact to be determined by the tribunal before which the claim comes. There the accident happened close to the factory, and the facts showed that the workman was employed in a way which reasonably brought him within the Act. Here the county court judge found that what happened a mile and a-half away from the factory did not happen about the factory. I think the learned judge was right. The appeal must therefore be dismissed.

COLLINS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicant, *Halse, Trustram, & Co.*, for *A. Muir Wilson*, Sheffield.

Solicitors for the employers, *Hurd & Son*, for *A. Neal*, Sheffield.

(*a.*) Reported by F. G. BUCKER, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div.
Stirling, J. March 22, 23.

In re MOWAT.

KINGSTON COTTON MILL CO. *v.* MOWAT. (*a.*)

Fraudulent conveyance—Assignment of policy and investment of money on mortgage—Protection of creditors—Administration following assets—Injunction—13 Eliz. c. 5.

The court has jurisdiction before judgment in an administration action to secure, for the benefit of creditors, the proceeds of moneys which have been received under a deed which is impeached as void by virtue of 13 *Eliz. c.* 5.

This was a motion in an administration action for payment into court by the defendant, Mrs. Dalzel, of the proceeds of two policies of assurance received by her, or, in the alternative, for a receiver.

The facts were as follows: In 1890 and 1894 the testator effected insurances on his own life; he assigned them to his niece, the defendant Mrs. Dalzel, and notice was given to the insurance companies, so that under the provisions of the Judicature Act, 1873, s. 25 (6) the legal title passed to her. The

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

testator died in 1895. In April and May, 1895, the policy-moneys were received on Mrs. Dalzel's behalf by her brother and were invested by him on mortgage for her with other moneys which she handed to him. The testator's will was not proved until the 6th of June, 1895. His estate proved to be insufficient, and the present action was brought on behalf of the plaintiffs and all other creditors of the testator, alleging that the assignments to Mrs. Dalzel are void under the statute 13 Eliz. c. 5.

Upjohn, Q.C., and *Hon. T. H. Watson*, for the plaintiffs.—Mrs. Dalzel is an executrix *de son tort* or a constructive trustee; the property in question is assets, and is impressed with a trust. If the policy-money were in the hands of the insurance company I could ask for an injunction to prevent payment. Mrs. Dalzel is in a fiduciary capacity.

They referred to 13 Eliz. c. 5; *Lister* v. *Stubbs*, 38 W. R. 548, 45 Ch. D. 1; *Shears* v. *Rogers*, 3 B. & Ad. 362.

Jenkins, Q.C., and *Dunham*, for the defendants.—The property passed to Mrs. Dalzel by assignment. The money has been received and disposed of; it no longer exists. The statute 13 Eliz. c. 5 is not founded on any doctrine of trusts. The motion was not brought within a reasonable time. An assignee under a deed which is void is not a trustee. The highest right of the plaintiffs is to rank as creditors against the assignee or her estate; there is no right to follow the property.

They referred to *Lister* v. *Stubbs*.

Borthwick, for the executrix.

Upjohn, Q.C., replied.

STIRLING, J., after stating the facts, continued: All that is sought is an undertaking by Mrs. Dalzel not to deal with the mortgages or the principal money thereby secured until trial, without notice to the plaintiffs. Mrs. Dalzel resists on the ground that there is no jurisdiction to grant an injunction or appoint a receiver.

The statute confers on creditors legal rights: *In re Maddever*, 33 W. R. 286, 27 Ch. D. 523. As against creditors an assignment within the statute is void both at law and in equity, and the property comprised in it is to be treated as being that of the testator at the time of his death: see *Bethel* v. *Stanope*, Cro. Eliz. 810; *Shears* v. *Rogers*. In the latter case Littledale, J., says the creditors "had a right to the property which the deed purported to convey, and might enforce that right at law. The assignment was void as soon as the creditors claimed to treat it as such, though not until then." Paterson, J., points out that the assignee becomes by intermeddling with the property after the death of the assignor, executor *de son tort*, and chargeable by the creditors in respect of the property taken by him under the assignment. This view was approved by Kindersley, V.C., in *Shee* v. *French*, 5 W. R. 386, 3 Drew. 716. Although the rights of the creditors are legal, the courts of equity assist them by giving such equitable remedies as are not given by courts of law. Thus there are many cases in which, after the death of a debtor, deeds void under the statute have been set aside at the instance of creditors and the property comprised therein administered for their benefit: see, for example, *Adames* v. *Hallett*, L. R. 6 Eq. 468, 16 W. R. Ch. Dig. 99; *Taylor* v. *Coenen*, 1 Ch. D. 636, 24 W. R. Dig. 262. The court seems to have adopted the same course as is taken with reference to assets by descent: see *Pimm* v. *Insall*, 2 Sc. & G. 449. The question here is whether the court will grant any relief before judgment. On principle it seems to me that such relief may be given. The assignments become void the moment the creditors claimed to treat them as such; therefore the property comprised in them ceased, as against creditors, to be the property of the assignee and became assets for payment of the creditors. Why, then, in a proper case should not the court interfere to secure the property for the benefit of the creditors? Indeed it was not disputed in argument that if the money paid over by the insurance companies existed in specie the court might lay hold of it; but it was said that it has been dealt with by the assignee, and all that the creditors are entitled to is a judgment at the trial that the assignee shall make good to the creditors the amount received. I do not think this argument is well founded. Though the fund paid over no longer exists in specie it is still in the hands or under the control of the assignee, and can be traced, and it seems to me that the court has jurisdiction to secure it for the benefit of the plaintiffs. If the assignee is to be regarded as an executor *de son tort*, there would be jurisdiction, I apprehend, in a properly constituted action to restrain him from dealing with assets under his control to the prejudice of the persons legally entitled.

Reliance was placed on *Lister* v. *Stubbs*. The basis of the decision in that case was that until judgment was given, the money in the hands of the defendant could not be treated as the money of the plaintiff. Here, according to the law as stated by Littledale, J., the assignments became void when the plaintiffs asserted their claim, and thenceforward a legal right on the part of the plaintiffs to have their debts satisfied out of the fund existed. On the whole, it seems to me that the defendant Mrs. Dalzel ought not to be allowed to deal with these mortgages except with the consent of the plaintiffs or the sanction of the court.

Solicitors, *Collyer-Bristow, Russell, Hill, & Co; Oldman, Clabburn, & Co.*

Chan. Div.
Cozens-Hardy, J. } April 14, 18.

MCFARLANE v. HULTON & CO. (*a*.)

Newspaper—Publication—Agreement not to "publish"—"Sporting" paper.

A newspaper is published when and where it is offered to the public, and may be published at more than one place at the same time. A newspaper which excludes racing and betting intelligence is not a "sporting paper" within the meaning of an agreement framed to protect the copyright of papers specially connected with horse-racing.

The plaintiff, who carried on business at 48, Fleet-street, in 1886 purchased from the defendants the copyright in a newspaper called *Bell's Life in London*, and in a book called "Festiana." The agreement for sale contained the following clauses: "(3) The vendors will not, nor will either of them, do or suffer anything whereby their offices and premises at 31, Bouverie-street may at any time during the term for which they are at present entitled to the same be used for the purpose of printing and publishing any sporting paper. (4) The vendors will nor will either of them print or publish, or cause to be printed or published, or permit their or either of their names to be used in connection with any sporting paper or

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

periodical within ten miles of Bouverie-street aforesaid." At the date of the agreement the defendants carried on business in premises at Manchester, which was their main office, and had also an office in Bouverie-street, London. They were the owners and publishers of two newspapers, the *Sporting Chronicle* a daily paper, and the *Athletic News*, a weekly paper, both published before 1886 in addition to the paper they sold. In 1887 they started a third paper, the *Sporting Chronicle Weekly Handicap Book*. All these papers were printed in Manchester. They still continued their office in London, but after the agreement removed it from Bouverie-street, and again in the year 1897 they removed to their present premises, No. 68, Fleet-street. On these premises, which were opposite to the premises of the plaintiff, were painted the words, "Sporting Chronicle and Athletic News Advertising and Publishing Office."

The plaintiff was the proprietor of a daily newspaper called the *Sporting Life*, devoted to sports of all kinds, and a weekly paper called the *Sporting Life Racing Guide*, containing records of horse-racing. After the purchase he incorporated *Bell's Life in London* with the *Sporting Life*. He alleged that what the defendants were doing was in breach of clause 4 of the agreement, and asked for an injunction against the defendant Hulton in the terms of that clause, the other defendant having died during the action. The defendant denied that he published the papers in London, and that the *Athletic News* was a "sporting" paper. It was admitted that the papers were not printed within the prohibited limits. The course of business with regard to the publication and sale of the defendants' papers was as follows: The *Sporting Chronicle* was printed at Manchester in time for the midnight train from Manchester to Euston. This midnight edition was often, if not always, different from that which is sold at Manchester in the morning, inasmuch as late news arriving after midnight is inserted in the Manchester issue. Parcels of the *Sporting Chronicle* thus printed were sent together to Mr. Healey, a distributing agent, who received them at Euston and delivered them to the various persons to whom they were addressed. Amongst several parcels was one addressed to the *Sporting Chronicle*, and this was delivered before business hours at the defendants' office in Fleet-street. On the days when the two weekly periodicals were issued at Manchester they were likewise included in the parcel. The parcel thus delivered to the defendants at their office in Fleet-street varied in its contents, but the average number of copies was as follows: *Sporting Chronicle*, 50 to 100 per day; *Athletic News*, 400 to 2,500 per week; *Handicap Book*, 400 to 500 per week. These figures represented only a small portion of the total circulation. The copies so delivered were used partly for the purpose of exchange with other papers, partly for filing, and to a considerable extent for sale, and mostly, if not entirely, at trade prices. The learned judge found that substantially the business done in Bouverie-street in 1886 was business of the same nature as that being done in Fleet-street.

Eve, Q.C., and *Woodfin*, for the plaintiffs.—The papers are published in Fleet-street as well as in Manchester. A paper is published whenever offered for sale to the public by the proprietor. The Newspaper Libel and Registration Act, 1881, c. 60, s. 1, uses the term "publication" as equivalent to being "dispersed." Many newspapers state several places as being where they are published. The defendants have rightly called their office a "publishing office" in the notice upon it.

Astbury, Q.C., and *Ashton Cross*, for the defendant.—A paper cannot be published in more than one place at the same time, except where some provision is made for simultaneous publication. These newspapers were published once for all in Manchester, and publication was exhausted there. Publication in the ordinary sense has not the same meaning as when the word is used with reference to the law of libel. At any rate the defendants did not publish the papers except in Manchester, as they belonged to the distributing agent as soon as delivered to the carriers at Manchester. The *Athletic News* is not a "sporting paper" within the meaning of the covenant, being devoted to amateur sports only. The plaintiffs are guilty of such delay that they are not entitled to relief.

Eve, Q.C., replied.

April 18.—COZENS-HARDY, J.—The plaintiff alleges that this is a breach of clause 4 of the agreement, and there are two questions which arise for my decision. In the first place, are the defendants "publishing" their papers in Fleet-street; and in the second place, is the *Athletic News* a "sporting paper or periodical" within the meaning of the clause? What is the meaning of "publishing" a newspaper? It is plainly something different from printing it. I see no reason why a newspaper should not be published in more than one place. In fact my attention has been called to two well-known newspapers which are expressly stated to be published in several towns. I refer to the *North British Daily Mail* and the *Western Morning News*. At the end of the *North British Daily Mail* there is printed the following note: "Printed by the Mail Newspapers (Limited), and published at Glasgow, 102 to 114, Union-street; Edinburgh, 4, St. Giles-street; Greenock, Municipal-buildings; Paisley, 4, County-place; London, 190, Fleet-street." And at the end of the *Western Morning News* the following words appear: "Printed and published by Ernest Croft, for the Western Morning News Co. (Limited), at the publishing offices, 31, George-street, Plymouth; 45, Fore-street, Devonport; 27, High-street, Exeter; and 10, St. Nicholas-street, Truro."

It seems to me that a paper is published when and where it is offered to the public by the proprietor. Webster's definition of the word is as follows: "To send forth as a book, newspaper, musical piece, or other printed work either for sale or for general distribution." I received, at the request of both parties, evidence from persons engaged in the newspaper trade as to the meaning of the word "publish." I doubt whether such evidence was admissible, and it was so conflicting that it has in no way assisted me. I have endeavoured to ascertain the meaning of the word irrespective of this evidence, and I have come to the conclusion that where a newspaper proprietor has two offices, one in Manchester and the other in London, at each of which he offers for sale or distribution copies of his papers, the paper is "published" at each office. I cannot forget that the defendants themselves described their office in Fleet-street as a "publishing office"; and although this circumstance would not suffice to make it a publishing office if it were clearly not so, I think in a case of doubt it is not unreasonable to hold that the defendants have rightly described what they do in Fleet-street. It can make no difference that since action brought they have painted out the words "publishing office." It follows that, in my judgment, the defendants are acting in breach of clause 4 of the agreement.

It remains to consider whether the *Athletic News* is a "sporting paper" within the meaning of clause 4. The covenant was for the protection of the copy

right and goodwill of the papers which were sold, and regard must be had to this circumstance in interpreting the clause. Now, the *Athletic News* contains no racing intelligence, and no betting odds, and is merely a record of amateur sports, such as cricket, football, cycling, running, &c. It in no way resembles *Bell's Life* or the *Sporting Life*. It appeals to a different section of the public. It undoubtedly is devoted to "sports" in one sense of the word, but upon the whole I do not think that a paper which deliberately excludes all racing and betting intelligence is a "sporting paper" within the meaning of clause 4. [His lordship also held the plaintiff was not guilty of *laches*.] The result is I must grant an injunction as prayed as to the *Sporting Chronicle* and the *Handicap Book*, but not as to the *Athletic News*.

Solicitor for the plaintiff, *Webster Butcher*.

Solicitors for the defendant, *Wheatley, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

Chan. Div. }
Wright, J. } Jan. 14.

In re AFRICAN GOLD CONCESSIONS AND DEVELOPMENT CO.
MARKHAM AND DARTER'S CASE. (*a*.)

Company—Contract—Shares—Shares issued as fully paid—Filed contract—Consideration—Sufficiency of identification—Estoppel—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

It is sufficient to satisfy section 25 of the Companies Act, 1867, *if an enforceable contract is filed, which states with reasonable plainness the nature of the consideration which is substituted for cash, although it may not be a complete identification.*

A statement in a share certificate that the shares are fully paid is not a representation that a sufficient contract has been filed under section 25 of the Companies Act, 1867, *so as to estop the liquidator from denying it.*

The applicants claimed to have their names re-inserted in the list of contributories of the company as holders of fully-paid shares.

In 1892 one Osborne had obtained a concession of mining rights from the Cape Government over a certain district in South Africa. Being in want of capital to work these rights the applicants assisted him with money, taking an interest in the property as security, and forming with Osborne and one Webster a private syndicate called the Osborne Syndicate. It was agreed that Osborne should come over to England and sell the property there to a company, receiving the purchase-money either in fully-paid shares or cash as he should choose, and for this purpose the members of the syndicate gave him a power of attorney authorizing him to do so, and to receive the consideration on behalf of the principals.

Osborne came to England, and without informing the other members of the syndicate formed a company in England called the Homtini Syndicate (Limited) to take over the property and sell it at a greatly increased price to a company, which was to be formed for the purpose of purchasing it—this company being the one now in liquidation. This was effected by three contracts, by the first of which, dated the 6th of December, 1894, and made between the Homtini Syndicate of the one part and one Henry Harris as trustee of the company, thereinafter called "the intended company," of the other part, it was agreed, *inter alia*, as follows:

"That the vendors shall sell and the intended company shall purchase all the estate, right, title, and interest of the vendors of and in the premises known as Millwood, in the Cape Colony of South Africa.

"2. As to the consideration for the said sale the said Henry Harris, as trustee for the said intended company, shall, on or before the 15th day of December inst., allot to the vendors, or as they may direct, 22,500 fully-paid shares of 10s. each in the said intended company . . . and shall also allot to the vendors, or as they may direct, 277,493 shares of 10s. each . . . upon each of which . . . shares the sum of 8s. shall be deemed to have been paid.

"9. The said intended company shall procure an agreement respecting the allotment of such shares to be duly filed in the joint-stock registry, and upon the adoption of this agreement by the said intended company the said Henry Harris shall be discharged from all liability hereunder."

This contract was never filed with the Registrar of Joint-Stock Companies.

The second contract was dated the 12th of December, 1894, and made between the Homtini Syndicate of the one part and the company of the other part, and provided for the allotment to the syndicate of the above-mentioned shares "as mentioned in an agreement dated the 6th of December, 1894" (being the agreement recited above), and continued, "In consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement. In all other respects the said agreement is hereby confirmed.

The third contract was dated the 19th of December, 1894, and made between the company of the one part and the Homtini Syndicate of the other part, and contained the following clauses:

"In consideration of the . . . syndicate agreeing to give the . . . company immediate possession of the lands and premises situate in the mining district of Millwood, in Cape Colony, of South Africa, more particularly mentioned and referred to in an agreement dated the 6th of December, 1894, made between the . . . syndicate of the one part and Henry Harris . . . as trustee for the . . . company of the other part, the said . . . company shall forthwith allot to the said . . . syndicate, or to their nominee or nominees, 22,500 fully-paid shares of 10s. each in the said . . . company to be numbered 8 to 22,507, both inclusive, and for all purposes the said shares shall be deemed fully-paid shares in the said company.

"The said syndicate shall, with all possible expedition, procure the lands and premises to become vested in the . . . company free from all incumbrances according to the law in force for the time being of the said mining district of Millwood."

A third clause provided for the transfer of water rights to the company.

No mention was made in this contract to the partly-paid shares mentioned in that of the 6th of December.

These last two contracts were filed before the shares were allotted.

The applicants knew nothing about these transactions, or even of the formation of the Homtini Syndicate. In 1895 they handed over the title-deeds of the property to one Bass, on his producing the power of attorney and claiming to be the purchaser from Osborne. Later on they received, as members of the Osborne Syndicate, certificates and shares in the company. Each of the applicants received certificates for 1,406 ten-shilling shares. Each certificate

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

stated, "there has been paid up to this date, in respect to each of such shares, the sum of 10s."

The company was now being wound up. The liquidator had obtained leave to have the applicants' names removed from the list of contributories as fully-paid shareholders, and to state that nothing had been paid in respect of the shares held by them.

The applicants thereupon took out this summons that their names might be reinstated in the list of contributories as holders of fully paid-up shares.

Buckley, Q.C., and *A. W. Rowden*, for the applicants.—The liquidator is estopped from denying either that the shares were paid for in cash, or that a sufficient contract was filed before the shares were allotted: *In re Building Estates Brickfields Co., Parbury's case*, 44 W. R. 107, [1896] 1 Ch. 100; *Bloomenthal* v. *Ford*, 45 W. R. 449 [1897], A. C. 156. If a sufficient contract had been filed the shares would have been paid for, and the certificates stated that they were fully paid. A sufficient contract was filed. The document of the 6th of December, which sets out the consideration fully and was not filed, is not a contract at all, for it was made with a person purporting to be trustee for a company which was non-existent when the contract was made. The first contract filed, that of the 12th of December, may not be sufficient: *Karaskhoma Exploring and Prospecting Syndicate*, 46 W. R. 37, [1897] 2 Ch. 451. But the second filed contract dated the 19th of December states the consideration, and by reference to the covenant of the 6th of December identifies the property and states the consideration with sufficient clearness to satisfy section 25: *In re S. Frost & Co., ante* p. 27, [1898] 2 Ch. 556. The contracts are filed in order that the nature of the bargain may be known. That has been done here.

Jenkins, Q.C., and *R. J. Quain*, for the liquidator.—The filed documents are not sufficient; if you searched the register they would be misleading. The true facts of the bargain are to be found in the documents—only two of which are on the register. This is fatal. The liquidator is not estopped. The applicants knew that cash had not been paid, and the fact that the certificates say that the shares were fully paid cannot mean that a sufficient contract had been filed. *Bloomenthal* v. *Ford* and *In re Building Estates Brickfields Co., Parbury's case*, are distinguishable.

Buckley, Q.C., replied.

Jan. 14.—WRIGHT, J.—(After stating the facts, continued:) The earlier of these two filed contracts may not be sufficient for the purpose of section 25 of the Companies Act, 1867, because there is no indication of the nature of the "premises" except the reference to an agreement, which is not identified except by a statement of the parties to it, or in any other manner except a date; but I express no opinion on this point. If the later contract is sufficient in form, I do not see that the earlier is material, except in so far as it might lead to the conclusion that the latter does not state the real contract as it stood when the shares were issued. No explanation is given of the omission from the later contract of the 277,493 partly-paid shares, but I do not think that the existence of this discrepancy is of itself enough to justify such a conclusion. The real question is whether the second document filed satisfies the language of section 25: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filled," &c. In the present case there is in the documents of the 6th and 19th of December together a contract, or note, or memorandum in writing such as would satisfy the Statute of Frauds, but the filed contract might not have been sufficient by itself to identify the subject-matter without the aid of the previous agreement of the 6th of December to which it refers for identification. Is it necessary under section 25 that there should be a complete identification within the four corners of the filed contract, or is it enough if the filed contract states plainly the nature of the consideration and supplies the means of identification as in the present case? The question is left open in the *Karaskhoma case*, where the only statement of the consideration was a mention of an unfiled contract and the words "for the consideration therein mentioned," and there was, therefore, on the face of the filed contract, nothing to show whether the consideration in the unfiled contract was cash or what else it was. All the lords justices reserved the consideration of the degree of particularity with which the consideration must be stated, but two of them appear to express an inclination of opinion that it may be enough to state the nature of the consideration. In *In re Maynards (Limited)*, 46 W. R. 346, [1898] 1 Ch. 515, the filed contract stated the consideration merely by reciting that by a former agreement between the vendor and the company (which was not filed) it was "agreed that the vendor should sell and the company . . . should purchase . . . (*a*) the business and property mentioned in the first part of the schedule thereto, and (*b*) the leasehold hereditaments and tenancies, short particulars of which are set out in the second schedule thereto." Kekewich, J., expressed an opinion (guarded by an observation that the point had not been fully argued) that this was insufficient, but without indicating what further degree of particularity was requisite. In *In re Frost & Co., ante* p. 27, the filed contract stated the consideration only by reciting that by a former agreement between the vendor and the company it had been agreed that "the vendor should sell and the company should purchase certain leasehold messuages, shops, and premises, and that he should grant to the company and the company would accept the lease of certain other premises, and that the vendor should sell and the company should purchase all the goodwill of the several businesses carried on by the vendor upon the same respective premises, together with all the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses as therein mentioned." Here there obviously was not without the aid of the unfiled contract or of parol evidence anything to identify the shops or premises; but my brother Romer held the filed contract sufficient. He was apparently of opinion that the filed contract by itself would have satisfied the Statute of Frauds. However that may be, I do not think that Romer, J., meant that a filed contract cannot be sufficient for the purposes of section 25 unless it would without the aid of the unfiled contract satisfy the Statute of Frauds. On the contrary, I understand him to mean that if the real nature of the consideration is disclosed, that may be enough, although the details can be ascertained only by other evidence, and I adopt that view. I apprehend that the filed contract in the present case might, so far as the certainty of description is concerned, have been sufficient for the purposes of specific performance: see the cases collected in Sir E. Fry's book, sections 325 *et seq.*, and *Plant* v. *Bourne*, 46 W. R. 59, [1897] 2 Ch. 281. I have come to the conclusion that in the present case the filed contract may be a contract in writing determining that the payment for the shares shall be otherwise than in cash, notwithstanding that evidence

beyond the writing itself is necessary for complete identification, provided the writing clearly explains, as this one does, what is the nature of the consideration which is to be substituted for cash and supplies the means of identification. It is true that the means of identification which are in this case supplied may not be accessible to a person inspecting the filed contract. But neither would he in general be any the wiser if the filed contract described the particular properties by locality, name, and bounds. It seems to me to be enough if there is an enforceable contract in writing which states with reasonable plainness the nature of the consideration which is to be substituted for cash. Here the contract does contain such a statement; and it is enforceable, because it refers to a document which supplies all that is legally wanting for complete identification. If this view is right, it is not necessary to determine the other and much more important question which was first argued; but in case I am wrong on the first point, it will be necessary to determine the other question, and I think that I ought to express an opinion upon it. It is argued for the applicants that the statement in the certificates that the shares are fully paid estops the liquidator from denying both the fact of payment in cash and the sufficiency of the filed contract. As regards the fact of payment in cash, I think there cannot in this case be any estoppel. It is plain from Mr. Markham's affidavits (paragraph 10 of the earlier and paragraph 6 of the later) that the applicants were fully aware that they might get and did get from the company vendors' shares which had not been paid for in cash, but which were to be treated as fully paid in lieu of cash, as the consideration for their interest in the properties sold, and that in accepting the shares they did not at all rely upon the statement in the certificates as importing that the shares had in fact been paid for in cash. They knew that they had not paid cash, and they cannot have supposed that the company was making them a present of shares which someone else had paid for in cash. This excludes the application of *Parbury's case*. As regards the alleged estoppel against denial of sufficiency of a filed contract, I think there is no authority for it. It is not necessary to decide what would be the effect of an express representation by the certificate that a contract has been filed. Here there is no express representation that any contract has been filed. A contract has in fact been filed, though the certificate does not refer to it. It would be a strong thing to hold that a company, by a certificate stating that shares have been fully paid, warrants the sufficiency in law of a filed contract. Moreover, such a conclusion would, as it seems to me, nullify section 25. The very object of the section is to deal with cases in which certificates represent shares to have been paid. If that representation creates an estoppel against denial of the filing or sufficiency of a contract, I do not see in what case the section can operate, unless the shareholder is foolish enough (in that view) to examine the file for himself. It is said that the language of Lord Cairns in *Burkinshaw* v. *Nicolls*, 26 W. R. 819, 3 App. Cas. 1004, at p. 1,017, is an authority in favour of the applicants' contention. I do not so understand his language. When he there speaks of a representation that section 25 has been complied with, I understand him to mean complied with by payment in cash. Nor can I find in *Bloomenthal* v. *Ford* any suggestion that there can be any other estoppel in such a case than an estoppel against denial of payment in cash or of power to issue the shares. The result is that the application must be allowed, with costs. I will only add that, if I were compelled to hold this second filed contract insufficient, I should think that relief ought clearly to be granted under the Companies Act, 1898, unless the liquidator can show that there has been fraud or other matter of objection affecting the applicants.

Solicitors for applicants, *Clayton, Sons, & Fergus.*

Solicitors for liquidator, *Bird & Eldridges.*

Q. B. Div.
(Darling and Channell, JJ.) April 14.

SWEETLAND *v.* THE TURKISH CIGARETTE CO. (*a.*)

County court—Trial with judge and jury—Order as to payment of costs varied by judge on subsequent application of unsuccessful party—Jurisdiction—Functus officio—*Appeal—Prohibition.*

Where a county court judge has made an order he is functus officio *and has no jurisdiction to vary such order afterwards.*

Where an order has been made in circumstances that would give a Divisional Court jurisdiction to issue a prohibition, the party aggrieved is not thereby deprived of his right to appeal against such an order to the Divisional Court in the ordinary way instead of applying for a prohibition.

Barker *v.* Palmer, 30 *W. R.* 59, 8 *Q. B. D.* 9, *considered and followed.*

Appeal from his Honour Judge Stonor sitting at the Brompton County Court.

In the action the plaintiff claimed £50 damages for alleged trespass. The defendant paid into court, more than five clear days before the hearing in accordance with the County Court Rules, the sum of £5 and proportionate costs with a denial of liability. At the trial before the learned judge and a jury on the 9th of December, a verdict was returned for the plaintiff for £5, and thereupon judgment was entered for the defendants with costs. The plaintiff then applied for a new trial on the ground of the inadequacy of the damages, but this was refused. On the 22nd of December the plaintiff made an application on notice to the learned county court judge to review his decision of the 9th of December as to costs on the ground that at the trial it was not mentioned that the payment of the £5 into court was made with a denial of the defendants' liability. Upon this application the learned judge amended his order of the 9th of December so far as it related to costs, in respect of which he made no order, and the defendants thereupon appealed.

Lewis Thomas, for the appellants, submitted that the learned judge had no jurisdiction to make the order of the 22nd of December, as he was *functus officio.*

Rockingham Gill, for the respondent, contended that whether the learned judge had jurisdiction to vary his order of the 9th of December or no, the Divisional Court had no power to review what he had done on the defendants' appeal because it was a question that should be brought before that court, if at all, by prohibition.

Lewis Thomas, in reply—Although the defendants might also have their remedy by prohibition that did not deprive them of their right to appeal against the order of the 22nd of December; *Barker* v. *Palmer*, 30 W. R. 59, 8 Q. B. D. 9.

DARLING, J.—I think it is quite clear that on the application of one of the parties to an action a county

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law

court judge has no jurisdiction to vary his judgment, and in this case his doing so amounted to his trying a case without a jury in which he had already given his decision on the findings of a jury. Whether he would have been right at the conclusion of the trial on the 9th of December to have made such an order as he made on the 22nd of December appears to me to be a doubtful question, but it is unnecessary for the purposes of this appeal to determine it, and I therefore purposely refrain from expressing any opinion which might be construed as a decision of mine on that question. It is perfectly clear that the order of the 9th of December was the order that the learned judge then intended to make, and the fact that on a subsequent application by one of the parties something was said which led him to alter the view he had previously taken of the matter and had embodied in the first order, gave him no jurisdiction to re-try the case and make a new and different order as to costs. Even assuming that this was a case in which a writ of prohibition could rightly have issued, that fact of itself in no way deprives the defendant of his right to bring the matter before this court by way of appeal. That appears clear from the decision in *Barker* v. *Palmer* (*supra*). The defendants' appeal must therefore be allowed with costs.

CHANNELL, J., concurred.

Appeal allowed.

Solicitors for the appellants, *Armitage & Strouts.*

Solicitors for the respondent, *Gill & Son.*

IN BANKRUPTCY.

Q. B. Div.
(Wright and Bigham, JJ.) } March 28; April 14.

In re FROST & FROST.
Ex parte THE OFFICIAL RECEIVER *v.* FROST.

Bankruptcy—Payment of dividends to assignee of debts —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 63, *r.* 225, *form* 126.

An assignee of debts in a bankruptcy cannot obtain payment of dividends on such debts from the trustee except by proving in place of the creditors who have assigned, or producing to the trustee written authorities from each of such creditors in accordance with form 126.

Appeal from an order of his Honour Judge Addison in the county court at Greenwich.

A receiving order was made against the firm of Frost & Frost on the 31st of December, 1887.

The trustee paid a dividend of 3s. 5½d. in the pound.

In 1898 the trustee was released, and the official receiver became trustee *ex officio.*

During the same year a sum of £16 came into the hands of the official receiver available for the payment of a further dividend on the joint estate.

Mrs. Frost, the respondent, who had, in October, 1897, bought up the claims of a number of the creditors for 2s. 6d. in the pound, applied to the official receiver for the payment of dividends on the claims she had bought.

The official receiver refused to pay Mrs. Frost, alleging that he could only pay dividends to creditors whose proofs were on the file, or persons duly authorized by such creditors to receive dividends for them in the prescribed form (form 126).

The county court judge ordered the official receiver to pay the dividends to Mrs. Frost.

The official receiver appealed.

Muir Mackenzie, for the appellant.—The official receiver can only pay a dividend to a creditor who has proved a debt—Bankruptcy Act, 1883, s. 58, sub-section 1, "shall distribute dividends amongst the creditors who have proved"—or to persons authorized by creditors to receive them in the prescribed form (form 126): see also regulation 30 annexed to the Board of Trade Circular to Trustees in Bankruptcy.

Arthur Powell, for the respondent.—"Creditors" in section 58 should be used as including assignees of creditors; the executor of a deceased creditor, or the trustee of a bankrupt creditor would be entitled to dividends. Why should not the assignee of a creditor? The forms in the appendix to the Bankruptcy Act are not intended to be strictly followed: see rule 5.

WRIGHT, J.—The question before us is of some difficulty and importance. This lady is clearly entitled to these dividends, and the question is how she is to get them. No action lies for them; payment can only be enforced by virtue of the statute. There is no way of enforcing payment pointed out in the statute except section 63: "If the trustee refuses to pay any dividend the court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld and the costs of the application." In considering this section, however, the court should look at the paramount intention of the Act, which seems to be that payment should only be made to persons having proofs on the file. If the trustee or official receiver had to deal in every case with assignments such as these the administration of the Bankruptcy Act might be clogged with inquiries of an embarrassing character. I think that an assignee should be allowed to prove in place of the creditors who have assigned their debts to him, unless he is able to get signed authorities from them to receive their dividends. I see no other point which we need decide.

BIGHAM, J.—The respondent is assignee of certain debts, and entitled in some way to receive dividends. She says that she is entitled to get cheques from the official receiver in her favour. I think section 58, sub-section 1, governs the case: "The trustee shall . . . distribute dividends amongst the creditors who have proved their debts." The respondent has not proved her debt, therefore she is not entitled to be paid. She has a right to require the cheques to the creditors to be handed over to her, or she very likely has a right to put a proof on the file to stand in place of the proofs of the creditors who have assigned to her. Then she will have proved her debt and complied with the requirements of section 58, sub-section 1.

Appeal allowed.

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

Solicitor for the respondent, *H. Toomer.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) May 6.

FLOWERS v. CHAMBERS. (a.)

Master and servant—Employers' liability—Accidental injuries—Employment on, in, or about a factory—Dock—Employment on ship lying in dock—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Employment on a ship lying in a dock is not employment on, in, or about the dock so as to come within the Workmen's Compensation Act, 1897.

Appeal from an award of the judge of the Bow County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was a labourer in the employment of a barge-owner and contractor, who undertook the work of discharging manure and refuse from cattle steamers. On the 1st of December, 1898, at 7 p.m., a cattle steamer was lying in the Victoria Docks, moored alongside the quay, and a barge was lying alongside the ship. The applicant was at work on the ship in the course of his employment, and was engaged in mooring the barge to the ship, in order that the work of discharging the ship's refuse into the barge might commence, when in consequence of the darkness he fell from the upper deck on to the lower deck, and was injured. The method adopted for removing and discharging the refuse was by means of picks and shovels, no machinery being used.

The county court judge made an award in favour of the applicant.

The employer appealed.

J. D. Crawford, for the appellant. — Since the award of the county court judge, the court has decided, in the case of *Hall* v. *Snowdon, Hubbard, & Co., ante*, p. 486, that a wharf on which no machinery is used is not a factory within the meaning of the Workmen's Compensation Act. That case governs this case. A dock on which no machinery is used is not a factory within the meaning of the Act.

[A. L. SMITH, L.J.—There is the further question, whether, assuming this dock to be a factory within the Act, a ship in a dock comes within the terms "dock" as used in the definition of "factory" in section 7, sub-section 2. We left this question undecided in *Woodham* v. *Atlantic Transport Co. (Limited), ante*, p. 105, [1899] 1 Q. B. 15.]

Candy, Q.C., and *Pocock*, for the respondent.—If this dock is a factory within the meaning of the Act, then employment on a ship lying in the dock is employment on, in, or about a factory. Secondly, this dock is a factory, because it is a dock to which some of the provisions of the Factory Acts are applied by section 23 of the Factory Act, 1895—viz., the provisions with respect to accidents.

A. L. SMITH, L.J.—We are now faced with a question which has been looming in the distance for some time, and which we have known that before long we should have to decide—viz., whether a man employed on a ship which is lying in a dock is employed on, in, or about the dock so as to come within the meaning of employment on, in, or about a factory. If it had been intended to bring ships within the purview of the Act, it would have been easy to do so expressly. But the Legislature in defining what is included in the word "factory" has picked out a number of words, one of which is "dock," but "ship" does not appear among them. They are: "dock, wharf, quay, warehouse, machinery, plant." We are asked to hold that a ship is a dock; all I can say is that we cannot so hold. The answer to the question whether a man employed on board a ship in a dock is employed in or about the dock so as to come within the Act must be in the negative. It is not necessary to determine whether this dock is such a dock as is included in the word "factory." The appeal must be allowed.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitors for the appellant, *Keene, Marsland, Bryden, & Besant.*

Solicitor for the respondent, *S. Benham.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 11.

SIMMONS v. WHITE. (a.)

Master and servant—Employers' liability—Accidental injuries—Dependants—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2; *Sched. I., s.* 1.

"Dependants" within the meaning of section 7, *sub-section* 2, *and Schedule I., s.* 1, *of the Workmen's Compensation Act*, 1897, *must have been wholly or in part dependent upon the earnings of the workman for the ordinary necessaries of life, having regard to the class and position in life of the parties.*

The question whether the applicants in any case were dependants in this sense is a question of fact to be decided by the arbitrator.

Appeal from a decision of the judge of the Dartford County Court in an arbitration under the Workmen's Compensation Act, 1897.

The claim to compensation in this case was made by the father and mother of a boy who had been accidentally killed in the course of his employment while engaged in shunting trucks at the works of his employers, John Bazley White & Brothers.

The applicants claimed to be "dependants" of the deceased within the meaning of section 7, sub-section 2, of the Workmen's Compensation Act, and section 1 of Schedule I.

By section 7, sub-section 2, "'dependants' means —(*a*) in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death."

Section 1 of Schedule I. deals with the amount of compensation under the Act, where death results from the injury and the workman leaves dependants.

The evidence of the father was that his son was fourteen years of age, that he was earning 17s. a week, that he used to bring home his wages and hand them to his parents, who gave him what they thought right for pocket-money, that the wages helped to maintain the family, and that they expected this help. He further said that he himself was thirty-four years of age, and that he was in receipt of full wages and was working overtime, and that he owed no man anything. The county court judge found that the boy's wages went into a common

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

fund for the benefit of the family, and that they were sufficient to pay for his keep and leave a balance, and he decided that upon the facts the applicants were in part dependent upon the deceased, and he adjudged that the applicants should recover £35 and £3 10s. for funeral expenses.

The employers appealed on the grounds that the county court judge had misdirected himself as to the meaning of the words "dependants" and "dependent" in section 7, sub-section 2, of the Workmen's Compensation Act, and that there was no evidence that the applicants were "dependants" within the meaning of the Act.

S. H. Leonard, for the employers.—The county court judge misdirected himself by assuming that the word "dependants" in the Workmen's Compensation Act included all those persons who could recover damages under Lord Campbell's Act. That is not the right test; the idea of dependence is not suggested in Lord Campbell's Act. The ordinary meaning of "dependent" as given in the dictionaries is, "That depends on or has to rely on something else for support, supply, or what is needed"; "subject to the power of, not able to exist or sustain itself without the power of." And that of "dependant" is, "one who lives in subjection to or at the discretion of another." In Shakespeare's "Cymbeline," Act I., scene 6, the phrase occurs, "What shalt thou expect, To be depender on a thing that leans?" The words imply the tie of necessity. It is not enough to show merely that the applicants derived some pecuniary advantage from the deceased; it must be shown that they had to rely on him for some of the necessaries of life. There was no evidence that the applicants were dependent on their son in this sense. The county court judge was wrong in law in inferring from the facts proved that the applicants were "dependants" within the meaning of the Act. The true meaning of "dependent" in this Act is rightly given in "Accidents to Workmen," by Minton-Senhouse and Emery, at p. 156.

Hawtin, for the applicants, was not called upon to argue.

A. L. SMITH, L.J.—We cannot say there was no evidence on which the county court judge could find as he has found. The deceased was a boy who was earning 17s. a week, and who brought home his wages and put them into a common fund, and thereby helped to maintain the family. The county court judge found that his father and mother were in part dependent on the deceased. It is not our duty to decide whether that finding of fact is one to which we should ourselves have come, but we cannot say there was no evidence to support it. The appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. I do not see how we can say that the county court judge misdirected himself. I agree with the expression of opinion to be found in "Accidents to Workmen," by Minton-Senhouse and Emery, at p. 156: "By the expression 'wholly or in part dependent' a wide latitude is given to the arbitrator. It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits, and be decided as a question of fact by the arbitrator." I think that is a good direction, and I will presume that the county court judge had read it and adopted it. That being so, we cannot interfere with his finding.

ROMER, L.J.—I cannot escape from the finding of the county court judge, though I might have arrived at another finding myself. I agree with what is stated in Mr. Minton-Senhouse's book. I think that "dependants" within the meaning of the Act must be dependent in the proper sense of the word—that is, dependent for the ordinary necessaries of life, having regard to the class and position in life of the parties.

Appeal dismissed.

Solicitors for the employers, *Leonard & Pilditch.*

Solicitor for the applicants, *Edward Clarke.*

High Court of Justice.

Chan. Div. } May 12.
Kekewich, J. }

ALDIS v. THE CORPORATION OF THE CITY OF LONDON. (a.)

Metropolis—Management—Streets—Widening streets—Compulsory purchase—Corporation—Power of corporation to take part of house—Injunction—Owner—Right of owner to retain part not required—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

Where the Corporation of the City of London bonâ fide adjudged that part of a house obstructed and prevented the widening of a street, and served a notice on the owner to purchase and compulsorily acquire, under sections 80 and 82 of Michael Angelo Taylor's Act, the whole of the house,

Held, that, as the corporation failed to show that the part of the house remaining after they had taken as much as was absolutely required for the widening of the street would be useless to the owner, the owner was entitled to retain that part; and injunction granted restraining the corporation from acting on the notice to take the whole.

Gordon v. The Vestry of St. Mary Abbotts, Kensington, 38 SOLICITORS' JOURNAL, 580, [1894] 2 Q. B. 742, *considered and explained.*

Motion asking for an order to restrain the Corporation of the City of London from acting on a notice pursuant to a resolution to take under the powers and provisions of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), ss. 80, 82, the house No. 3, Cheapside for the purpose of widening Cheapside.

The house in question occupied an area of about 70 square feet, of which, as appeared from the plans of the corporation, about 400 square feet only was actually required for the purposes of the projected widening.

The corporation had, however, duly served the plaintiff with a notice to treat with the intention of acquiring the whole of his premises, and it was only when the plaintiff saw the plans that he discovered that a portion only would necessarily be acquired for the proposed improvement.

The defendants at the bar acknowledged that in view of recent decisions they could not maintain that the plaintiff was estopped by "acquiescence" from bringing this motion.

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

The premises were partly occupied as a toy shop and partly for a photographic business.

P. O. Lawrence, Q.C., and *MacSwinney*, for the applicants.—The corporation can only take compulsory the 400 square feet actually needed for widening the streets. The applicant will be able to carry on his business on the remaining 300 square feet, which will be amply sufficient for his purpose if, as he intends doing, he relinquishes his photographic business and makes some other minor arrangements. The corporation cannot, under the Act, drive out people unless the ground they propose to take is really wanted for the improvements or unless indeed they can show that the part remaining after taking what it is absolutely necessary for them to take will be useless to the present occupier, and it is further necessary that their notice to treat must be a *bonâ fide* one and show clearly what is really requisite for their purpose.

They referred to *Teuliere* v. *The Vestry of St. Mary Abbotts, Kensington*, 30 Ch. D. 642, 34 W. R. Dig. 102; *Fernley* v. *The Board of Works for the Limehouse District*, 43 SOLICITORS' JOURNAL, 332; *Gard* v. *Sewers Commissioners*, 28 Ch. D. 436, 33 W. R. Dig. 106.

Warrington, Q.C., and *John Henderson*, for the corporation.—The corporation have served notice to take the whole, because they practically require the whole. The nature of the property precludes subdivision. They will have substantially to pull down the whole house, and under these circumstances are entitled to acquire the whole house. Had the corporation served the applicant with notice to acquire part only, it would have been competent for him to turn round and say, "No; you must take the whole." Conversely the corporation have, under the circumstances, the right to acquire the whole though a portion only of the ground may be required for the actual widening of the street: *Gordon* v. *The Vestry of St. Mary Abbotts, Kensington*, 38 SOLICITORS' JOURNAL, 580, [1894] 2 Q. B. 742. The case of *Fernley* v. *Board of Works for the Limehouse District*, which is cited in favour of the applicant, was a very special one. Here there is no secret prior agreement to sell the surplus property as there was in that case; the notice of the corporation is in all respects *bonâ fide*.

KEKEWICH, J.—The ingenious argument presented on behalf of the corporation invites me to decide a point which does not arise in this case. The argument is that if the corporation were taking the part coloured pink leaving out the part coloured blue on their plan (a small isolated part of the building), could not the plaintiff, the defendants urge with considerable force, fairly say, "You cannot take part of the house, practically destroying the whole of the house, without taking the whole house"? That contention is supported by the judgment of the lords justices, and especially by the judgment of Collins, L.J., in the case of *Gordon* v. *Vestry of St. Mary Abbotts*. But that is not the present question. The corporation have served notice on the plaintiff to take the whole house, but the plaintiff says, "No; by your owns plans it is shown that you only need a part, and you are not entitled to take the whole but only that part which you actually require." I, for my part on the facts before me, cannot see why the plaintiff may not insist on the corporation only taking a part of the house merely because, if the tables were turned, he could say, if the corporation only claimed to take a part, "No; you cannot take a part without taking the whole." If the plaintiff were merely obstructive and attacking the corporation, the court, of course, would not for a moment support him; but here, by his definite evidence, he shows that he has carried on his business for some time, that he sees his way, by various means—for instance, by relinquishing his photographic business and carrying on the toy-shop only—to carry on his business, and it is quite possible that he may do so well. It may be a small place that he will have left, but in London, as one goes along the streets, one sees many shops carried on in straitened premises, and they are frequently found to pay. I know a shop of the kind not far from here. The corporation say we must have the land, and attempt to take the whole; there is no moral obliquity, nothing morally wrong in that on their part; they are not taking any undue advantage. But they show by their plans that they only want part of the house for the purpose of widening the street, whereas they want, and are attempting to take, the whole; and on the authorities it is clear that they cannot do this unless they show that the remainder is useless to the plaintiff. With reference to the case of *Gordon* v. *The Vestry of St. Mary Abbotts, Kensington*, I will make one remark. In that case both the lords justices took pains to decide the law on the Act and did not apply it to the facts of the case. At p. 754 of [1894] 2 Q. B. (nearly at the bottom of the page), Collins, L.J., expressly says: "Our decision leaves the question of fact to be decided." Applying the decision of law in that case to the facts before me, I think that the plaintiff succeeds in his contention that he is entitled to keep that part of the property which the defendants do not actually require for carrying out the widening of the street.

Motion allowed.

Solicitors, *W. E. Aldis; H. H. Crawford (the City Solicitor).*

Chan. Div. Kekewich, J. March 11.

In re CHATARD'S SETTLEMENT. (*a.*)

Practice — Payment out of court — French subjects — Infants—French guardian's right to receive money—Discretion of court.

A French subject who, according to French law, is the legal guardian of his infant children (also French subjects), and is empowered by that law to receive and give legal discharges for all moneys coming to them during their minority, is not entitled as of right to payment out of court of a fund to which such infant children have become absolutely entitled.

The court, however, can, in its discretion, pay the fund out to him upon the production of satisfactory evidence that it will be applied for the benefit of the children.

Petition.

This was a petition by two infant French subjects by their father and lawful guardian, also a French subject, as next friend, praying for the payment out of court of a sum of £2,001 0s. 3d. new consols, and £26 12s. cash. The trust fund had been paid into court under the Trustee Relief Act by the respondent, the surviving trustee of the settlement made upon the marriage of the infant petitioners' grandparents, and in the events which had happened the infant petitioners had become absolutely entitled to the settled property.

The petition prayed that the funds in court to which the infant petitioners were entitled might be divided

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

into moieties, and one moiety paid to the father as the guardian of the infant female petitioner. and the other paid to him as the guardian of the infant male petitioner.

Paragraph 14 of the petition stated that by the law of France the father as the legal guardian of the infant petitioners was entitled to receive and give legal discharges for all moneys coming to his children during their minority.

The case was argued on the assumption that this statement in the petition was strictly proved.

Ingpen, for the petitioners.—The father is entitled as of right to have these funds paid out to him as guardian of these infants: *In re Crichton's Trusts*, 24 L. T. O. S. 267; *In re Ferguson's Trusts*, 22 W. R. 762; *In re Brown's Trust*, 13 W. R. 677, 12 L. T. Rep. 488. *In re Hellmann's Will*, 14 W. R. 682, L. R. 2 Eq. 363, is perhaps against me, but the weight of authority is in my favour: Simpson on Infants (2nd ed.), p. 254. The same principle guides the court in appointing guardians to infants domiciled abroad: *In re Willoughby*, 33 W. R. 850, 30 Ch. D. 324; *In re Bourgoise*, 37 W. R. 563, 41 Ch. D. 310.

Stewart Smith, for the respondent.—*In re Hellmann's Will* is more applicable to the present circumstances than the other cases cited. There is nothing to prevent the court from keeping the fund until the beneficiaries can give a receipt for it; and I submit that is what ought to be done here. At any rate the father should satisfy the court that the money will be applied for the benefit of the children.

Ingpen, in reply.—The court has no jurisdiction to refuse to pay out funds to a foreigner who has proved his title to them according to the law of his domicil.

KEKEWICH, J.—This case has been argued at my suggestion as if the statement in the 14th paragraph of the petition had been strictly proved. The question which I have to determine is whether I am bound to direct the payment out of this money as prayed by the petition. If I am, then I must do my duty; if I am not, then I have a discretion which I must exercise on proper materials which at present are not before me.

The cases of *In re Crichton's Trust* and *In re Ferguson's Trusts* are distinguishable from the present case, for in them the infants were Scotch and had reached the age of puberty according to Scotch law; and also, as appears by the later case, the Scotch curator has to give security, and account for all sums received on behalf of the minor. The report in *In re Brown's Trust* is meagre, and I do not think it is a case which can be relied upon as establishing a principle. I do not think either that I ought to regard *In re Hellmann's Will* as affecting the present case. That was a petition under Lord St. Leonards' Acts (22 & 23 Vict. c. 35 and 23 & 24 Vict. c. 38), and a decision on a petition under those Acts cannot possibly, it seems to me, be regarded as an authority for the proposition that a French guardian is entitled as of right to have the fund in court paid to him. I think I ought to consider whether the fund if paid to the guardian will be properly applied for the infants' benefit, or whether I ought to retain the fund in court until they attain their majorities. Satisfactory evidence could perhaps be produced to show that the fund would be properly applied for their benefit; but at present I am not asked to pay out on that footing, but merely on the ground that the guardian is entitled to the fund as of right. Even assuming that the father can give a receipt for the money, nevertheless it seems to me that, having the custody of the fund for the infants, I ought not to pay it over unless I think that it is in the interests of the infants that that should be done. *In re Barlow's Will*, 35 W. R. 737, 36 Ch. D. 287, is a well-known example of a class of cases dealing with payment out to the officially-appointed curators of a foreign lunatic, and in that and similar cases the court has always required to be satisfied that the money is to be paid over to the foreign official for some purpose to which it is his duty to apply it. I shall accordingly be prepared to consider any evidence as to the proposed application of the money by the guardian, and the case may be brought before me again for that purpose.

Solicitors, *P. Collings & Co.; Claudius George Algar.*

Chan. Div.
Kekewich, J. } March 3.

In re BARONESS BATEMAN AND PARKER'S CONTRACT. (*a.*)

Ecclesiastical law—Enlargement of existing churchyard—"Adjoining" land—Intervening highway—Consecration of Churchyards Act, 1867 (30 & 31 *Vict. c.* 133).

A plot of ground immediately opposite to, but separated by a highway from, an existing churchyard was proposed to be added to the churchyard under the Consecration of Churchyards Act, 1867, *which contains provisions for the conveyance and consecration "of portions of ground adjoining and added to existing churchyards."*

Held, that it was "adjoining" land within the meaning of the Act.

Vendor and purchaser summons.

This was a summons by the vendor, who was tenant for life of the land contracted to be sold, asking for a declaration that she had power to sell the same under the Consecration of Churchyards Act, 1867.

The purchaser, who was rector of the parish of Brome, Suffolk, had agreed to buy the piece of land in question for the purpose of enlarging the existing churchyard. The churchyard had a frontage of 162ft. on to the south side of a public highway about 20ft. wide, and the land contracted to be sold had a frontage of 100ft. on to the north side of the same highway, and immediately opposite to the churchyard.

It was desired that the piece of land should be conveyed and consecrated under the provisions of the Consecration of Churchyards Act, 1867, which was passed for the purpose of diminishing "the expense attendant on the consecration of portions of ground adjoining and added to existing churchyards," but a question arose as to whether this was "adjoining land" within the meaning of that Act, and the present summons was accordingly taken out.

J. M. Stone, for the vendor.—Adjoining does not necessarily mean contiguous. In *Coventry* v. *London, Brighton, and South Coast Railway Co.*, 16 W. R. 267, L. R. 5 Eq. 104, and *London and South-Western Railway Co.* v. *Blackmore*, L. R. 4 H. L. 610, 18 W. R. H. L. Dig. 1, 13-15, which were cases under the Lands Clauses Consolidation Act, 1845, lands separated, in the former case, by a private right of way, and in the latter case, by a wall, were held to be adjoining lands. On the implication of ownership of the subsoil *usque ad medium filum viæ*, premises on opposite sides of the street were held to be "adjoining or contiguous": *Haynes* v. *King*, 42 W. R. 56, [1893] 3 Ch. 439; *Micklethwait* v.

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Newlay Bridge Co., 38 Ch. D. 133; and *In re White's Charities*, 46 W. R. 479, [1898] 1 Ch. 659.

W. M. Spence, for the purchaser.—This will be a new churchyard, not an enlargement of the existing one. In order that one piece of land may adjoin another it must be absolutely contiguous to it: *Rex* v. *Hodges*, 1 Moo. & Mal. 341. The cases cited under the Lands Clauses Consolidation Act do not really apply.

KEKEWICH, J.—It would be a great pity for me to attempt to define the meaning of the word "adjoining" in this Act of Parliament. If I were to attempt to do so, my definition, like most other definitions, would be sure to be more or less inaccurate, for in all probability it would not include every conceivable case, and I am afraid of excluding a case which might properly come within the scope of the Act. I shall therefore content myself by saying that in this particular instance this piece of land is "adjoining" land within the meaning of the Act.

Solicitors, *Hudson, Matthews, & Co.*

Chan. Div.
Cozens-Hardy, J. } April 25, 28.

JOHNSTON *v.* BOYES. (*a.*)

Vendor and purchaser—Contract—Sale by auction—Offer by conditions of sale—Acceptance by highest bidder—Payment of deposit by cheque—Custom at auction—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A vendor who offers property for sale by auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer if those conditions be violated, and who, being the highest bidder, is not allowed to sign the written contract; and it is no defence to an action to enforce such a liability that there is no contract in writing signed by the vendors.

Under the usual condition of sale that the purchaser shall, immediately after the sale, pay the auctioneer a deposit of ten per cent. and sign the subjoined agreement, cash must be paid.

There is no custom that a vendor is bound to accept the cheque of a person of good credit, much less that of a pauper.

Action.

This was an action by Theresa Johnston, suing as a married woman entitled for her separate use against W. O. Boyes and A. W. Adams, claiming damages under the following circumstances.

The defendants, who were trustees for sale, offered the White Hart Inn, South Mimms, Middlesex, for sale by auction on the 24th of May, 1898. By the first condition of sale, the highest bidder was to be the purchaser, and by the second condition the purchaser was immediately after the sale to pay to the auctioneers a deposit of £10 per cent. on the amount and in part payment of his purchase-money, and sign an agreement subjoined to the conditions to complete the purchase. The subjoined agreement was in the following form: "At the sale by auction made this day of the property described in these particulars, , of , was the highest bidder for, and was declared the purchaser of, the said property, at the price of £ ; and he has paid to Messrs. Rodwell & Son, of Watford, Herts, as agents for and on behalf of William Osborn Boyes, of Barnet, and A. W. Adams, of 90, Ladbroke-grove, Notting Hill, the vendors, the sum of £ by way of deposit and in part payment of the purchase-money, and hereby agrees to complete the purchase in accordance with the above conditions; and the said Messrs. Rodwell & Son, as the vendors' agents, hereby confirm the said sale and acknowledge the receipt of the said deposit."

The plaintiff's husband attended the auction and, on behalf of his wife, bid for the property, which was knocked down to him as the highest bidder at the price of £4,900. He immediately went to the auctioneer's rostrum with a view to signing the contract and paying the deposit amounting to £490. But Mr. Boyes, one of the defendants and the solicitor conducting the sale, recognized him as a man who, in the previous week, had appeared in the county court, of which Mr. Boyes is the registrar, and sworn that he had nothing in the world but the clothes he stood up in. Johnston tendered his own cheque in payment of the deposit, whereupon Mr. Boyes told the auctioneer not to take the cheque. Some further discussion took place, partly in the auction-room, and partly in an ante-room, to which the auctioneer and his clerk and Johnston and the defendants retired, the result of which was that the refusal to accept the cheque was persisted in. Johnston said that his wife would find the money the following day, but Mr. Boyes said he must have the cash that day, and as Johnston did not provide the cash, the matter was treated as at an end so far as he was concerned, and a contract was immediately afterwards signed for sale to another gentleman at the price of £4,950.

It was also proved at the trial that before the transaction was put an end to, Johnston said he was purchasing on behalf of his wife, and that though Johnston had at the time no assets to meet it, the cheque would have been met by the plaintiff providing funds.

The writ was issued on the 27th of May, 1898, and was indorsed with a claim for a declaration that the plaintiff was entitled to be the purchaser of the property; for an order directing the defendants to accept the deposit and to allow her to sign the agreement; and for an injunction to restrain the completion of the resale. On a motion, Stirling, J., refused the injunction (see 42 SOLICITORS' JOURNAL, 610). The writ was subsequently amended by substituting a claim for damages against both defendants for breach of contract that the highest bidder should be the purchaser, and against the defendant Boyes in particular, in so far as such breach of contract consisted in directing the auctioneer not to accept the cheque, and not to allow the husband to sign the agreement.

Tindal Atkinson, Q.C., and *F. P. Onslow*, for the plaintiff.—The plaintiff being, by her agent, the highest bidder at the auction, accepted the offer contained in the conditions, "that the highest bidder should be the purchaser," and is entitled to maintain an action for the breach of the contract thus made. It is not necessary that such a contract should be evidenced by writing signed by the vendors: *Carlill* v. *Carbolic Smoke Ball Co.*, 41 W. R. 210, at p. 212, [1893] 1 Q. B. 256, at p. 262; *Warlow* v. *Harrison*, 8 W. R. 95, 1 Ell. & Ell. 295; *Spencer* v. *Harding*, 19 W. R. 48, L. R. 5 C. P. 561, at p. 563. The plaintiff's agent followed the usual course at auctions in tendering his cheque, and the auctioneer ought to have accepted it. The custom of accepting cheques at auctions in payment of deposits has been judicially recognized: *Farrer* v. *Lacy Hartland & Co.*, 32 W. R. 196, 34 W. R. 22, 25 Ch. D. 636, 31 Ch. D. 42.

They also referred to *Papé* v. *Westacott*, 42 W. R. 131, [1894] 1 Q. B. 272.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Eve, Q.C., A. R. Ingpen, and *F. A. Milne*, for the defendants.—There is not an enforceable contract. The contract alleged by the plaintiff is that she is entitled to be put into the position of a purchaser of land, and it is necessary that such a contract should be evidenced by writing signed by the defendants. The plaintiff, through her agent, has not complied with the conditions. The deposit was to be in cash, and the vendors were not bound to take the agent's cheque. There is no recognized practice as to the acceptance of a cheque in payment of a deposit: see the judgment of Bowen, L.J., in *Farrer* v. *Lacy Hartland & Co.*, 34 W. R. 22, at p. 23, 31 Ch. D. 42; *Blumberg* v. *The Life Interests and Reversionary Securities Corporation (Limited)*, 45 W. R. 246, [1897] 1 Ch. 171.

Tindal Atkinson replied.

Cur. adv. vult.

April 28.—COZENS-HARDY, J.—In point of law I think such an action as this can be maintained. A vendor who offers property for sale by auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer, if those conditions be violated: *Warlow* v. *Harrison*, and *Carlill* v. *Carbolic Smoke Ball Co.* Nor do I think that the Statute of Frauds would afford any defence to such an action. The plaintiff is not suing on a contract to purchase land; she is suing simply because her agent, in breach of the first and second conditions of sale, was not allowed to sign a contract which would have resulted in her becoming the purchaser of the land. I think this conclusion results from the decision of the Exchequer Chamber in *Warlow v. Harrison*. That was not a case under section 4 of the Statute of Frauds, but the observations of Martin, B. (8 W. R. 96, 1 Ell. & Ell., at p. 317), as to section 17, seem to me to be applicable to the present case. It is therefore necessary to consider whether the facts proved have established a breach of the contract alleged by the plaintiff. [His lordship then referred to what took place at the auction, and continued:] These being the facts which I find, do they entitle the plaintiff to relief? In my judgment they do not. I think the defendants were not bound to accept the cheque of Mr. Johnston, who was, and was known by them to be, impecunious. I do not think any custom has been proved to oblige vendors to receive the cheque even of a person in good credit, though it is, doubtless, usual to do so. And certainly no such custom could bind vendors to accept a cheque from a pauper. In my view it makes no difference that they were told that Mr. Johnston was buying for his wife. They were not bound to wait for cash until the next day. The second condition provided that the purchaser should "immediately after the sale" pay a deposit of £10 per cent. This means a payment in cash. No such payment was made, and the defendants were under no obligation to sign the contract unless and until this condition precedent had been fulfilled. The result is that the plaintiff's action fails and must be dismissed with costs in the usual form, having regard to the fact that the plaintiff is a married woman.

Judgment for the defendants.

Solicitor for the plaintiff, *T. Allingham.*

Solicitors for the defendants, *Sismey & Sismey.*

Chan. Div.
Cozens-Hardy, J. } April 17, 18, 28.

NATIONAL COMPANY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS (LIMITED) *v.* GIBBS. (*a.*)

Patent—Grant to two persons—Joint tenancy or tenancy in common — Survivorship—Agreement for sale—Covenant for validity—Joint or several—Death of one grantee.

The grant of letters patent for a new invention to two persons, their executors, administrators, and assigns, in ordinary form, makes them joint tenants, and, upon the death of one, the rights under the letters patent, if not previously severed, belong wholly to the survivor, the rule that a grant to A. and B. makes them joint tenants not being merely a rule of tenure or real property law.

A provision in an agreement for the sale of letters patent granted to two persons that an assignment should be executed, and should contain a covenant by the vendors that the letters patent are valid, cannot be enforced against the representatives of one of the vendors who has died after the agreement and before assignment, nor will such representatives be liable for damages for breach of the agreement in this respect.

By letters patent dated the 13th of September 1882, (No. 4,362) after reciting that Lucian Gaulard and J. D. Gibbs had by their petition represented that they were in possession of a new system of distributing electricity for the production of light and power of which they were the first inventors, the Crown granted "unto the said L. Gaulard and J. D. Gibbs, their executors, administrators, and assigns, our special license, full power, sole privilege, and authority that they, the said L. Gaulard and J. D. Gibbs, their executors, administrators, and assigns, and every of them, by themselves, or by their deputy or deputies, servants or agents, or such others as they the said Gaulard and Gibbs, their executors, administrators, and assigns, shall at any time agree with, and no others, and from time to time, and at all times hereafter, during the terms of years expressed, shall and lawfully may make, use, exercise, and vend their said invention," with *habendum* "unto L. Gaulard and J. D. Gibbs, their executors, administrators, and assigns," for the term of fourteen years. The letters patent contained clauses prohibiting all persons using the invention during the term without the license of the grantees, commanding all public officers not to molest the grantees, declaring grant void if contrary to law or for an invention not new; and requiring as a condition that the grantees should particularly describe the invention by an instrument in writing, and other clauses usual in letters patent of that date, in all of which references to the grantees were to them, "their executors, administrators, and assigns." The patentees also obtained protective monopolies for their invention in other countries.

By an agreement under seal of May, 1883, made between Gaulard and Gibbs (thereinafter called "the vendors") of the one part, and the plaintiff company on the other part, it was agreed that the vendors should sell and the company should purchase the exclusive privilege of using, exercising, and vending the said inventions within the United Kingdom and certain other countries; that "the vendors and each of them" should do all necessary acts for procuring confirmation and extension of the patents, and should give the company advice as to the use of the inventions. Clauses 6 and 7 were as

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

follows: "(6) The vendors shall without delay, at the expense of the said company and to the satisfaction of the solicitors of the said company, establish a title to all the said inventions and letters patent and privileges hereby agreed to be sold, and assign and transfer the same to, and cause the same to be legally vested in, the said company or such person or persons as the said company shall appoint for the purpose. (7) The assignment and transfer of the said letters patent and other premises sold shall be prepared by and at the cost of the said company, and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of the said sum of £220,000, to be paid in fully paid-up shares and cash as before mentioned, and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned or any letters patent which may thus have been obtained in substitution for the same or in respect of such invention as is protected thereby are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the said company for giving effect to the sale hereby agreed to be made. Provided that the consideration money may be apportioned among two or more assignments as the said company shall think fit."

Gaulard died in November, 1888, and the defendant, Madame Ruelle, was his administratrix. No assignment of the patents to the plaintiff company had been executed. The plaintiff company alleged that the English letters patent had been declared void, and that the Brevets d'Invention in France, Germany and Austria had been declared void, or so restricted as to be of little or no value, and that the United States patent also had been materially limited. They therefore brought this action against Gibbs and Madame Ruelle claiming that the defendants might be ordered: (1) To assign to them the letters patent; (2) to pay them damages for breaches of the agreement and warranty contained in the said agreement of May, 1883; and (3) to repay to them part of the purchase-money in respect of the patents declared void, or partially so.

Subsequently the plaintiffs came to terms with Gibbs, and the action proceeded against Madame Ruelle. At the trial the point was raised that the covenant was a joint, and not a several one, and that consequently there was no right of action against the representatives of Gaulard.

Moulton, Q.C., and *Gore Browne*, for the plaintiff company.—The rights of a patentee of an invention are not the ordinary rights of property. They are merely an exception from the general prohibition upon all other persons. The letters patent do not really confer on the patentee the right to make and use the invention. He has such a right if there are no letters patent at all: *Mathers* v. *Green*, 14 W. R. 17, L. R. 1 Ch. App. 29; *Steers* v. *Rogers*, [1893] A. C. 232, 41 W. R. Dig. 159. Why, then, should the technical rule of real property law as to joint tenancy be applied to patent rights? These rights are intended to be a reward for merit, why should it be supposed that upon the death of one of two grantees the whole benefit of the letters patent is to belong to the survivor? We submit that the Crown must be supposed to intend to confer a tenancy in common. But whether this is so or not the covenant provided for by the agreement of sale was intended to be a joint and several one, and not merely a joint one. In commercial transactions covenants joint at law are treated as several: *Beresford* v. *Browning*, L. R. 20 Eq. 564, at p. 576, 23 W. R. Dig. 148, 24 W. R. 120, 1 Ch. D. 30. Moreover, this was a business agreement intended to be provisional and executory, and not complete and final. The assignment under it would have contained a joint and several covenant, which is the proper form: see Key & Elphinstone's Precedents (5th ed.), p. 404; Bythewood & Jarman's Precedents (4th ed.), vol. 4, p. 805. Under the Conveyancing Act, 1881, s. 7, if the vendors assigned as beneficial owners they would be severally bound in the covenants for title. This shows the previous practice (The case of *Walton* v. *Lavater*, 8 C. B. N. S. 162, 9 W. R. C. L. Dig. 61, was also referred to.)

Eve, Q.C., and *Rowden*, for the defendant.—Letters patent are ordinary property, and a grant to two persons follows the ordinary rule as to joint tenancy. A covenant joint in form is not construed as several in equity unless in special circumstances: *Sumner* v. *Powell*, 2 Mer. 30; *Richardson* v. *Horton*, 6 Beav. 185; *Wilmer* v. *Currey*, 2 De G. & Sm. 347; *White* v. *Tyndall*, 13 App. Cas. 263, at pp. 265, 274, 275, 36 W. R. Dig. 113. The proper and ordinary form of covenant for two persons is joint, and not several: Davidson, vol 1, pp. 92, 93; Platt on Covenants, p. 116; Dart's V. & P. (6th ed.), p. 624; Story on Contracts (5th ed.), s. 71, p. 61. The agreement here was not executory; it is under seal, and the covenant is completely stated. The principle of amplifying clauses in articles is confined to cases of real property. As regards the part of clause 6 providing for the insertion of other reasonable covenants, that was not intended to apply to covenants for validity, which had been already completely dealt with.

Gore Browne in reply.—The case of *White* v. *Tyndall* is distinguishable, as there the term of the covenant was evidently carefully considered, and intended to be complete.

Cur. adv. vult.

April 28.—COZENS-HARDY, J.—The plaintiffs in this action contracted on the 25th of May, 1883, to purchase certain letters patent for a large sum of money. The vendors were Gaulard, who died in 1888, and the defendant Gibbs. Gaulard's administratrix, Madame Ruelle, is a defendant to the action. It is admitted that the plaintiffs have settled their disputes with the defendant Gibbs, and it is, therefore, not necessary for me to consider the action except as one between the plaintiffs, who are the purchasers, and the defendant Ruelle, who is the administratrix of Gaulard, one of the vendors. The plaintiffs claim that the defendant may be ordered to assign and transfer to the plaintiffs the letters patent, and they also claim damages for breaches of the agreement and warranty contained in the contract of the 25th of May, 1883. At an early stage it became apparent that there was a serious question whether the plaintiffs had any right against the defendant Ruelle. With the approval of the parties, I thought it convenient to deal separately with this point, because, if it is decided adversely to the plaintiffs, it will not be necessary to consider other questions, including questions of foreign law, which may arise. The short point for my decision is whether Gibbs, the surviving patentee, is not the only person having anything to assign, and the only person liable to pay damages for breach of contract and warranty. [His lordship read the material parts of the contract, and proceeded:] It is admitted that all the patents were granted to Gaulard and Gibbs, and not to either of them separately, and it is not alleged that their rights *inter se*—whatever they may have been originally—have since been varied except so far, if at all,

as they were varied by the contract. The first question for my consideration is this—What was the nature of the interest of the patentees? I take the patent dated the 13th of September, 1882, which is the only one to which my attention was called. It is in the form which I believe to be usual, if not universal, in the case of a grant to two patentees. It recites that Gaulard and Gibbs had presented their petition, and that they were the first and true inventors, and that they had prayed her Majesty to grant unto them, their executors, administrators, and assigns, her Royal letters patent for the sole use, benefit, and advantage of the said invention within the United Kingdom for the term of fourteen years, and the letters patent proceed as follows: [His lordship read all except the formal parts, and proceeded:] On the construction of this grant, I think the two patentees took a joint interest which passed by survivorship to Gibbs on the death of Gaulard. It was scarcely disputed that a grant, whether by the Crown or by a private individual, of any ordinary species of property to A. B. and C. D., their executors, administrators, and assigns, would create a joint tenancy or joint interest, and not an interest in common. This is not a rule of tenure or of real property law. It applies to an assignment of a policy of assurance as much as to an assignment of a term of years. But it was urged that letters patent are of such a peculiar quality and nature that different principles of interpretation ought to be applied. I am unable to follow this argument. The right or privilege granted by the Crown by the letters patent is an exception from the general prohibition contained in the Statute of Monopolies. It is for all purposes to be regarded as property. It passes on bankruptcy as part of the assets of a bankrupt. On the death of a patentee duty is payable as it is part of the assets of the deceased, and I can see no justification in principle, nor has any authority been produced, for holding that a grant of letters patent to two persons, their executors, administrators, and assigns, created anything more than a joint interest which will survive on the death of one of them, unless there has been a severance of the joint interest. An elaborate argument was addressed to me with the view of persuading me that survivorship between joint tenants is unreasonable and cannot have been intended by the Crown. It is no doubt true that courts of equity have laid hold of slight circumstances to turn a joint tenancy into a tenancy in common, and there was at one time an idea that in equity all joint tenancies would be construed tenancies in common. This, however, is clearly not so. I may refer to the judgment of Sir William Grant in *Aveling* v. *Knipe*, 19 Ves. 441. It must not be forgotten that it is at any time open to two joint owners to sever their joint interest and to create a tenancy in common. A patent can be owned by tenants in common: see *Smith* v. *London and North-Western Railway Co.*, 2 E. & B. 69, and *Steers* v. *Rogers*. It follows, therefore, that in my opinion Gaulard's representative is not a proper party to the action, in so far as it seeks an order for the assignment of the patents, inasmuch as the whole interest in the patents is vested in Gibbs, as the survivor of the two joint patentees. The second, and, in my view, a more difficult question has now to be considered. Assuming that Gibbs and Gaulard were jointly interested in the patents, what is the nature of the obligation created by clause 7 of the agreement? Is it merely a joint covenant, in which case the only person who could be sued upon it would be Gibbs as the survivor, or is it a several covenant, or a joint and several covenant, under which either Gibbs or Gaulard, or the representatives of either of them, could be sued? This must depend upon a careful consideration of the language of the instrument. In the first place, the agreement itself is under seal, so that the obligations imposed are really covenants. In the second place, the obligation in question is something to be contained in the assignment of the patents, and when it is once held that Gaulard's representative is not a necessary party to the assignment it will be somewhat remarkable if the purchaser can require the concurrence of the representative, not for the purpose of assigning, but solely for the purpose of entering into a covenant binding herself not in her individual character, but solely in her representative character, and to the extent of Gaulard's assets. I doubt whether ever such a deed of assignment was ever seen. Certainly I never saw such a deed. It may be that the proper form of covenants for title in an assignment by two joint tenants is to make them, not joint, but joint and several. But it does not follow that after the death of one of the joint tenants before assignment his representative can be required to join for the mere purpose of covenanting. In the third place, the obligation in question is not one which the law implies from the contract of sale. It is a special and peculiar stipulation for which the plaintiffs have bargained, and which they have obtained from the vendors. In this point of view it is difficult to see what justification there can be for enlarging or altering the words used. Those words provide that the deed shall contain a covenant by the vendors. Now, such a covenant, in the absence of any qualifying context, must be a joint covenant. The case of *White* v. *Tyndall* is a strong authority on this point. The form of the covenant is joint, and I do not feel justified in making it several. For these reasons I have arrived at the conclusion that the plaintiffs are not entitled to any relief against Gaulard's representative.

Solicitors for the plaintiffs, *Campbell, Reeves, & Hooper.*

Solicitor for the defendant, *Edward Betteley.*

Chan. Div. }
Wright, J. } May 3, 5.

In re MUTOSCOPE AND BIOGRAPH SYNDICATE (LIMITED). (*a.*)

Company—Winding up—Surplus assets—Distribution—Fully-paid and partly-paid shares.

One of the articles of association of a company contained the following clause: "If upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid, or which ought to have been paid, on the shares."

The capital of the company consisted of 60,000 *shares of* £1 *each, of which* 26,000 *were vendors' shares issued as fully paid, besides which* 30,357 *other shares had been issued on which* 10*s. only had been paid up. On the voluntary winding up of the company there remained a large sum for distribution among the shareholders after paying all debts and the expenses of liquidation.*

Held, that the distribution must be in accordance with the agreement shown in the articles—viz., the balance after repaying the paid-up capital, must be distributed in proportion to the paid-up capital.

Application by the liquidators of the syndicate for the direction of the court upon what principles and in what shares and proportions the surplus assets of the

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

company should be distributed in the winding up as between the holders of fully-paid and partly-paid shares respectively, and whether any call should be made on the partly-paid shareholders.

The syndicate was registered on the 31st of July, 1897, with a capital of 60,000 shares of £1 each; of these, 26,000 vendors' shares were issued as fully paid up; 30,357 other shares were also issued, on which 10s. only had been paid up. The syndicate had recently sold its business and assets to another company, and had passed resolutions for voluntary winding up. When all the debts and expenses of liquidation had been paid there remained for distribution among the shareholders the sum of about £200,000, and the liquidators now applied to the court for directions as to how this sum was to be distributed.

The articles of association of the syndicate which were material to the question were 36 and 42. They were as follows: "(36) Subject to any priorities that may be given upon the issue of any shares, the profits of the company available for distribution shall be distributed as dividend among the members in accordance with the amounts paid up on the shares held by them respectively. (42) If upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid up capital, the excess shall be distributed among the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. If the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

Upjohn, Q.C., and *R. M. Montgomery*, for the fully-paid shareholders.—The question is really decided by article 42. Where the articles of association provide for the distribution you cannot go outside of the document. This case differs from *Ex parte Lowenfeld*, 70 L.T. Rep. 3, for in that case there was a deficit; here there is an excess, and the uncalled capital must not be included in the assets. This is shown in the judgments of Lindley and Davey, L.JJ., in that case. *In re Anglo-Continental Corporation of Western Australia*, 46 W. R. 413 [1898] 1 Ch. 327, was also a case of a deficit and is to be distinguished.

Theobald, Q.C., and *R. J. Parker*, for the partly-paid shareholders.—The partly-paid shares should be treated as having the remaining ten shillings called up on them, and then the surplus assets should be distributed in proportion to the shares held by all the shareholders. Article 42 does not alter the general law. The distribution should be made as in *Ex parte Maude*, 19 W. R. 113, L. R. 6 Ch. App. 51. That case was followed in *In re Anglo-Continental Corporation of Western Australia*. In *Ex parte Lowenfeld* the Court of Appeal held that "capital paid" did not merely mean capital paid before the liquidation or called up in the liquidation for the purpose of paying debts and liabilities, but included capital called up or to be treated as called up for the very purpose of satisfying equities in the repayment of capital.

They also cited *In re Driffield Gas Light Co.*, 46 W. R. 411, [1898] 1 Ch. 451.

A. R. Kirby, for the liquidators.

Upjohn replied.

Cur. adv. vult.

May 5.—WRIGHT, J.—In this case the question for decision is—In what way are the surplus assets of the syndicate, which is in voluntary liquidation, to be distributed? The syndicate appears to have so prospered in its business as to have a large amount of surplus assets to be divided amongst its shareholders. Of these there are two classes—namely, the holders of fully-paid vendors' shares and the holders of shares on each of which the sum of 10s. has been called and paid up. The assets remaining after paying all debts, liabilities, and expenses amount to about £200,000, of which about £41,000 must first be applied in repaying to the shareholders the sum of £1 on each of the vendors' shares and the sum of 10s. on each of the other shares. I have now to decide what is to be done with the balance. The fully-paid shareholders say that they are entitled to the full proportion which their paid-up capital represents and that the others are only entitled to the proportion represented by 10s. per share. On the other hand, the partly-paid shareholders say that, according to cases like *Birch v. Cropper*, 38 W. R. 401, 14 App. Cas. 525, the division should be in accordance with the number of shares, irrespective of the amount paid up. If there were no provision in the articles as to the method of distribution to be adopted, it would be tolerably clear that after the capital account had been properly dealt with the balance would be distributable share and share alike. But there are two articles which must now be considered. Article 36 points out how the profits are to be distributed as dividend. It has been decided over and over again that such a provision is not decisive of the question how surplus assets are to be divided, but that it may have some bearing on the question. The question for my decision really turns on article 42, which, so far as material, is as follows: "If upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid, or which ought to have been paid, on the shares." At the conclusion of the arguments I did not think there was any reasonable doubt as to the matter, but as the amount distributable was large I took time to look at the authorities again. These authorities are referred to in *In re Anglo-Continental Corporation of Western Australia* and in *In re Driffield Gas Light Co.*, but there is nothing in the cases to occasion doubt as to how this case should be decided. It is not like the cases where the surplus assets are insufficient to repay the whole of the paid-up capital. The distribution must be in accordance with the agreement shown by the articles—that is to say, the balance, after repaying the paid-up capital, must be divided in proportion to the paid-up capital. No call must be made, and the costs of all parties will come out of the assets.

Solicitors, *Lloyd-George, Roberts, & Co.*; *Field, Roscoe, & Co.*

Q. B. Div.
(Lawrance and Channell, JJ.) Feb. 15.

LONDON COUNTY COUNCIL v. DIXON. (a.)

Metropolis—London County—Buildings—Commencing to form or lay out a street—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), s. 8.

The owner of a building estate, having erected a row of houses adjoining a street, sold a piece of land on the

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

same side of the street to the respondent, who commenced to erect a row of houses in a line with the first row and fronting the street. A space of forty feet, the statutory width of a street for carriage traffic, was left between the two rows of houses. In the house adjoining the space the respondent put a doorway and windows looking on to the space, and the sole means of access for carriages to the stables at the back of the premises was across the space. The respondent had no control over the space, which remained the property of the owner of the building estate. The space was marked in the building plan of the estate as "proposed street," but before the respondent erected his houses it had not been laid out as a street.

Held, that the respondent did not commence to form or lay out a street within the meaning of section 8 of the London Building Act, 1894.

Case stated by a metropolitan police magistrate.

An information was laid by the appellants against the respondent charging that in May, 1898, at Sandhurst-road, in the parish of Lewisham, he did commence to form a street for carriage traffic leading out of Sandhurst-road without having obtained the sanction of the council for such street, contrary to the provisions of the London Building Act, 1894.

The following facts were proved: Sandhurst-road was a new street laid out upon land belonging to A. Cameron Corbett, Esq., and the laying out of such street had been duly sanctioned by the council. Prior to May, 1898, a row of houses had been erected by Corbett upon the south side of Sandhurst-road. In May, 1898, the respondent commenced to erect six shops upon land bought from Corbett on the south side of Sandhurst-road in a line with the houses built by Corbett, leaving a space of forty feet between the last house and the first shop. He at first commenced the foundations of this shop at a less distance than forty feet from the last house, but subsequently altered them so as to leave a distance of forty feet, which was the statutory width of a street for carriage traffic.

The space so left was the street which the respondent was alleged by the information to have commenced to form. It belonged to Corbett, and a portion of it was used as a cart-track leading to certain brickfields situated at the end of the alleged street, which was ninety feet in length.

The shop erected by the respondent at the corner of the alleged street had a doorway at the angle, and a shop window as well as other windows looked into the alleged street. There was also a door opening into the alleged street at a distance of ten or twelve feet from the Sandhurst-road, and at the back of the premises the respondent erected five coach-houses and stables, the only access to which for horses and carriages was by an entrance eighty feet down the alleged street. Persons could, however, enter the stables by a back door from the shops in Sandhurst-road.

There was no evidence that Corbett entered into any formal agreement with the respondent that the space forming the alleged street should be left open, but it was marked on the estate plans of Corbett's property as a "proposed street"; and in the plan accompanying the application sent by the respondent to the local authority for their sanction of his scheme of drainage for the premises erected by him, it was called a "new road."

Nothing was done by the respondent to form or lay out the alleged street except the building of the shops and stables.

The magistrate found as a fact that in the circumstances a new street for carriage traffic had been commenced to be formed and laid out, but he held that, though the respondent undoubtedly erected the shops in the expectation that such space would be a new street, yet he did not commence to form it, upon the ground that he had no control over the roadway of the alleged street, and he accordingly dismissed the information.

Section 7 of the London Building Act, 1894, enacts that before any person commences to form or lay out any street he shall make an application to the county council for their sanction to the formation or laying out of such street.

Section 8 of the same Act provides, in relation to section 7, as follows: "A person shall be deemed to commence to form or lay out a street if he erect a fence or other boundary, or lay down lines of kerbing, or level the surface of the ground so as to define the course or direction of a street, or if he form or lay the foundation of a house in such manner and in such position as that such house will or may become one of three or more houses abutting on or erected beside land on which a street is intended to be or may be thereafter laid out or formed. Provided that no person shall be deemed to commence to form or lay out a street if he do any of the acts in this section mentioned for some purpose other than that of forming or laying out a street."

Avory (*Daldy* with him), for the appellants.—The magistrate was wrong in dismissing the information. The respondent laid the foundations of the shop at the corner of the alleged street in such a manner and in such a position as that it might become one of three or more houses abutting on land on which a street might at some time be laid out or formed. This section is intended to apply as well in the case of a builder who builds on land adjoining the proposed new street as in the case of the owner of the roadway. The object of the legislation is to give the council power, at the earliest moment, to interfere in the formation of new streets. Under former Acts the council could not interfere until money had been spent upon building houses, the owners of which had either to pull them down again, if they did not conform to the requirements of a new street, or to pay fines in respect of them for the rest of their lives. Here the magistrate has found that a new street has been commenced to be formed and laid out. The only question is, Did the respondent commence to form it or somebody else? It could only be one other person—the freeholder, Corbett. But he has done nothing, for before the respondent built the shops the space found by the magistrate to be a street was mere open country. The question is, When was the street commenced to be formed? It was commenced to be formed when the respondent built his shop. The respondent, therefore, is the person who commenced to form it: *St. George's Local Board* v. *Ballard*, 43 W.R. 409, [1895] 1 Q. B. 702, and *Roberts* v. *Richards*, 54 J. P. 693.

R. C. Glen, for the respondent.—The circumstances do not constitute a commencing "to form or lay out a street" by the respondent. The respondent had nothing to do with the roadway, therefore he could not lay it out as a street, and as "laying out" must precede "forming," he did not commence to form a street. The fact that on the estate plan it was marked as a new street does not affect him. Before the Act of 1894 was passed the respondent would clearly have not been liable: see *Gozzett* v. *Maldon Urban Sanitary Authority*, [1894] 1 Q. B. 327, where it was held that the erection by a person of two houses upon ground adjoining a road over which he had a right of way did not amount to laying out the road as a new street within the meaning of a bye-law made under the Public Health Act, 1875, s. 157. The definition of "commencing to form or lay out a street" given in section 8 is not wide enough to

include what the respondent did. The section speaks of a house built in such a position as that it may become one of three or more houses abutting on land on which a street, &c. Here there were only two houses, including the respondent's. The street could not be said to be commenced to be formed or laid out within that part of the definition until other houses were commenced to be built adjoining the alleged street. Were it otherwise it would involve a serious hardship on owners who, having once built two houses adjoining such a piece of land as this, could never afterwards alter their plan and build over the space left vacant. The respondent is within the proviso. His purpose was to build houses fronting on Sandhurst-road, with stables behind them to which he hopes to get access from Corbett by means of the alleged street.

LAWRANCE, J.—The magistrate was right. What he meant by his finding was that the respondent's case came within the proviso to section 8. What the respondent did was this: The freeholder had built a row of houses. Then he left forty feet, and sold the land beyond to the respondent. The space of forty feet is referred to in the plan as the "proposed street," and the respondent built the corner house with windows and doors facing the "proposed street," expecting that it would ultimately become a public street; but it was a matter of indifference to him whether the space did in fact become a public street or not, so long as he obtained a right of way to the back part of his house.

CHANNELL, J.—I am of the same opinion. Section 8 is very difficult to understand. It seems to include what is an obvious absurdity, for any house may become "one of three or more houses abutting on land on which a street may be thereafter laid out," because someone may come and build the other two, and the land on which it abuts may thereafter be laid out as a street; therefore everyone who builds a house is commencing to form a street within the meaning of the section. That is an absurdity. But it seems that the Act is framed in the largest way so as to catch everyone. I could not understand the section until Mr. Avory pointed out that the vagueness is corrected by the proviso. So that if a man builds a house where somebody else may afterwards come and build other houses, and does any of the acts mentioned in the section for some purpose other than that of forming a street he is within the proviso. It is legitimate to say that a man does the acts "for some other purpose than that of forming or laying out a street" when he does them for a neutral purpose; for instance, where a man builds his house so that it may be suitable in the event of the adjacent land becoming a street, but so that it may also be equally capable of being used as a house in the event of the land adjacent not becoming a street. That being the meaning of the proviso, the magistrate has by his findings brought the case within it. For what he appears to mean is that the respondent had purchased the land upon the terms that he was to have a right of way or access to the back of the premises. The respondent had no power to turn the adjacent land into a street, but, knowing it was likely to become a street, he so built his house as to be suitable in the event of the street being formed. That seems to me to be a "neutral" purpose, and one that may be described as "other than that of forming or laying out a street" within the proviso.

Appeal dismissed.

Solicitor for the appellant, *Blaxland.*

Solicitor for the respondent, *E. Shalless.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — May 4.

In re CALVERT.
Ex parte CALVERT *v.* WALKER. (*a.*)

Bankruptcy—Inland Revenue—Proof for income tax—Inquiry by Court of Bankruptcy into assessment—Income Tax Act, 1845, *ss.* 52, 111, 113, 118.

The Court of Bankruptcy has no power to inquire into the validity of an assessment by Commissioners of Income Tax.

Application by the debtor for leave to expunge a proof for income tax tendered by a collector of inland revenue.

The debtor had failed to make any return of his profits as required by section 52 of the Income Tax Act, 1845, and the commissioners made an assessment upon him in pursuance of section 113, charging him with income tax upon profits estimated at £10,000 a year. The debtor did not appeal against the assessment within the time limited by the commissioners for such purpose. A receiving order having been made against the debtor, the collector proved for the amount due under the assessment. The debtor, who had obtained the assent of his creditors to a composition, now moved to expunge the proof of the collector upon the ground that within the period covered by the assessment he was making no profits at all.

Reed, Q.C., and *Carrington*, for the debtor.—Upon the facts it is quite clear that the debtor was making losses rather than profits during the period covered by the assessment; the only question is whether, there having been no appeal, the court has power to go behind the assessment in the same manner in which it will go behind a judgment. We submit that it can, for an assessment by Commissioners of Inland Revenue cannot be considered higher than a judgment of the High Court. [WRIGHT, J.—Can the court go behind a judgment in deciding a question of proof.] Yes; *Ex parte Revell, In re Tollemache*, 33 W. R. 288, 13 Q. B. D. 720, is an instance. The latest case of inquiry into a judgment is *Ex parte Troup, In re Hawkins*, 43 W. R. 346, [1895] 1 Q. B. 404, and there is an unreported case in which the court inquired into an assessment in a rate-book.

Danckwerts, for the Inland Revenue.—A judgment and an assessment are not upon the same footing, because there is no consideration for an assessment, and the only reason why the court will go behind a judgment is to inquire if there was consideration for it: *Ex parte Kibble, In re Onslow*, 23 W. R. 423, L. R. 10 Ch. App. 373.

Reed, Q.C., in reply.—If the court has no power to inquire into an assessment, it leaves the debtor in a position to defeat his creditors by making an exaggerated return of profits which might swallow up his whole estate, income-tax being payable in full as a preferential claim.

WRIGHT, J.—It seems to me that the assessment here is not like a judgment nor within the principle on which the cases of judgment are applied. It seems absolutely necessary in order to prevent fraudulent proofs and fraudulent bankruptcies to adopt the view that judgments should not of themselves be conclusive. That view appears to be founded on necessity. Here there is no such necessity. It is quite inconceivable that a man should act in the way that it is suggested he might act in order to spite his creditors. If he did

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

I am not sure that the bankruptcy law is not strong enough to reach the case within certain limits of time—possibly as a fraudulent preference to the Crown. If not within those limits of time I should think very likely on common law principles it might be possible for the court to deal with the matter. In the case of an assessment there is no question of consideration as there is in the case of a judgment, there is a mere administrative assessment with a special mode of appeal provided, which must be followed. I cannot think it possible that it is competent to the Bankruptcy Court, on the invitation of the trustee in bankruptcy, to re-open questions of that kind. It is quite impossible to conceive that it would be competent for me sitting here to go into the question of the rateable values of a union or of a parish, or any question of that sort. That seems to me to be a case which is analogous to the case in which I am at present invited to act. I think the application fails and must be dismissed with costs.

Solicitors for the applicant, *Poole & Robinson.*

Solicitor for the respondent, *The Solicitor to the Inland Revenue.*

Q. B. Div. (Wright, J.) April 17.

In re DAWSON.

Ex parte DAWSON *v.* THE SHERIFF OF MIDDLESEX. (*a.*)

Bankruptcy — Execution —" Tools and implements of trade"—Sheriffs Act, 1845 (8 *&* 9 *Vict. c.* 127), *s.* 8 *—Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 44 (2), 45, 54 (1)*—Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11.

Where the goods of a debtor are seized in execution, and bankruptcy supervenes, unless the official receiver requires the sheriff to hand over the goods seized before sale, the bankrupt will only be entitled to retain the tools of his trade, &c., to the value of £5, as provided by the Sheriffs Act, 1845, *s.* 8, *instead of to the value of* £20, *as provided by the Bankruptcy Act,* 1883, *s.* 44 (2).

Motion by the bankrupt to continue an *interim* injunction restraining the Sheriff of Middlesex from selling the debtor's tools and implements of trade to the value of £20.

Upon the 2nd of February, 1899, the Sheriff of Middlesex, acting under a writ of *fieri facias*, seized the goods of the bankrupt, other than his bedding, wearing apparel, and tools of trade to the value of £5, to satisfy a debt of £37 2s. and £1 10s. costs.

Upon the 8th of March the bankrupt filed his own petition, a receiving order was made against him and he was adjudged bankrupt upon the same day.

The sheriff not having been required by the official receiver to deliver up the goods to him, advertised them for sale on the 14th of March.

The bankrupt obtained an *interim* injunction to restrain the sheriff from selling the tools of his trade to the value £20, which he now moved to continue.

Barnard Lailey, for the debtor.—By section 54 (1) of the Bankruptcy Act, 1883, immediately on a debtor being adjudged bankrupt his property shall vest in the trustee, who, until a trustee is appointed by the creditors, is the official receiver. By section 44 (2) the property of the bankrupt shall not comprise the tools of his trade, wearing apparel, &c., to the value of £20. Further, by section 45 an execution creditor is not entitled to the benefit of his execution unless he has completed it by seizure and sale before bankruptcy supervenes. It follows, therefore, in this case, that upon the applicant being adjudged bankrupt his property vested in the official receiver, except his tools of trade, &c., to the value of £20, which he should be allowed to retain.

P. Rose-Innes, for the sheriff.—By section 8 of the Sheriffs Act, 1845, the applicant was only entitled to exemption from seizure of goods to the value of £5, and the sheriff was right in seizing all goods beyond that value. The official receiver never required the sheriff to hand over the goods to him as he might have done under section 11 (1) of the Bankruptcy Act, 1890. The only course, therefore, for the sheriff to pursue is to proceed to sell the goods seized and hand over the proceeds, as provided by section 11 (2) of the same Act, to the official receiver.

Barnard Lailey replied.

WRIGHT, J.—This is a point of some difficulty and importance. What happened was this: there was judgment followed by execution whereby the rights of the execution creditor and the sheriff became fixed, subject only to bankruptcy supervening. Till that event the debtor's right to exemption from the seizure of his tools did not extend to tools beyond the value of £5. The question now is whether he has acquired a right to exemption of tools of greater value by becoming bankrupt. I do not think that a supervening bankruptcy alters the position of the sheriff until the official receiver or trustee comes in and claims the goods. Until that occurrs it is the sheriff's duty to go on and complete the execution by sale.

It is true that the following curious and anomalous result ensues: The sheriff having sold the goods hands the proceeds over to the official receiver; the tools are then no longer tools, they have been transformed into money, which the official receiver is entitled to retain, whereas had the official receiver demanded the goods from the sheriff before sale he would have been obliged to allow the bankrupt to retain his tools, &c., to the value of £20. Such, however, is the law, and nothing short of an Act of Parliament can alter it. The injunction must be dissolved.

Solicitor for the bankrupt, *G. B. Crook.*

Solicitors for the sheriff, *W. & T. Burchell.*

Q. B. Div. (Wright and Bigham, JJ.) April 13.

In re COOK.

Ex parte CRIPPS. (*a.*)

Bankruptcy—Charging order on dividends in favour of stranger to bankruptcy—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 102*—Solicitors Act,* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.

The court sitting in bankruptcy has no power to make a charging order under the Solicitor's Act, 1860, *upon dividends payable under the bankruptcy to the client of the solicitor seeking the charging order.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Appeal against a decision of his Honour Judge Emden in the county court at Tunbridge Wlels.

Mr. Cripps, the appellant, was a solicitor, and had acted for a man named Fooks in an action against Cook, the bankrupt. The action succeeded, but its ultimate result was the bankruptcy of Cook; and Fooks proved in the bankruptcy for the judgment debt and costs.

In 1895 Fooks went abroad without having paid the appellant's bill of costs in the action, and had never been heard of since. He was over seventy years of age at the time of his departure, and his reappearance seemed improbable.

After Fook's disappearance a dividend was declared in the bankruptcy of Cook and Mr. Cripps applied in the county court for an order charging the dividend payable to Fooks to the extent of his costs. He offered to give any indemnity that might be required, and his application was not opposed by the trustee in the bankruptcy, but the judge was of opinion that he had no power to make the order asked for.

Mr. Cripps appealed.

Mackintosh, for the appellant.—I contend that the court has power to make the order asked, and rely on the provisions of section 102 of the Bankruptcy Act, 1883, which empowers the court to decide all questions whatsoever which may arise in the bankruptcy or which the court may deem expedient or necessary to decide for the purpose of doing complete justice. The appellant cannot enforce his claim by garnishee order (see *Prout* v. *Gregory* 38 W. R. 204, 24 Q. B. D. 281), and his only course would appear to be this application to the court: see *Ex parte Brown, In re Suffield and Watts*, 36 W. R. 584, 20 Q. B. D. 693.

Hohler, for the trustee in bankruptcy, referred to *Ross* v. *Buxton*, 42 Ch. D. 190, 37 W. R. Dig. 169.

WRIGHT, J. (after stating the facts).—The power of the court to charge money recovered or preserved depends partly upon the common law and partly upon section 28 of the Solicitors Act, 1860: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved." It seems, however, plain that the court sitting in bankruptcy has no power to charge property recovered in the High Court, even though such property may have been converted into dividends. It has been urged that section 102 gives us such power, but I do not think that we have any legal right to deal with this fund in the hands of the trustee in the way we have been asked to do. We must contemplate the possibility of the indemnity offered turning out to be valueless, and in such an event we should have jeopardized property which now belongs to Fook, and if he should not re-appear, or die leaving no legal representatives, would probably be the property of the Crown. We cannot interfere with rights such as these.

BIGHAM, J., concurred.

Solicitor for the appellant, *W. C. Cripps*.

Solicitors for the respondent, *Andrew & Cheale*.

House of Lords.

From C. A. (England). March 14.

COWLEY v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Estate duty—Settled property—Value of property passing on death—Mortgage created by tenant for life and remainderman—Annuity charged on estates in favour of remainderman during life of tenant for life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.

The tenant for life and the remainderman in tail of certain property duly barred the entail, reserving to themselves a joint power of appointment over the fee. They subsequently joined in mortgaging the fee simple to secure £230,000, part of which was applied for the benefit of the tenant for life, and the rest was paid to, or for the benefit of, the tenant in tail. A resettlement was afterwards executed, whereby the property was charged with an annuity of £3,000 for the tenant in tail during the life of the then life tenant, who died in 1895.

Held, that what passed on the death of the tenant for life was the equity of redemption, and, in determining its value, the £230,000 should be deducted, but not the capitalized value of the annuity, which ceased to be payable.

Decision of the Court of Appeal (46 *W. R.* 222, [1898] 1 *Q. B.* 355), *reversed on the main contention.*

Appeal by Earl Cowley from an order of the Court of Appeal (A. L. Smith, Rigby, and Collins, L.JJ.), reported 46 W. R. 222, [1898] 1 Q. B. 355, where the facts are set out at length. Shortly they are as follows:

A petition was filed by the third Earl Cowley pursuant to rule 1 of the rules made under section 10 of the Finance Act, 1894, for the determination of the amount of estate duty payable upon the estate of the second Earl Cowley, who died on the 28th of February, 1895. The Mornington estates were settled upon the second Earl Cowley for life with remainder to his son (the third earl) in tail. The second earl had mortgaged his life interest therein in 1868.

By a disentailing deed executed by the second earl and the present appellant on the 14th of January, 1887 (and duly enrolled), the estate tail of the third earl in the settled property was barred, and the settled property limited to such uses as the second earl and his son (the third earl) should jointly appoint, and in default of appointment to the use of the second earl for life by way of restoration of the life estate vested in him immediately before the execution of the disentailing deed, with remainder to the third earl in tail, with remainders over.

The father and son in 1888 joined in creating mortgages whereby, in exercise of the powers given to them by the disentailing deed, they appointed, and by virtue of their estates and interests conveyed all the settled property in fee simple to the mortgagees to secure £230,000. Of this sum nearly £198,000 was paid to or on behalf of the second earl, and some £30,000 to or for the appellant.

By a deed of resettlement, subsequently executed, and which completed as between the second and third earl the arrangement under which the £230,000 was borrowed, it was provided that the third earl should receive during the life of the second earl certain annuities, which at the death of the second earl amounted to £3,000 a year,

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

and that as between the second earl, his trustees, executors, and administrators, and the third earl, his heirs, executors, and administrators, the second earl should during his life be primarily liable for the repayment of the interest on the mortgage debt.

The second earl died on the 28th of February, 1895, and the appellant lodged a statement and valuation of the amount upon which he was liable to pay duty under the Finance Act, 1894.

The Commissioners of Inland Revenue disallowed the deduction of the £230,000 with which the settled estates had been charged, and also of the capital value of the annuity of £3,000.

Upon the petition coming before the Divisional Court (Pollock, B., and Bruce, J.), reported 45 W. R. 538, [1897] 2 Q. B. 47, they allowed the deduction of the £230,000, but not the capitalized value of the annuity of £3,000. The Court of Appeal reversed this decision as regards the deduction of the £230,000 only.

The present appellant appealed on both points.

Haldane, Q.C., and *H. Fellows*, for the appellant.

Sir R. B. Finlay, S.G., and *Vaughan Hawkins* (*Sir Richard Webster, A.G.*, with them), for the respondents.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—The question in this case is upon what property the duty is payable by the appellant under the Finance Act, 1894. That statute enacts in the 1st section that certain duties shall be levied and paid upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of the Act.

The second Earl Cowley died possessed of the equity of redemption of certain estates, and the appellant, to whom that property had passed, is undoubtedly liable to pay the duties ascertained in the specified manner.

It does not appear to me that that question is a very difficult one. What I have described as the equity of redemption is undoubtedly the true description of the property, and what passed upon the death of the second earl to the third earl was the equity of redemption. How the value of that is to be ascertained is for this purpose unimportant. The thing which is liable to duty is that property and no other thing.

For the purpose of my opinion I discard all reference to the 7th section, which is only applicable to the mode of determining the value of an estate whatever that estate is; and if I am right that the estate which the second earl possessed was that which came to the third earl by the second earl's death, we have nothing to do with allowances or the series of enactments upon that subject, but the whole question must be determined upon the property, real or personal, settled or not settled, which passed on the death of the second earl.

I have great difficulty in following the reasoning by which, in the Court of Appeal, it has been held that one is at liberty to go back to the history of the property to which the third earl succeeded, and to split up that property into the different interests of which it was originally composed. If I may trace out in this case the life estate and the remainder in fee or in tail, I do not know how far back in the history of the property in question I may be entitled to go, nor am I quite certain what is intended to be effected by such an inquiry. There is no part of the Finance Act which appears to me to give ground for such an investigation, and I do not know that the adoption of any such principle by your lordships would not have a far wider operation than upon such taxation questions as arise in such cases.

It would seem to me to be a very pertinent question to ask whether the deeds which were executed in 1887 by the late earl and the appellant did or did not operate as they purported to operate; and if not, why not? But if they did, what prevented the appellant and his father granting a mortgage to the Prudential Co. upon the settled estates? What was done with the money seems to me to be immaterial. Though as a matter of fact the greater part of it was paid to liquidate the liabilities of the second earl, there was a second mortgage for the security of a further advance of £20,000; but in the view that I take of this case it is immaterial to pursue the destination of the money or the source from which it came. As a matter of fact, the whole property which is in question upon this part of the case is the equity of redemption. If that is all that the appellant has received that is all upon which he is bound to pay duty.

Your lordships have already held in *Attorney-General* v. *Beech*, *ante*, p. 257, [1899] A. C. 53, that where a tenant for life and remainderman in fee combine so as to get complete command of the estate in fee they may dispose of it as they will, and I am unable to comprehend why, when they grant a mortgage in fee, that transaction is capable of being dissected so as to prevent the union of the two estates, and by an artificial process resolve the estate into its original elements, or into its original settlement, and treat them as though such new arrangement had not been made at all. It would seem as though the argument suggested (although the Act does not say so) that the ordinary transaction of a resettlement of an estate can, for the purpose of the Finance Act, be traced back to any period, however remote, and duties exacted upon the artificial theory that you must treat each death in the chain of investigation as giving rise to liability to duty under an Act passed long after the resettlement or the death.

There is only one argument—namely, the conveyancing point referred to by Collins, L.J.—which seems to give any ground for looking back to the history of the transactions out of which this question has arisen. It appears that the incumbrances which did or might have existed were assigned to the company advancing the money as a protection to them in case any claim should be made in respect of some dealing with his life estate by the second earl. If it had been found that any such dealing had taken place the lenders wanted to have a right which should take precedence of any such dealing; but I confess I am unable to understand how this transaction could affect or in any way interfere with the power of the second and third earl to resettle the estate, or, having resettled it, to grant a mortgage in fee such as they did grant with the result which I have described. I am wholly unable to give any such interpretation to an Act which seems to me in its ordinary and natural meaning to be clear enough, and I for one decline to go into a minute investigation as to how the equity of redemption was created. It is enough for me that that is the property which, under section 1 of the Act, has passed to the appellant, and that alone is the property upon which he is liable.

I see no ground for dealing with section 2, since for the reasons I have given, I think it is section 1 to which you must look to see what property, real or personal, settled or not settled, passed upon the death of the second to the third earl; but if I were compelled to give a construction to section 2, sub-section 1 (*b*), I should come to the same conclusion in respect of the liability to duty, since I think the benefit accruing or arising to the third earl was only

to the extent of the value of the equity of redemption. But, as I have said, the question must be determined on section 1 alone.

As to the claim by the appellant to a deduction in respect of the cesser of the rent-charge of £3,000 a year, it is enough to say that the argument in respect of it is hardly intelligible, and certainly the appellant has made out no case to establish it.

No question as to the policies has been raised, and I therefore do not allude to them.

For these reasons I am of opinion that the appeal should be allowed, and with costs.

Lord WATSON (after stating the facts and the claims made by the appellant for deduction).—The legal questions raised by these two claims are so different in their character that I shall notice them separately. I have come, without much difficulty, to the conclusion that the order of the Court of Appeal ought to be reversed, and the judgment of the Divisional Court restored.

With regard to the second deduction claimed by the appellant, I have had no difficulty in coming to the conclusion that the decisions of both courts below were right. Very little was said about the point in the argument of the learned counsel for the appellant, and, so far as I can see, their reticence was not injudicious. The annuities, the capitalized value of which forms the subject of the claim, were regularly paid to the appellant during his father's lifetime, and they ceased to be payable on his death. No part of them formed a charge upon the equitable estate to which the appellant has succeeded, under the deed of resettlement, not in fee but in life-rent. In these circumstances I do not think it can, with any degree of plausibility, be maintained that the estate which passed to the appellant upon his father's death has been thereby diminished or affected.

The argument addressed to us with reference to the other point, the charge of £230,000 advanced on mortgage by the Prudential Assurance Co. (Limited), did not, so far as I could discern, involve any serious question as to the construction of the Finance Act. It turned mainly, if not exclusively, upon the real character and legal effect of the deeds by which the advance was secured. On the one hand, it was not disputed by the appellant's counsel that if the original settlement of the Mornington estates had remained unaltered, and these deeds had been executed by the late earl as life-renter, and by the appellant as expectant fiar, no part of the sum of £230,000 would have formed a proper deduction from the amount upon which the appellant is liable for finance duty. In that case the appellant would have derived benefit from his father's decease to the extent to which he had borrowed upon the security of his right in expectancy, and would thereby have been enabled to pay his own debt. On the other hand, counsel for the Crown hardly ventured to dispute that if the £230,000 had been duly charged by the original settlor, or had been subsequently validly charged upon the fee of the settled estates, the appellant must be held to have taken the estates *cum onere*, and could not be held, upon his father's death, to have taken any benefit from the charge of £230,000, or in the estates, so far as these were affected by it.

The learned counsel for the respondents accordingly addressed themselves to the bold and, in my opinion, somewhat extravagant contention that, notwithstanding the tenor of the securities held by the Prudential Assurance Co., the reality of the transaction between the company and the mortgagors, apart from any question as to the form of conveyancing adopted in the deeds, consisted in the second Earl Cowley and the appellant merely pledging their respective rights of life-rent and expectant fee. I should not have thought that the argument was deserving of much consideration, had it not been that it appears to have found favour with the learned judges of the Court of Appeal.

A. L. Smith, L.J., who was of the same opinion with the other learned lords justices, after stating that the second earl's life estate was not extinguished or merged into an equitable estate in fee in the Prudential Co., goes on to say: "The real substance of what was done, and this is what is to be looked at apart from the form of the conveyancing, was that the second earl mortgaged his life estate in the settled estates to the Prudential Co., and that his son mortgaged his reversion in such estates to that company to secure the repayment of the £230,000, and that this was the real transaction, whether it was bound to be carried out by one deed or by two."

The argument thus stated appears to me to ignore these facts that, in the first place, the Finance Act, 1894—does not prohibit the alteration or modification of the terms of the settlement by any legitimate means; and in the second place, that, assuming the proceedings taken in the years 1887, 1888, and 1889, for disentailing, charging with debt, and resettling the estates, to have been at the time valid, the Act of 1894 does not contain a single provision which, either directly or indirectly, denies effect to them. It is not maintained on behalf of the Crown that any one of these proceedings was illegitimate or invalid. The disentailing assurance had the legal effect of vesting the second earl and his son with the full right and title to dispose of the life-rent and the fee of the settled estates, and in virtue of that right and title they entered into onerous contracts with the Prudential Co., by which they professed to convey, and did convey to the company, in security, the immediate fee of the estate. Notwithstanding the reasoning of the learned lords justices, I fail to comprehend how the merger or non-merger of the second earl's life estate could possibly affect the title of the earl and his son to convey the immediate fee. I see no reason to doubt that, under their two conveyances, the company acquired, and from the date of the completion of their securities was possessed of an interest in fee, which was effectual against the beneficiaries under the settlement made by the last Earl of Mornington, including the appellant. I think the appellant took the estate *cum onere* of the charge of £230,000, which under the settlement as modified affected the settled estates in the same way as if it had been created by the original settlor, and that upon his father's death no interest or benefit accrued to the appellant in respect of any part of the estates which was covered by the securities of the Prudential Assurance Co. Any other conclusion is, to my mind, at variance with the substance and reality of the transaction.

A certain degree of colour was lent to the respondents' argument by the circumstance that the assurance company took an assignment of the debts due by the second earl to the London Assurance, which were charged upon his life estate with the same powers of recovery which were competent to their assignors. The object of the company in taking the assignment apparently was, not to impair the security which they had obtained from the appellant and his father over the immediate fee of the settled estates, but to enable them to compete with creditors, if any, to whom the second earl might possibly have previously conveyed his life estate. In short, the assignment was a precautionary device resorted to in order to meet the possibilities of events which had never occurred.

Lord MACNAGHTEN.—The principle on which the Finance Act, 1894, was founded is that whenever

property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding. Section 1 gives effect to that principle. Subject to certain exceptions or savings, it imposes a duty called estate duty upon the principal value of all property "settled or not settled" which passes on death. Section 2 is merely subsidiary and supplemental. It was intended apparently to sweep in a few cases which were thought perhaps to be within the spirit though not within the letter of the proposed enactment, or else were supposed likely to lead to evasion if not made equally subject to estate duty. Section 2 therefore declares that the expression "property passing on the death of the deceased" shall be "*deemed* to include" property classified under four different heads, to no one of which does that expression literally apply. The rest of the Act deals with matters of detail, valuation, and machinery.

The 1st section contains the pith and substance of the enactment. It is comprehensive, broad, and clear. The other provisions of the Act, which were dragged into the discussion rather unnecessarily as it seems to me, are strangely confused and singularly ill-drawn. But still I do not think that the Act is wholly to blame for the perplexity in which the learned judges below found themselves entangled. I think they took a wrong turn at starting. They left the broad highway for a narrow by-path, which led in a wrong direction and presented difficulties increasing at every step. Is it any wonder if they came to a wrong conclusion?

The first question as it seems to me—the question that lies at the very threshold of our inquiry—is simply this: Under which section of the Finance Act, 1894, does the present case fall? Is it the ordinary and normal case of property passing on death, or is it one of those exceptional cases in which property is deemed to pass, though there is no passing of property in fact? Does it come under section 1 or under section 2? The learned judges of the Court of Appeal, one and all, have held that the case is not within section 1. The reason is given by A. L. Smith, L.J. His lordship quotes the words of section 1, and then goes on to say: "This section would not, I think, embrace the present case, for the life estate of the second earl ceased at his death and passed to no one." I must say I cannot think that reasoning satisfactory. What the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which if it be a limited interest can never pass. With an interest that ceases on death the Act is not directly concerned, except in the one case where without any passing of property a benefit accrues or arises by reason of the cesser of a determinable interest such as a charge that expires. In every case in which property comprised in a settlement passes on death the life estate or other limited interest of the preceding owner must have ceased for good and all. If the criterion proposed by the learned lord justice were the true criterion, settled property could not in any case come within section 1. But then that section expressly and in terms applies to settled property. You might just as well strike the word "settled" out of section 1 altogether as hold that the section does not embrace a case where a limited interest under a settlement ceases on death and passes to no one.

I am, therefore, compelled to differ from the Court of Appeal at the very outset. I think the present case falls within section 1. I think it belongs to a class of cases which the authors of the Act had directly in view when they framed that section.

Now, if the case falls within section 1 it cannot also come within section 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed, "With regard to property passing on death, be it enacted as follows." Section 2 might with equal propriety be headed, "And with regard to property not passing on death, be it enacted as follows" I cannot, therefore, agree with Rigby, L.J., when he says that section 2 is a provision "explanatory" of section 1. In my opinion the two sections are quite distinct, and section 2 throws no light on section 1. But, then, no doubt section 2 speaks of "property in which the deceased . . . had an interest ceasing on the death of the deceased." And that, it may be said, was just the position of the second earl with regard to the Mornington settled estates. So it was. But section 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section. For, if property passing on death was in the lifetime of the deceased subject to a charge or interest which ceased on the death, the property must of course pass free from that charge or interest. And, so passing, it must of course be valued accordingly. That is section 1. You do not want section 2 for that. You cannot resort to section 2. For that would be giving the duty twice over. The Crown cannot have it both ways. Double duty is forbidden by the Act.

It is interesting and, I think, instructive to refer to sub-section 4 and 5 of the Succession Duty Act, from which the provisions of section 2, sub-section 1 (*a*), and section 2, sub-section 1 (*b*), are evidently adapted. The marginal note to section 4 is this: "General powers of appointment to confer successions." In the Succession Duty Act a power of appointment confers a succession when it is exercised, but only then. In the analogous provision of the Finance Act "property of which the deceased was competent to dispose at the time of his death" is deemed to pass though the power be not exercised. Then the marginal note to section 5 of the Succession Duty Act runs as follows: "Extinction of determinable charges to confer successions." The section itself provides that "Where any property shall . . . be subject to any charge, estate, or interest determinable by the death of any person . . . the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession. It is quite plain, I think, that the provisions of section 2, sub-section 1 (*b*), of the Finance Act, 1894, have been borrowed and adapted from that section. But they do not, as I said just now, refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass. On reading the Act I think this is made tolerably clear not only by the opening sentence of section 2, sub-section 1, but also by the directions for valuing "the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased" in section 7, sub-section 7. If property passes you can put a value on it by considering what it would fetch in the open market. You must resort to other means in order to estimate the value of property deemed to pass when an interest ceases. And here I would venture to say that, in my opinion, the provisions of section 7, sub-section 7 (*b*), are not open to the severe censure passed upon them in the Court of Appeal. They are quite intelligible if section 2, sub-section 1 (*b*), be confined to the case which it was really intended to meet. The difficulty, so far as there is any, comes from the drafting of section 2, sub-section 1 (*b*). There would have been none, I think, if the draftsman had been content to follow the wording of the Succession Duty Act. But the general word "interest" without the word "charge" preceding it at first sight seems to point

rather to a life interest than to a determinable charge. And thus it was, I think, that the Court of Appeal were led into the error which seems to run through their judgment.

Now, if the present case is within section 1 and not within section 2, the only remaining question is, what was the settled property that passed on the death of the second earl? "Settled property," according to the definition of that expression in the Finance Act, 1894, "means property comprised in a settlement." It is difficult to see what else it could possibly mean. But at any rate it is a comfort to find something in the Act about which there can be no dispute. The settled property in this case is the property comprised in the resettlement of the 9th of June, 1888. What was that property? Why, the equity of redemption of the Mornington estates, which were subject to certain incumbrances described as the overriding charges, and subject also to the mortgage in fee simple in favour of the Prudential Assurance Co. to secure £230,000. There can be no doubt about that. What, then, was the principal value of the settled property? That, according to section 7, sub-section 5, must be estimated at the price which, in the opinion of the commissioners, the property comprised in the resettlement would have fetched if sold in the open market at the time of the second earl's death. What right the commissioners can have to swell that estimate by adding to it a sum equal to the amount of the Prudential mortgage I cannot understand. The mortgage did not pass on the death of the second earl. The mortgage debt was no part of the settled property. It diminished the property before resettlement. I may remark in passing that we are not concerned with section 7, sub-section 1. Whatever the meaning of that section may be, as to which I do not hazard a conjecture, it can have nothing to do with the present case, for in the present case the property which had to be brought into the aggregated estate "for determining the rate of duty" was not subject to any debt. It was only the equity of redemption that was resettled. Then we had a long argument about the doctrine of merger, and an argument longer still, intended to persuade the House that, for the purpose of this Act, the transaction with the Prudential ought to be split up into two distinct mortgages—one by the second earl and one by the present earl, one by the father mortgaging his life estate and one by the son mortgaging his reversion. The Court of Appeal say that was the real transaction. In my opinion it was nothing of the kind. The Prudential Co. bargained for a mortgage in fee simple, and a mortgage in fee simple they got. Why the commissioners should seek to reform a deed which carried out the transaction between the parties in the way everybody wished to have it carried out is beyond my comprehension. The argument seems to be founded on a fallacious analogy. Because in the case of succession duty it is necessary and proper to trace a disposition of property to its origin for the purpose of seeing out of whose interest the succession is derived and so discovering the predecessor, therefore it seems to be thought you are at liberty, in the case of the Finance Act, to dissect and pull to pieces one entire and completed transaction in order to enable the Crown to exact duty in respect of property which neither passed nor can be deemed to pass. Nor, again, can I see how the question is affected by the circumstance that mortgages, in fact paid off, were transferred and kept alive for the purpose of forming a protection against mesne incumbrances during the life of the tenant for life. That is every-day practice. Every beginner is acquainted with that device. Collins, L.J., thinks it decisive in favour of the commissioners. With deference, I think it has nothing to do with the question. If, indeed, it could be shown that by the cesser of that protective interest any benefit arose or accrued to anybody under section 2, sub-section 1 (*b*), which has not already been taken into account, and which could be valued under section 7, sub-section 7, there might be some show of reason in the argument. But that would be a hopeless contention in the circumstances.

The result is that in my opinion the commissioners are wrong from beginning to end on the main point. Some people think the Act a harsh Act as it stands. It would be intolerable if it could be construed as the commissioners desire to construe it.

As regards the minor point urged by Mr. Haldane I think the claim to deduct the value of the £3,000 annuity must fail. There is no foundation for it; the property passed free from the annuity, and the Act makes no provision for any such allowance. There was a provision to that effect in the Succession Duty Act. At any rate section 38 of that Act was so construed in this House: *Lord Braybrooke* v. *Attorney-General*, 9 W. R. 601, 9 H. L. Cas. 150; *Commissioners of Inland Revenue* v. *Harrison*, 22 W. R. 559, L. R. 7 H. L. 1. But there is no analogous provision in the Finance Act, 1894.

I agree that the appeal must be allowed with costs here and below.

Lord MORRIS.—I agree *a priori* it would be expected that an estate duty accruing on a death would be calculated on the amount of property left by the deceased at the time of his death, and which would be payable by the person getting the property so left to the extent to which he did get it. Has the Finance Act of 1894 enacted anything more than that? The appellant on the death of his father succeeded to an equity of redemption in the Cowley estate—a mortgage of £230,000 affecting it. Much of the argument in the case has been addressed to the state of the title under the Mornington will, which, in my opinion, is beside the question, as are all considertions of how the title stood antecedent to the indenture of resettlement of the 9th of June, 1888—that was the settlement under the provisions of which the property passes. It also appears to me to be irrelevant to inquire into the conveyancing mazes or devices by which that was effected. The substance is that the estate was mortgaged and that an equity of redemption remained. If the property passed to the appellant on the death of his father under section 1—as I consider it did—I ask, what passed? Surely a property subject to a mortgage—or, if the property is to be deemed to pass under section 2, sub-section 1 (*b*) of that section enacts that it is to be deemed to pass to the extent to which a benefit accrues. I ask what extent of benefit in the rest of the Cowley property comes to any person by reason of the death of Lord Cowley? Surely the difference between the value of the Cowley estate and the amount of the mortgage or prior charge. With respect to the allowance claimed by the appellant by reason of the ceasing of the rent-charge payable to him during the lifetime of his father, I fail to see any sound argument for such contention. He succeeded to the Cowley property burdened with its charges; and that he at the same time ceased to enjoy a rent-charge is an indifferent fact.

Lord SHAND.—The questions raised in this appeal have been so fully discussed by some of your lordships that I have not much to add. As to the point on which my noble and learned friend Lord Macnaghten has strongly insisted, I agree in holding

that this case falls within the 1st section of the Finance Act.

The property in question, having been disentailed, formed the subject of a deed of resettlement under which it again became "settled estate," as defined in the Act. What, then, was the settled estate, beneficial in its nature, which passed to the appellant on the death of his father, the late Earl Cowley? The answer to that question is, I think, the right to the possession and enjoyment of the settled estate no longer burdened by the right of life-rent of his father, the late earl. This right may be well described in technical legal language as the equity of redemption, which is so described, I presume, because of the power which the appellant has to acquire and enjoy an unburdened right of property by payment of the amount secured by mortgages on the estate and to which that estate was subject. But in ordinary language one would justly say the estate itself passed on the death of the deceased earl to the appellant, his son, and so estate duty became due.

What, then, is the value of that estate? It was well and validly charged with a debt of £230,000, which formed a burden on the succession which opened to the appellant, and I confess I can see no answer to the appellant's demand to have the amount of that charge or burden taken into view as a deduction from the value of the estate in estimating the estate duty payable.

I have only to add that I agree with my noble and learned friends in thinking that the circumstance that the Prudential Assurance Co., in transacting with the late earl and the appellant in the advances they made, took an assignment of the debts due by the second earl to the London Assurance Corporation, and the securities given for these debts, can have no effect on the determination of the present question. That assignment was given and taken obviously for a purpose quite in common use, that purpose being only to enable the Prudential Co. to compete with creditors if there were any in whose favour the second earl might have granted securities affecting his life-rent right.

Lord DAVEY. — I entirely concur in the judgment proposed, and I should not add anything were it not that we are differing from a unanimous and carefully considered judgment of the Court of Appeal.

The first and principal question is whether the mortgage for £230,000 ought to be deducted in assessing the value of the settled estates for the purpose of the payment of estate duty under the Finance Act, 1894. I agree with the views so fully and clearly expressed by my noble and learned friend opposite (Lord Macnaghten) as to the construction of that Act, and I think that the case, the facts of which I need not recapitulate, clearly falls within the 1st section. But, in my opinion, whether it falls within the 1st or the 2nd section we arrive at the same result.

By the 1st section of that Act the tax is imposed on all property, settled or unsettled, which passes on the death of any person, and by the 2nd section, sub-section 1, property passing on the death of the deceased is to be deemed to include the property following. The only material words for the present purpose are in sub-section 1 (*b*): "Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest.'

I ask myself, therefore, what property passed on the death of the second earl, or (which appears to me in this case to be the same question in other words) in what property had the second earl an interest ceasing on his death, and did a benefit then accrue or arise.

The Court of Appeal have held that the property passing was the whole value of the estates without deduction of the Prudential Co.'s mortgage. And they have come to that conclusion on the grounds that the mortgage was not really a mortgage in fee, but was in truth two mortgages—one on the life estate of the second earl, and one on the remainder of the appellant.

Since the decision in *Attorney-General* v. *Beck* it cannot be denied that if tenant for life and remainderman in fee combine to sell settled property, it is thereby taken out of the settlement, and does not pass, and is not to be deemed to pass, on the death of the life tenant. And I think the result must be the same if, instead of selling, they combine to create a mortgage in fee upon the settled property. *Pro tanto* the property is taken out of the settlement, and what passes on the death of the tenant for life is the equity of redemption only, and the benefit accruing or arising in that event is in that equity alone. In the present case the mortgage was antecedent to the settlement under which the appellant now claims title in remainder. But it is said that the conveyancing arrangements in the present case, by which the incumbrances on the life estate were purposely kept alive for the better security of the mortgagees, prevented any union of the life estate and remainder in them, and they were not mortgagees on the fee in possession during the second earl's lifetime.

"It is the existence," says Collins, L.J., "of this mortgage (on the life estate) so kept alive and determining, so far as it was a charge on the life estate, on the death of the second Earl Cowley, that is decisive in favour of the Crown in this case." With the most sincere respect for the learned judges in the Court of Appeal, I find myself unable to concur in this view, which seems to me to overlook the substance and real character of the transaction.

The joint power created by the disentailing deed was the appropriate machinery for enabling the parties to make a conveyance of their respective interests by a simultaneous act and so as to create one estate. By the exercise of that power a mortgage was created which was expressed to be, and intended to be, a mortgage on the fee, and, in my opinion, was a mortgage of the equitable fee, subject, of course, to all existing burdens.

There was no intervening estate or interest which prevented a union in the appointees of whatever equitable estate was left in the life tenant (subject to the charges thereon) with the equitable estate in remainder of the appellant. The money due to the holder of the incumbrances effected by the second earl on his life estate was paid out of the mortgage money. If the matter had rested there, or if the incumbrances had been left outstanding and undischarged, there could not, in my opinion, have been any question that a mortgage was created on the *corpus* of the property, subject to the subsisting charges created by the will of the first earl, and subject also during the life of the second earl to whatever prior incumbrances, effected by him on his life estate, were subsisting. But the incumbrances were assigned to the Prudential Co., and this is said to make all the difference, and to be decisive of the case. I am really unable to understand how or why the rights of the mortgagees conferred by the exercise of the power were altered or (as is said) split into two mortgages, because, by a conveyancing device, they had also a collateral right in case a mesne incumbrance turned up, to claim priority over it during the life of the second earl.

I am, therefore, of opinion that the property in

which the second earl had an interest ceasing with his death, was the equity of redemption only, or (in other words) his interest was in the income of the estate after deduction of the interest on the Prudential Co.'s mortgage (laying aside the paramount charges), and the benefit which accrued or arose on the second earl's death under section 2, sub-section 1 (*b*), if the case falls under that sub-section, was the principal value of that income only, or, shortly, the value of the equity of redemption.

All the learned judges in both courts below, except perhaps Rigby, L.J., have agreed that section 7, sub-section 1, applies only to the case of an estate passing from a deceased owner subject to his debts and incumbrances. That sub-section is not an easy one to construe, and I am not satisfied that I have quite mastered the meaning of it, but I do not think that it applies to the present case.

There is only one other point I wish to mention. The policies which formed part of the security of the incumbrancers on the life estates were assigned to trustees upon trust to apply the proceeds on the death of the second earl in reduction of the Prudential Co.'s mortgage, and not, as Smith, L.J., seems to have thought, to the Prudential Co. themselves. No claim to estate duty on the proceeds of the policies, or to deduct the proceeds of these policies from the mortgage debt, is made by the Attorney-General in this appeal, and no argument was addressed to your lordships on the point. Consequently, no opinion is expressed or implied upon it in the decision of this case.

As to the other point—whether the appellant is entitled to any deduction in respect of the cesser of the rent-charge of £3,000 a year to which he was entitled during the second earl's lifetime—I agree with your lordships that he is not entitled to that deduction, and I need not repeat the reasons which have been given.

Earl of HALSBURY, L.C.—Before putting the question I think it right to add that my lamented and distinguished friend, Lord Herschell, authorized me to say that he concurred in the conclusion at which your lordships have now arrived.

Order appealed from reversed and order of the Queen's Bench Division restored with costs here and below.

Solicitors for appellant, *Collyer-Bristow, Russell, Hill, Curtis, & Dods.*

Solicitor for respondents, *Solicitor of Inland Revenue.*

Court of Appeal.

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — May 6.

HOLNESS *v.* MACKAY & DAVIES. (*a.*)

Master and servant—Employers' liability—Accidental injuries—Accident arising out of and in course of employment—Workman injured on his way to his work—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the workman was in the employment of a firm of contractors, who had contracted with a railway company for the construction of a siding. While he was walking to his work, the weather being foggy, he was run over by a train and killed on the main line, about seven minutes before the time for the commencement of work and at a distance of about* 150 *yards from the place of work.*

Held, by A. L. Smith *and* Vaughan Williams, L.JJ. (Romer, L.J., *dissenting*), *that there was nothing to justify the county court judge in holding that the accident arose out of and in the course of the workman's employment.*

Appeal from the decision of the judge of the Newport County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who had met with his death in consequence of accidental injuries while in the employment of a firm of contractors, who had contracted with the Great Western Railway Co. for the construction of sidings in connection with the company's line of railway between Newport and Cardiff. The workmen employed by the contractors on this work had access to the premises of the railway company by one or other of two gates—viz., the Waterloo gate on the south side of the main line, and the Maesglas gate on the north side.

The deceased was a ganger, and the gang of which he was in charge was engaged in ballasting a siding on the south side of the main line.

On the morning of the 12th of November, 1898, while the deceased was walking to his work, the weather being very foggy, he was run over by an express train on the main line and was killed. His work was to have commenced at 7 a.m.

The accident happened at 6.53 a.m., at a distance of about 150 yards from the siding.

There was no evidence as to whether the deceased entered the railway company's premises by the Maesglas gate, in which case it would have been necessary for him to cross the main line, or by the Waterloo gate, in which case it would not have been necessary for him to cross the main line. He had been told by the contractors' foreman to come upon the line by the Waterloo gate, which was the more convenient gate for him.

The county court judge drew the inference that the deceased came on to the line by the Waterloo gate, and lost his way in the fog, and he was of opinion that, by whichever gate the deceased came on to the line, he began his day's work when he got upon the company's premises in order to go to his work. He accordingly held that the accident arose out of and in the course of the employment of the deceased, and he made an award in favour of the applicant.

The employers appealed.

Ruegg, Q.C., and *A. J. David,* for the appellants.—The accident did not arise out of and in the course of the employment of the deceased. It happened at a time before his work had commenced and at a place some distance from the locality of his work. The employers had no control over the place where he was killed. The county court judge thought that the employers were under an obligation to obtain a license from the railway company to enable the deceased to get to his work, and that, while he was going to his work under that license he was in the course of his employment: see *Brydon* v. *Stewart,* 2 Macq. 30. But there was no necessity for him to go upon the main line at all. The county court judge also based his decision on *Tunney* v. *Midland Railway Co.,* L. R. 1 C. P. 291, 14 W. R. C. L. Dig. 57; but that case is distinguishable from this.

Montague Lush, for the respondent.—It is not

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

necessary to contend that in every case where a workman is injured while on his way to his work the Act applies. Each case depends on its own circumstances, and there is no reason here for interfering with the finding of the county court judge. This case is analogous to that where a workman employed on work in a particular corner of a quarry meets with an accident while passing through the quarry to his place of work, or where a man employed on an upper floor of a factory meets with an accident on a lower floor while proceeding to his work.

A. L. SMITH, L.J.—This case raises an important question—viz., whether an employer is liable under the Workmen's Compensation Act for accidental injury sustained by a workman while going to his work. I do not think it can be said as an abstract proposition that an employer is under such a liability. The employment to which the Act applies is employment on or in or about a railway, factory, or one of the other localities specified in section 7, sub-section 1. I cannot say that injuries sustained by a man while he is going to his employment arise out of his employment on, in, or about the railway, factory, or other locality where the employment takes place. In this case the employers, who were contractors, had undertaken the work of ballasting a siding, which was at the side of the Great Western main railway line, and the deceased man was employed by them on that work. The contractors had control over the siding, but they had no control over the main line on which the man was killed. There were two ways by which the deceased might have gone to his work. If he went by the Waterloo gate it would not be necessary for him to go upon the main line at all. If he went by the other gate he would have to cross the main line. He was found dead on the main line, and apparently he had walked along it some way and had then been run over in the fog and killed. Now, did the accident arise out of and in the course of his employment? His employment was on the siding, and not at all on the main line of the Great Western Railway. It was no part of his contract of employment that he should go to his employment by any particular way. While he was on his way to his work, some seven minutes before the time at which his work was to commence, and before he had reached the locality where his work was to be done, he met with his death. It is said that this case resembles that of a workman being killed by an accident in a large quarry while on his way to his work in a particular corner of the quarry, or of a man whose employment is on an upper floor of a factory meeting with an accident on a lower floor while on his way to his work. But in the supposed cases the employers would have the control of the whole quarry or factory. This case seems to me to be quite different, and to be more similar to that of a man meeting with an accident while going along a highway to his work. There was no contract here between the employers and the workman that the employment should extend so as to embrace within it matters occurring before the time for the commencement of the work and not upon the locality where the work was to be done. And I think the county court judge was wrong in holding that there was anything in the facts to show that the employment was so extended. It was suggested that the employers were under an obligation to obtain a license for the workman to cross the line, and the case of *Brydon* v. *Stewart* was referred to as an authority to show that the workman while going along or across the line was in the course of his employment. In my opinion, that case does not govern the present case, and I cannot think that the deceased's work began when he came upon the premises of the railway company and was still going to his work. The case of *Tunney* v. *Midland Railway Co.* seems to me to be distinguishable from this case. I therefore think that the accident did not arise out of and in the course of the employment of the deceased, and that the appeal must be allowed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. I do not agree with the conclusion of law at which the county court judge arrived, but I recognize that he grappled with the question of law which he had to decide. The question is whether on the facts as found by him this accident was an accident which arose out of and in the course of the employment of the deceased. It occurred before the time when, by the contract between the parties, the workman's work was to begin, and before he arrived at the place where the work was to be done. The county court judge came to this conclusion, that, as a general proposition, a workman's employment does not begin until he gets to the place where he has to do his work, but that the duration of the employment may be amplified by reason of the nature of the employment. The case of *Brydon* v. *Stewart* was cited before him, and he asked himself whether the facts of this case showed anything arising out of the contract of employment which had the effect of thus amplifying the duration of the employment, and he found that a state of things did exist which, as he thought, involved some duty on the part of the employer towards the workman even before the workman arrived at the place of his work, and he accordingly held that this accident arose in the course of the employment of the deceased. I arrive at a different conclusion. On the facts I think that the employer owed no such obligation to the workman as would have the effect of extending the duration of the employment so as to make this accident an accident arising in the course of the employment. In my opinion the employer was bound to obtain a license for the workman to go upon the railway company's premises so as to enable him to get to his work without being a trespasser, but the employer was not under any obligation to the workman, either by giving warning as to the running of trains or otherwise, to take care of him while crossing the line. I think that at the time of the accident the employer had no duty towards the deceased, and that there was nothing in the nature of the employment to extend its duration. As to the case which has been suggested of a man meeting with an accident in a factory while going to his work in another part of the same factory, if the whole factory was not under the control of the same employer, the suggested case does not assist the consideration of the present case, for it is *idem per idem* with it. If, on the other hand, the whole factory was under the control of the employer, the case is useless as an analogy, unless it is also explained why the case of a factory not all under the control of the employer should be treated as analogous to the case of a factory which is all under the control of the employer.

ROMER, L.J.—I differ from my learned brethren with much diffidence. But the county court judge has found that this accident arose out of and in the course of the employment of the deceased man, and I think there was evidence which justified him in so doing, and that therefore we ought not to differ from his finding. The place where the deceased man's work had to be done was surrounded by railway lines, and he had to cross what might be called a dangerous zone in order to get to his work. It was clearly necessary for him to have through the contractors a license to go upon the railway company's premises

That license was obtained and given by implication, and at the time of the accident the deceased man was acting under it. In my opinion the contractors were not free from all obligation towards the workman while he was going across the railway company's premises to get to his work, and I think that his employment commenced when he began to act under the license and go upon the company's premises. The view which the county court judge took of the circumstances seems to me to be correct, and I think those circumstances show that the man was acting in the course of his employment, and that the accident arose out of his employment. I do not think that I am bound to say that he was not acting in the course of his employment until his work had actually begun. The case of *Brydon* v. *Stewart* seems to be in point. In my opinion this case is like that of a man who is employed in a particular part of a factory, and has to go through the rest of the factory to get to his work. If, while so going to his work, he sustained accidental injuries, he would have sustained those injuries in the course of his employment. It is said that that case is different from this, because the factory would all belong to the same employer. But I think that this case is analogous, for the contractors had some power over the line which had to be crossed. I do not think that this case is like that of a workman who meets with an accident while going along a public highway to his work. In my opinion, therefore, the appeal ought to be dismissed.

Appeal allowed.

Solicitors for the appellants, *W. Hurd & Sons*, for *David & Evans*, Cardiff.

Solicitors for the respondent, *Metcalfe & Sharpe*, for *F. P. Jones-Lloyd*, Barry Dock.

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) April 29.

CHAMBERS *v.* WHITEHAVEN HARBOUR COMMISSIONERS. (*a.*)

Master and servant—Employer's liability—Accident to workman—Employment "on or in or about engineering work"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman was employed on a steam dredger in a harbour, part of his duty being to take a barge filled with mud which had been dredged up, a mile and a-half out to sea and to deposit the mud there. The workman, while depositing the mud a mile and a-half out at sea, was injured.

Held, that (assuming that the work carried on in the steam dredger constituted "engineering work" within section 7 of the Workmen's Compensation Act, 1897) *the workman was not injured "on or in or about" the main locality of the engineering work, and was not, therefore, entitled to compensation.*

The words "engineering work" in section 7 indicate locality.

Appeal from an award of the judge of the Whitehaven County Court under the Workmen's Compensation Act, 1897.

The appellant, Ann Chambers, was the widow of a workman who was killed while in the employment of the respondents, the Whitehaven Harbour Commissioners.

The respondents owned a steam dredger, which was used for dredging their harbour, and some hoppers, into which the spoil which was dredged up was emptied, and the hoppers when filled were towed about a mile and a-half out to sea, and the spoil emptied out. Two of the labourers who were employed on the dredger went out in turn with the hoppers to sea. Upon the day in question the deceased went with another man out in a hopper, and when the hopper got a mile and a-half out, the deceased knocked out the bolts which fastened the doors at the bottom of the hopper, and so opened the doors and let out the spoil. Just as he did so a sea struck the hopper, and the deceased fell into the well and was carried with the spoil into the sea and was drowned.

The county court judge held that the deceased man was at the time of the accident employed as a seaman, and that therefore the Act did not apply. He was also of opinion that the deceased was not employed at the time of the accident "on or in or about an engineering work" within the meaning of section 7, sub-section 1, of the Act. He accordingly held that the appellant could not recover compensation.

By section 7, sub-section 1, of the Workmen's Compensation Act, 1897, "the Act shall apply only to employment . . . on or in or about a railway, factory, mine, quarry, or engineering work. . . ." By sub-section 2 "'engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used."

Shepherd Little, for the appellant.—The dredger was worked by steam, and was employed in the repair of the harbour. The work, therefore, which was being carried on was "engineering work" within the definition of those words in section 7, sub-section 2, of the Workmen's Compensation Act, 1897. The deceased man was employed on the dredger, and it was his duty, when his turn came, to take the hopper out to sea and deposit the mud there. The whole operation constituted one job, as it was necessary to carry the mud out to sea. The deceased man was, therefore, at the time of his death employed "on or in or about an engineering work" within section 7, sub-section 1, of the Act. In that sub-section the words "railway, factory, mine, quarry," indicate locality. But "engineering work" does not, the word "work" indicating the operations carried on.

Rueyg, Q.C., and *A. Powell*, for the respondent.—Assuming for the purposes of the argument that this was an engineering work, the deceased man was not employed at the time of his death on or in or about engineering work. "Engineering work" signifies locality. The expression follows words in section 7, sub-section 1, which are clearly words of locality, and the definition of engineering work in sub-section 2 implies locality. The words "on or in or about" signify locality, that is, the place where the engineering work is being carried on. The engineering work was here being carried on in the steam dredger, and the deceased man could not he said to have been killed on or in or about the locality of that work.

Shepherd Little replied.

A. L. SMITH, L.J.—In my opinion the decision of the county court judge must be affirmed, but not upon the first ground stated by the county court judge. The deceased man was employed to a certain extent upon a steam dredger used for dredging the harbour. When the mud was dredged up from the bottom of the harbour it was emptied into a hopper, and it was the duty of two of the men employed on the steam

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

dredger to take the hopper out to sea to a distance of about a mile and a-half from the harbour, and to deposit the mud there. The deceased man having assisted in taking one of the hoppers out to sea was killed while emptying the mud out of the hopper. The question we have to determine is whether the deceased man was at the time of the accident employed "on or in or about engineering work" within the meaning of section 1 of the Workmen's Compensation Act, 1897. Sub-section 1 of that section provides that "this Act shall apply only to employment . . . on or in or about a railway, factory, mine, quarry." Stopping there, these words obviously indicate locality. Then follow the words "or engineering work." The material words are therefore "on or in or about engineering work." For some time I doubted whether those words indicated locality, but I have come to the conclusion that they do, because, as my brother Vaughan Williams has pointed out, when the definition of engineering work in sub-section 2 is looked at, it seems to me that the words there used all indicate locality. Therefore, in order to bring the case within the Act the workman must have been employed at the time of the accident on or in or about the main locality of the engineering work. There have been two cases dealing with the words "on or in or about." In *Powell* v. *Brown*, *ante*, p. 145, [1899] 1 Q. B. 157, a workman in the employment of the owners of a factory was engaged in loading timber on to a cart standing in the street just outside the factory gate, and he was killed while doing so. The county court judge held that he was "about" the factory, and we upheld his decision, saying that the word "about" was an enlarging word, and was intended to cover more than the words "on or in," and I said that "about" meant in close propinquity to the factory. Then came the case of *Lowth* v. *Ibbotson*, *ante*, p. 506, where a carter in the employment of a miller, the mill being a factory, was delivering sacks of flour about one and a-half miles away from the mill when he met with an accident. The county court judge held that the carter was not employed "about" the factory when he was injured, and we affirmed his decision. The question, therefore, in the present case is whether the deceased man was at the time of the accident "on or in or about" the locality named—that is, the engineering work carried on in the dredger. I do not think it can be said that the deceased man was killed on or in or about the engineering work. If, for instance, supposing such a thing possible, the mud had been taken away from the dredger in carts, instead of in hoppers, and the accident had happened when the cart was being emptied at a place a mile and a-half away from the dredger, to my mind the Act would clearly not have applied. I decide in this case nothing more than that the deceased man was not killed while employed on or in or about what has been assumed to be engineering work.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred

Appeal dismissed.

Solicitors for the appellant, *Helder, Roberts, & Walton*, for *E. Atter*, Whitehaven.

Solicitors for the respondents, *W. Hurd & Son*, for *W. H. Chapman*, Whitehaven.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) April 22.

CASTNER-KELLNER ALKALI CO. (LIMITED) v. COMMERCIAL DEVELOPMENT CORPORATION (LIMITED). (a.)

Patent—Particulars of objections—Shorthand writer's transcript of evidence—Costs—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-section* 6.

In patent actions the settled practice is that certificate under section 29, *sub-section* 6, *of the Patents, Designs, and Trade-Marks Act*, 1883, *are always granted so as to secure to the party delivering the particulars the costs of everything reasonably and properly inserted in them, although he may fail to prove the specific objection under which the detailed particulars may be ranged.*

In the above patent action, tried by Bigham, J., defences of anticipation, disconformity, and want of subject-matter were raised, with numerous particulars of objections. At the trial all the issues were found in favour of the plaintiffs.

The defendants appealed, and the Court of Appeal allowed the appeal (Vaughan Williams, L.J., dissenting).

The defendants then applied for the costs of three copies of the transcript of the shorthand notes of the proceedings at the trial.

T. Terrell, Q.C., Astbury, Q.C., MacConkey, and *J. H. Gray*, for the appellants.

Moulton, Q.C., Bousfield, Q.C., J. C. Graham, A. J. Walter, and *Lord Robert Cecil*, for the respondents.

Cur. adv. vult.

April 22.—The written judgment of the court was delivered by

LINDLEY, M.R.—The appeal in this case having been allowed with costs we have to consider whether the costs of the shorthand writer's transcript of the evidence should be allowed, and what certificate we ought to give under section 29, sub-section 6, of the Patents Act, 1883, relating to particulars of objections. As regards the shorthand transcript of the evidence, it was taken and referred to day by day in the court below, and three copies of it were really necessary to enable this court to follow the argument. The costs incurred by the appellants in obtaining not only those copies but also such other copies as were reasonably required for the purposes of their appeal ought therefore to be allowed them.

As regards the particulars of objections, the defendants raised eight objections to the plaintiffs' patent, and the second, which was want of novelty, was followed by a list of patents said to be anticipations. They were not anticipations, and the second objection was not proved. But a knowledge of the patents enumerated in the list, with one exception (Petres') was really necessary to enable the court to understand the subject-matter to which the patent related and the state of knowledge which persons conversant with that subject had at the date of the patent. We felt a difficulty, however, in adopting the ordinary form of order owing to the objection for want of novelty. The particulars to which the Act refers are not confined to the objections, but include whatever is stated will be relied upon by the party delivering them. The specifications enumerated under the second objection are particulars within the meaning of the section quite as much as the objection itself; and as they (with the

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

exception of Petre's) were all reasonably and properly mentioned in the defendant's particulars of objections we cannot properly decline to certify in the usual form that the costs of the defendants' particulars ought to be allowed except as regards Petre's specification mentioned in No. 2. We do not think it necessary to except Nos. 3 and 4, considering the difficulty of distinguishing the costs, if any, occasioned by them from the costs occasioned by the other particulars, which were all reasonable and proper. Having regard to the language of section 29, and to our own limited experience in granting certificates under it, we have thought it right to consult our colleagues and one of the most experienced taxing-masters as to the practice in these cases. We are informed that certificates under section 29 are always granted so as to secure to the party delivering the particulars the costs of everything reasonably and properly inserted in them, although he may fail to prove the specific objection under which the detailed particulars may be ranged. The practice has grown up owing to the difficulty of doing justice as regards costs in any other way.

We were also asked to stay execution unless the defendants' solicitor gave his personal undertaking to repay the costs in the event of our decision being reversed in the House of Lords. But ever since *Attorney-General* v. *Emerson*, 38 W. R. 102, 24 Q. B. D. 56, this court has said that it will not make any such order without some reason to justify it; and at present there is none in this case.

Solicitors, *Brook, Freeman, & Batley*, for *Wright, Becket, & Co.*, Liverpool; *Baker, Blaker, & Hawes.*

High Court of Justice.

Chan. Div. Kekewich, J. } April 14; May 13.

In re GJERS.
COOPER *v.* GJERS. (*a.*)

Will—Leaseholds—Mortgage—Interest—Rent—Covenants—Tenant for life—Remaindermen—Liability.

The tenant for life of a leasehold house bequeathed to him directly without the intervention of trustees, and then over, is, in the absence of further provision, liable to keep down the interest on a mortgage made by the testator on the house, and also to pay the rent reserved by, and perform the covenants contained in, the lease.

In re Courtier, Coles *v.* Courtier, 35 *W. R.* 85, 34 *Ch. D.* 136, *ought to be construed as merely deciding that the tenant for life under a bequest of leasehold property is not liable for any breach of covenant or condition occurring prior to the date of the testator's death.*

In re Redding, Thompson *v.* Redding, 45 *W. R.* 457, [1897] 1 *Ch.* 876; Kingham *v.* Kingham, [1897] 1 *Ir. Rep.* 170, 45 *W. R. Dig.* 180; *and* In re Betty, Betty *v.* The Attorney-General, [1899] 1 *Ch.* 821, *followed.*

In re Baring, Jeune *v.* Baring, 41 *W. R.* 87, [1893] 1 *Ch.* 61, *and* In re Tomlinson, Tomlinson *v.* Andrew, 46 *W. R.* 299, [1898] 1 *Ch.* 232, *not followed.*

Summons.

By an indenture of assignment made on the 30th of October, 1897, the leasehold house and premises in Bournemouth, known as "Bournewood," were assigned to John Gjers for the residue of a term of eighty years from the 24th of June, 1891, subject to the payment of the rent reserved by and performance of the covenants contained in the lease, which was dated the 7th of December, 1891.

By an indenture of mortgage made the 1st of November, 1897, John Gjers mortgaged the premises to the trustees of his vendor to secure the sum of £3,000 advanced to him by them and interest thereon.

By his will dated the 8th of November, 1892, John Gjers gave all his real and personal estate to his son Lawrence Farrar Gjers, Charles Ellison Mills, and John Vernon Cooper, upon trust to pay to John Vernon Cooper ("in case he shall act as executor and trustee of my will") a certain legacy, and upon further trusts to pay certain other specific legacies, and subject thereto, he gave devised and bequeathed the whole of his real and personal estate to his son Lawrence Farrar Gjers. By a second codicil to his will dated the 9th of December, 1897, John Gjers bequeathed to his "wife" (Florence Longdon Gjers) "my leasehold house known as 'Bournewood' and all the contents of the same . . . for her life, or so long as she shall remain my widow, and from and immediately after her death or second marriage . . . I give and bequeath the same to my daughter Hilda absolutely."

On the 6th of October, 1898, John Gjers died, and on the 5th of January, 1899, his will was proved by John Vernon Cooper. On the 8th of February, 1899, an originating summons was taken out between John Vernon Cooper, the plaintiff, and Florence Longdon Gjers (widow) and Lawrence Farrar Gjers, defendants, to have it determined whether the widow of the testator, as tenant for life, was "liable during her life to pay and keep down the interest of the mortgage" on "Bournewood," and "to pay the rent reserved by and perform the covenants and conditions on the part of the lessee contained in" the original lease of the 7th of December, 1891, "or by whom . . . the same interest, rent, covenants, or conditions respectively ought to be paid and performed," and for necessary inquiries and directions.

The rent and interest had been duly paid and the covenants and conditions duly performed up to the time of the testator's death. The will contained no directions as to the question by whom these burdens should be borne.

R. J. Parker, for the executor and trustee.—The decision of North, J., in *In re Betty, Betty* v. *The Attorney-General*, [1899] 1 Ch. 821, conflicts with that in *In re Tomlinson, Tomlinson* v. *Andrew*, 46 W. R. 299, [1898] 1 Ch. 232, and in these circumstances the plaintiff comes to the court for direction.

George Lawrence, for the tenant for life.—The tenant for life of the leasehold is under no liability to keep up the lease, though there are cases in which he has been held liable, as from the death of the testator: *Hawkins* v. *Hawkins*, 28 W. R. 526, 13 Ch. D. 470; *Eccles* v. *Mills*, 46 W. R. 398, [1898] A. C. 360.

George Northcote, for the residuary legatee.—The tenant for life is liable: *In re Redding*, 45 W. R. 457, [1897] 1 Ch. 876; *In re Betty*, and *Kingham* v. *Kingham*, [1897] 1 Ir. Rep. 170, 45 W. R. Dig. 180. These cases all adopt a different view as to the decision in *In re Courtier*, 35 W. R. 85, 34 Ch. D. 136, to that expressed in *In re Baring*, 41 W. R. 87, [1893] 1 Ch. 61, and *In re Tomlinson.*

KEKEWICH, J.—The position of the question as regards the authorities is such that I do not think I ought to allow it to pass by merely saying that I will dispose of it in a certain way. The question arose before me in the case of *In re Baring, Jeune*

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

v. *Baring*, where the point no doubt was raised quite plainly. The headnote states the case shortly, it was this: There was a tenant for life of leasehold property with no provision in the will for that tenant for life bearing the burdens attaching to such leasehold property, such as the payment of the rent, repairs, and insurance; there I was pressed by the able counsel for the plaintiffs, Sir Horace Davey and Mr. Ingle Joyce, with the maxim, which is quoted in the report, "*Qui sentit commodum sentire debet et onus.*" It went entirely upon that; they did not think it necessary to quote any cases except *In re Fowler*, *Fowler* v. *Odell*, 29 W. R. 891, 16 Ch. D. 723, decided by Fry, J., and *In re Courtier*, *Coles* v. *Courtier*, which the Court of Appeal professed to distinguish from the former case. The case was argued on either side with reference to these cases, and Sir Horace Davey in reply, put his case entirely on the distinction between *In re Fowler* and *In re Courtier*, and never went into the general principle at all; he considered that was sufficiently dealt with by the maxim. The view which I took was that I was bound by *In re Courtier*, and I observe that the Vice-Chancellor of Ireland, in the case of *Kingham* v. *Kingham*, says that I followed the decision in *In re Courtier* with some reluctance. I thought myself bound by *In re Courtier*, which decided that a tenant for life was not bound to do anything at all, but that the burdens must be borne by the estate. Then the question came before Stirling, J., in *In re Redding*, *Thompson* v. *Redding*, and he thought that I had misinterpreted the decision in *In re Courtier*, and that all that the Court of Appeal in that case intended to decide was that the tenant for life was not bound to fulfil the covenants so far as they were broken at the testator's death. The property in the case of *In re Courtier* was not in a good and proper state of repair; there were things which ought to have been done to make the lease a good one, and that was the point which the Court of Appeal decided. Stirling, J., thought that the decision of the Court of Appeal was confined to that, and did not understand it as absolving the tenant for life from liability from the date of the testator's death onwards. Of course, the judgment of Stirling, J., deserved respect of the profession and of myself, and it received the respect of myself in the case of *In re Tomlinson*, *Tomlinson* v. *Andrew*. In that case I read *In re Courtier* again with all the care that I could give to it in view of the decision of Stirling, J.; and although I saw that perhaps the lords justices had not, in *In re Courtier*, said quite as much as I thought, I was unable to see that the Court of Appeal had not decided it upon the ground upon which I thought they had decided. There it remains. The case of *In re Baring* was not appealed. There was, therefore, a difference of opinion between Stirling, J., and myself. Then a similar question came before North, J., in the case of *In re Betty*, *Betty* v. *The Attorney-General*, and he gave an elaborate judgment after full argument. It was a considered judgment. He has gone into the cases before that of *In re Courtier*, my comments upon which he has considered; and he has gone into the law generally with reference to a tenancy for life of leaseholds. Thus he approaches the case of *In re Courtier* from a judicial aspect, and says that it cannot be intended to introduce new law, and that that is the view expressed by the judges who decided it. He says: "I can quite accept the decision in *In re Courtier* by limiting it to the state of things existing at the testator's death, without giving it the more extensive view which Kekewich, J., proposed to do." And then North, J., refers to the case of *Eccles* v. *Mills*, 46 W. R. 398, [1898] A. C. 360, and also to a case which, although not binding upon me, is yet entitled to respect and attention—namely, the case of *Kingham* v. *Kingham*, where the Vice-Chancellor of Ireland also thought that I had misconstrued *In re Courtier*, and says, "I am of opinion that a tenant for life whether legal or equitable is within the maxim, *Qui sentit commodum sentire debet et onus.*" So we have these three judges arguing upon the same lines, the only difficulty being that I have taken a different view of *In re Courtier* from that which the other judges have taken. I am not prepared to say that the language of the Court of Appeal in *In re Courtier* does not bear the interpretation that I placed upon it. Of course I admit that it is capable of bearing another interpretation, not only because other judges have thought so, but because language very often bears two possible interpretations.

The view I take is that I am not entitled as a judge to say that my view of the decision in *In re Courtier* is the right one. I find that Stirling, J., North, J., and the Vice-Chancellor of Ireland all think differently from myself, so I am bound to arrive at the conclusion that I must be wrong, and I will act upon that assumption. It might seem to some persons to be a strong line for me to take, if I adhered to my former decision, and allowed the Court of Appeal to put it right. To my mind sometimes weakness may be strength and strength may be mere obstinacy. I do not profess to say that I do not still think that the decision in *In re Courtier* is capable of two interpretations, but I give way. I think it is the right course to take. I must therefore decide that the tenant for life must bear these burdens, including insurances, as the lease contains a covenant to insure. That I understand to be the view of North, J., and the Vice-Chancellor of Ireland.

There will, therefore, be a declaration that the tenant for life of the leasehold is bound during his life or widowhood to keep down the interest on the mortgage and pay the rent and perform the covenants in the lease.

Solicitors, *Hollams, Son, Coward, & Hawksley*, for *J. T. Belk & Cochrane*, Middlesbrough.

Chan. Div.
Byrne, J. } May 16.

In re HOPE'S SETTLED ESTATES.
DE CETTO *v.* HOPE. (*a.*)

Settled land—Tenant for life—Heirlooms—Sale of heirloom by tenant for life—Pecuniary position of the tenant for life—Discretion of judge—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 37, 53.

The discretionary power of the court in directing a sale of heirlooms under section 37, *sub-section* 3, *of the Settled Land Act,* 1882, *is a power which will be exercised on a consideration of the circumstances of each particular case and of the interests of the persons entitled.*

The fact that a tenant for life has, through his own extravagance, brought himself into pecuniary difficulties will not induce the court to relieve him by ordering a sale of heirlooms under the section above mentioned.

This was an application under the Settled Land Acts.

Lord H. Francis Hope Pelham-Clinton Hope applied for the sanction of the court under section 37 of the Settled Land Act, 1882, to a contract for sale into which he had entered, for the sale of

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

diamond known as the Tavernier Blue or Hope Diamond, settled as an heirloom.

The facts of the case were as follows: The Tavernier Blue or Hope Diamond was a blue diamond weighing 44¼ carats, set in a brooch surrounded by twenty-two brilliants. It was said to have formerly been one of the crown jewels of Louis XIV. of France, but had only been for a comparatively short period in the possession of the applicant's family. It appeared from the evidence that this diamond is not at the present time unique in the sense of being the only known blue diamond in existence. It is, however, unique as being the first known, and until recently the only known, blue diamond. The diamond formed one of certain chattels settled with the family mansion-house and estate of Deep Dene, and other real estates, upon the applicant for life under the will of his grandmother Mrs. Hope. The limitations in the settlement were to the applicant for life with remainders in the event of his death without having issue to his three sisters in tail male, with an ultimate remainder in fee to his elder brother, the Duke of Newcastle. The income arising from the settled estates was estimated at £15,000 to £16,000 a year. The diamond had, since 1894, been deposited at Parr's Bank. The applicant, who was born in 1866, married in 1894, but had no issue. For several years past he had been in embarrassed financial circumstances and had ceased to be in a position to reside at the family mansion. In 1893 he applied to Chitty, J., for an order authorizing the sale of the Hope collection of pictures which were settled with the diamonds. The application was opposed by the parties interested in remainder, and was refused, Chitty, J., being of opinion that no satisfactory reason for a sale had been shewn and that the applicant's difficulties were the result of his own extravagance.

In 1895 the applicant was adjudged bankrupt. In the following year, however, he entered into a deed of arrangement with his creditors and obtained his discharge. Under the provisions of this deed the life estate of the applicant was vested in trustees until a sum of £210,000 had been raised, and an income of £2,000 per annum was assigned to him.

In 1898 the parties interested in remainder withdrew their opposition to the sale of the pictures, an arrangement having been made, for the application of a part of the income arising from such sale upon the the maintenance and education of the eldest son of the first of the tenants in tail in remainder, and the pictures were accordingly sold under an order of Romer, J. The applicant stated in his affidavit that his position had not been benefited by the sale of the pictures. There was a considerable discrepancy in the evidence as to the value of the diamond. A jeweller who had valued it on behalf of the applicant put it at about £18,511, which was understood to be the price at or about which it had been contracted to be sold. The parties interested in remainder submitted evidence to the effect that it was of far greater value, and all strongly opposed the sale.

Farwell, Q.C., and *Martelli*, for the applicant.—The only questions to be considered, having regard to sections 37 and 53 of the Settled Land Act, 1882, is whether the sale of the diamond is for the interest of all parties. The mere fact that the parties interested oppose the sale ought not to be considered: *Bruce* v. *Marquis of Ailesbury*, 41 W. R. 318, [1892] A. C. 356; *In re Hope's Settlement*, 9 Times L. R. 506. The sale is one that a prudent person would make. The diamond is not an old family possession, but a mere curiosity. If the diamond is sold the applicant will be placed in a satisfactory pecuniary position, and all persons interested will be practically benefited. The applicant is willing, however, not to ask the court to approve of the present contract, but will be satisfied with an order for sale in the usual way under the Settled Land Act.

Mulligan, Q.C., and *A. à B. Terrell*, for the parties interested as tenants in tail in remainder.—The decision in *Bruce* v. *Ailesbury* turned partly on the fact that the court was dealing with landed property, and there the interests of the tenants on the estate had to be considered. Here no such question can arise. The applicant would never have made this application if he had not dissipated the greater part of his income; but this is no reason why the court should assist him: *In re Beaumont's Settled Estates*, 58 L. T. 916, 36 W. R. Dig. 177; *Earl of Radnor's Trusts*, 45 Ch. D. 402, 39 W. R. Dig. 202. The court will pay attention to the sentimental feelings of remaindermen. The sale, if carried out, will benefit only the tenant for life: *Sutherland* v. *Sutherland*, 42 W. R. 12, [1893] 3 Ch. 169.

Benn, for the Duke of Newcastle.

J. H. Young, for the mortgagees.

E. S. Ford, for the trustees of the will.

Farwell, Q.C., replied.

BYRNE, J.—Lord Francis Hope, who is the tenant for life of the estates settled under the will of Mrs. Hope, applies to the court to approve a provisional contract for the sale of the celebrated Hope diamond. The applicant has no issue, and the sale is opposed by his sisters, who are entitled in remainder in tail, and by the Duke of Newcastle, in whom is the ultimate interest. Lord Francis Hope, in his summons, asks the court to sanction the sale of the diamond. I could not under any circumstances sanction this contract because there is a difference between the experts as to the value, and I cannot say whether the sum proposed to be given represents the fair market price.

But I am asked to decide this matter as if it were an application to the court for the sale of the diamond in a proper way. As to the way in which such a case as this should be considered, there is an important passage in the judgment of Chitty, L.J. (then Chitty, J.), in the case of *Earl of Radnor's Trusts*, which is repeated with approbation by Lord Esher, M.R.: see 45 Ch. D., at p. 418. "I think, therefore," says the Master of the Rolls, "that the passage in the judgment of Chitty, J., in which he lays down the way in which the law is to be administered in a court of first instance, is correct." "I desire," he says, "to repeat here what I have said before, that the controlling power of the court is a discretionary power, and that it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized, as it would become in course of time, by one judge attempting to prescribe definite rules with a view to bind other judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to have been left untrammelled and free, so as to be fairly exercised according to the exigencies of each particular case. I agree with every word of this, and say that this is the right rule." This does not mean that a judge in considering the grounds upon which he shall exercise his discretion, ought not to notice what other judges before him have done, or what matters they had regard to

as circumstances to be taken into consideration in various cases. There has already been an application before Chitty, J., for the sale of certain pictures belonging to this estate, and on that occasion, the sale being opposed by the rest of the family, Chitty, J., refused to sanction a sale at the instance of Lord Francis Hope. Now I have here certain circumstances existing which were also circumstances existing then. One was that in that case the applicant had himself made the pictures homeless. This does not apply to the present case, because the jewel in question is probably exactly in such custody as it would be—namely, at the bank—if the tenant for life had not been extravagant and rendered it impossible for himself to live at the family mansion. Another argument brought forward both then and now was the financial position of the applicant. This is not a circumstance which affects the rest of the family and those who may succeed him, and this too is a circumstance (I do not wish to use any harsh term) which has been brought about by the applicant's extravagance, and I have said before and I now repeat that the fact of a tenant for life having got himself into difficulties is not a circumstance which ought to have weight in deciding in favour of a sale. Then the learned judge had in that case to consider, what I have also to consider here, the strong opposition of all the members of the applicant's family, and the learned judge proceeded to say that although this Act of Parliament did not give any special intimation to the court as to the grounds upon which it was to decline or allow a sale, yet he thought that the person who came to the court and asked the court's sanction, must make out his case for the sale. Now, what have I here? The applicant is not in a position of a tenant for life, who, if certain of the heirlooms were sold, would be able to take his natural position as the head of the family, and reside in the family mansion, taking up that position which probably the testatrix anticipated would be his; but I have the case of a tenant for life who is unable to occupy that position. It would be a reasonable and a fair and proper ground to take into consideration if substantial relief could be given, in the way of increased income, to a member of the family. That is a circumstance to be taken into consideration; but what I have here is the possession in the family of a jewel, which is acknowledged to be unique, as being the first known and until recently the only known blue diamond, and one which has taken its name from the family, and which is known to all the world as the Hope diamond. It is said to be no longer unique in the sense of being the only blue diamond in the world; but I cannot from the evidence before me say that the diamond does not still stand out as a jewel unique in its size, from the circumstances connected with it, and it bears the name of the family. I appreciate Mr. Farwell's contention to the full that the argument in favour of having regard to what may be called feelings of sentiment on the part of the family, does not apply in the same way or perhaps with the same strength to the case of the possession of a family jewel without any particular family history attached to it, as it does in the case of an old mansion-house or of pictures of ancestors which have been in the family a great number of years;, but it is nevertheless a possession to which people, I cannot say unreasonably, do attach very great value as making them the possessors of a unique article. An illustration of the feeling may be found in the possession of a Warwickshire vase. A person may not know the history of a particular vase, but the possession of such a unique work of art is one that may well be the object of pride in a family. I do not think that too much weight should be attached to this, but it is a circumstance for consideration. Then there is another matter to be considered in this case. Every member of the family who is in existence, except the applicant, is opposed to the sale of the diamond, and further, there is no evidence to show that Lord Francis would get what I may call any further usable income if the sale were effected. It might or might not be that such an arrangement could be made, but at present there is none such.

Giving the best attention that I can to the circumstances and arguments in the case, I do not think that a sale would be for the benefit of all the parties concerned, and therefore there is nothing for me to do but to refuse the application.

Summons dismissed.

Solicitors, *Maddisons, Leman, & Co.; Richard Smith & Sons*, for *Marshalls & Bate*, East Retford; *Richards & Nightingale; Devonshire, Monkland, & Co.*

Chan. Div. } Cozens-Hardy, J. } May 5, 6, 8, 9, 10, 19.

BROWN v. MAYOR, &c., OF DUNSTABLE. (a.)

Local government—Sewers—Sanitary authority—Unauthorized connection of sewage drains — Private nuisance—Liability of sanitary authority—Form of injunction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 21.

A householder has, under section 21 *of the Public Health Act*, 1875, *an absolute right to connect his drains with the public sewers, and the local authority cannot legally prevent him.*

Where householders have connected their sewage drains with the public sewers which, without any legal right so to do, discharge upon the land of a private owner, and thereby cause a nuisance to him, the local authority will not be restrained, at the suit of the owner, from "permitting," although they will be from "directing or authorizing" future connections of the kind complained of, to be made.

Ainley *v.* Kirkheaton Local Board, 60 *L. J. Ch.* 734, 40 W. R. Dig. 133, *followed, in preference to* Charles *v.* Finchley Local Board, 31 *W. R.* 717, *L. R.* 23 *Ch. D.* 767.

Action.

This was an action by W. F. Brown, who was the owner of Dunstable Park, for an injunction to restrain the Corporation of Dunstable from continuing to discharge sewage upon the park.

Dunstable Park consisted of a farm and farm buildings which were in the occupation of a tenant for years, who was joined as co-plaintiff, and of certain messuages in the occupation of other tenants. It was situate partly within and partly without the borough.

W. F. Brown (who is referred to below as the plaintiff) derived the property from his father, who died in 1846, leaving it to his widow the mother of the plaintiff, for life, and then to the plaintiff in fee. Mrs. Brown, the tenant for life, died in 1875.

Dunstable was an ancient town. Two Roman roads —Watling-street and Icknield-way—crossed each other at this point. It was nothing more than an ordinary parish until 1863, when a local board of health was formed, and in 1864 for the first time it was incorporated as a municipal borough. There were along Watling-street, which is now High-street, sewers of great age. Through these sewers, surface water from

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

the streets had, as far as living memory goes, flowed in three directions—part through the drain or pipe under what is known as Perkin's-house, in High-street, and thence into a pond in the park, the overflow of which went to a low-lying piece of land near the railway embankment. Another part crossed Icknield-way, now known as Church-street, and then entered land not belonging to the plaintiff, but this also ultimately found its way into the low land near the railway embankment. The third part went, until recently, in a comparatively short sewer in the High-street, towards the north, outside the boundary of the parish, to a field formerly belonging to the plaintiff, known as the Dog-kennel-close. It was proved that these ancient sewers had for many years conveyed not only surface water, but also slops and foul matter coming from house drains, the consequence of which was that the open ditches or receptacles in Dunstable Park and in Dog-kennel-close became from time to time offensive. It was proved that as far back as 1869 no less than 610 houses were connected with the sewers. With reference to sewage matter other than slops and house drainage, it was not shown that it found its way into the sewers to any considerable extent until after the year 1873, when for the first time a water company supplied the town with water, though probably there were a few water-closets prior to that date which were flushed by means of rain-water cisterns, and there may have been a few privies the contents of which found their way into one or other of the sewers. But, speaking generally, the ordinary mode of dealing with sewage of this nature was by cesspools which were periodically emptied. In 1887 part of the Dog-kennel-close was sold by the plaintiff, and the pond into which the overflow from the third sewer above mentioned used to pass, was filled up. Two dome-wells were constructed nearer the road in order to receive and retain the sewage and other matter which formerly went to the pond, and the plaintiff covenanted with the purchaser (in effect) to prevent any sewage matter from coming on to the land. In 1890 the plaintiff sold the rest of the Dog-kennel-close, including the two dome-wells. These soon proved a nuisance, and the corporation. with a view to remedy this nuisance, reversed the gradient of this third sewer so that the fall was towards the south instead of towards the north, and the contents of this sewer, which formerly discharged into Dog-kennel-close thenceforward passed by another way into the park. For thirty years complaints had been made of the inadequate drainage of the town, and letters had repeatedly been addressed by the Local Government Board to the corporation on this subject, but nothing had been done for more than a quarter of a century. The park had thus become the receptacle for the sewage of a large part of the town. There was a foul pond of several acres in extent in it, and the surface was so clogged with filth coming from the sewers that water would not pass away into the chalk. The value of the park was thus substantially lessened, but there was no evidence of any injurious effect upon health. Among the houses thus draining into the park were some belonging to the plaintiff. The defendants alleged a lost grant by the owners of the park to trustees for the inhabitants of the parish of Dunstable of the right to discharge both surface and sewage water from houses in the parish into the park. They also alleged that the plaintiff had acquiesced in and taken advantage of such grant and had used the existing system of sewage.

Eve, Q.C., and *W. M. Cann*, for the plaintiff.—No such prescriptive right as that set up could exist. You cannot prescribe for all persons present and future to discharge their sewage upon the land of the of the plaintiff: Gale on Easements, p. 3; Wood, V.C., in *Attorney-General* v. *Richmond*, 14 W. R. 686, L. R. 2 Eq. 306. Moreover, the only prescriptive user alleged is to send sewage into the sewers of the defendants, not upon the land of the plaintiff. The defendants must be treated in this matter as a private person (*Attorney-General* v. *Acton Local Board*, 31 W. R. 153, 22 Ch. D. 221), and if they exceed their easement they will be restrained: *Metropolitan Board of Works* v. *London and North-Western Railway Co.*, 29 W. R. 693, 17 Ch. D. 246. The defendants may, under section 21 of the Public Health Act, 1875, stop up unauthorized connections with their sewers (*Charles* v. *Finchley Local Board*, 31 W. R. 717, 23 Ch. D. 767), and they should do so. At anyrate they should be restrained from permitting fresh connections: *Attorney-General* v. *Richmond*. If they cannot stop these existing connections they must alter their sewers and discharge them elsewhere: *Attorney-General* v. *Acton Local Board*.

A. T. Lawrence, Q.C., *Hughes, Q.C.*, and *Kenyon Parker*, for defendants.—The plaintiff cannot require the local authority to provide another system of sewers, nor are they liable for what others do to their sewers, but only for their own acts: *Glossop* v. *Heston and Isleworth Local Board*, 28 W. R. 111, 12 Ch. D. 102; *Attorney-General* v. *Clerkenwell Vestry*, 40 W. R. 185, [1891] 3 Ch. 527. The only remedy open to the plaintiff is to apply to the Local Government Board under section 229 of the Public Health Act, 1875: *Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A. C. 387, 46 W. R. Dig. 106. Householders have an absolute right to connect their drains with the public sewers, and the local authority cannot prevent them, although it may prescribe the mode: *Ainley* v. *Kirkheaton Local Board*, 60 L. J. Ch. 734, 40 W. R. Dig. 133. The court will not restrain the local authority from allowing present connections to continue (*Attorney-General* v. *Acton Local Board*), nor from permitting fresh connections: *Attorney-General* v. *Guardians of the Poor of Dorking*, 30 W. R. 579, 20 Ch. D. 595. *Charles* v. *Finchley Local Board* was not a case of sewers at all, and therefore distinguishable. As to the prescriptive right, a lost grant would have been presumed if the corporation had been for the time being existing (*Haigh* v. *West*, [1893] 2 Q. B. 19, 41 W. R. Dig. 87); and such a grant for the benefit of the inhabitants of a parish is valid: *Gatewards' case*, 6 Co. Rep. 59*b*; *Grimstead* v. *Marlowe*, 4 T. R. 717.

Eve, Q.C., in reply.—Such a user as that alleged would be *clam*, and indefinite, and cannot create rights by prescription: see observations of Lord Herschell, *Lemmon* v. *Webb*, [1895] A. C. 1, at p. 6, 43 W. R. Dig. 125.

May 19.—COZENS-HARDY, J. (after stating the facts as above mentioned, and remarking that the Attorney-General was not a party, that no public nuisance was alleged, and that no *mandamus* was or could be asked for, proceeded:)—The defendants allege a lost grant, and that the plaintiff had taken advantage of such grant. This allegation, if well founded, would dispose of the whole action; but, in my judgment, it cannot be maintained. A lost grant is a valuable legal fiction devised to support long-continued possession and oft-repeated acts which otherwise could not be legally justified. Thus prior to the Prescription Act it was the custom to direct juries to find a lost grant after more than twenty years' enjoyment of an easement, and *Haigh* v. *West* is a modern example of the use of this fiction. But the evidence in the present case falls far short of what is requisite to raise the presumption of a lost grant. Such a grant

must have been made before 1846, and the state of things existing at that date was essentially different from the present state of things. It would be highly dangerous to allow the trivial and occasional passage along a natural channel, of water more or less contaminated, to ripen into a legal claim to pour sewage of all kinds and of indefinite amount along such natural channel. I therefore hold that the defendants' claim of right fails, and I must grant an injunction to restrain them from exercising that alleged right.

This, however, by no means disposes of the action, and it remains to consider what, if any, further relief the plaintiff is entitled to. In the first place, there are a large number of houses in respect of which prescriptive rights to pass sewage into and along the sewers have been gained; and it is plain that no injunction can be granted which will interfere with such rights. For this reason, amongst others, it is impossible for me to make any order which will involve the complete closing or abandonment of the sewers. In the second place, there are other houses, the connections of which with the sewers have been made with the consent or by the acquiescence of the defendants, and it is settled law that I cannot interfere with them: *Attorney-General* v. *Clerkenwell Vestry*. In the third place, there are a few houses which have been connected with the sewers, in spite of the protest of the defendants, and the plaintiff contends that the defendants ought to stop up these connections. But I think the defendants must be taken to have acquiesced in that to which they at first objected, so that these houses really fall under the second head. If, however, I am wrong in this, they must be treated as falling under the fourth head. In the fourth place, the plaintiff contends that an injunction ought to be granted to restrain the defendants from allowing any future connections to be made. The defendants are willing, if they fail, as I hold they have failed, in their major claim of right, to undertake not to authorize or direct any such connection, but beyond this they will not go. The strength of the plaintiff's case lies in this, that the defendants can, without being guilty of any trespass, stop up any future connection with their sewers, and it is urged that this is the true test, and that which has been applied by the court in similar cases. On the other hand, it is urged that under section 21 of the Public Health Act, 1875, a householder adjoining the sewer has a right to connect his house with the sewer, and could obtain an injunction if the defendants absolutely refused on any terms to allow him to connect his house with the sewer. It is necessary to consider some of the authorities cited by counsel on this point. In the case of *Attorney-General* v. *Guardians of the Poor of Dorking* it was held in 1882 by the Court of Appeal that where a sanitary authority had not themselves constructed the sewers which were a nuisance, but only permitted them to be used as formerly by the inhabitants, they could not be restrained by injunction. But Sir George Jessel, at p. 606, laid stress upon the fact that the defendants could not physically put an end to the nuisance, and could only proceed by means of actions for injunction against persons who, with or without legal justification, were pouring sewage matter into the defendants' sewers. Section 21 of the Public Health Act, 1875, was cited, but Sir George Jessel does not seem to have considered that section to be material. In the same year, 1882, in the case of *Attorney-General* v. *Acton Local Board*, Fry, J., refused to grant a mandatory injunction, which would compel the stopping up of existing drains, but he granted an injunction as to the future, restraining the defendants from directing or authorizing sewage to flow into the sewers in question, but he deliberately declined to insert in the injunction the word "permitting." In the following year, 1883, the case of *Charles* v. *Finchley Local Board* came before Pearson, J., who granted an injunction restraining the local board from allowing sewage to flow into a brook opposite the plaintiff's house, on the ground that they could at any time physically put an end to the nuisance without any action at all. This decision was primarily based upon the fact that the defendants had given permission to the third person to lay down a pipe from his house to the brook to pass pure water only, and that as he, in breach of their permission, was sending sewage through the pipe, they could, and ought to, revoke the permission. This may be a sufficient ground for the decision, but the learned judge, at p. 775, expressly held that the local board had a right under section 21 of the Public Health Act, 1875, to abate the nuisance without asking any leave, and without bringing any action. Now, section 21 is as follows: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made and subject to the control of any person who may be appointed by that authority to superintend the making of such communication. Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding £20, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses incurred by them under this section." I am not satisfied that in the *Finchley case* there was any sewer to which section 21 would be applicable, but this does not diminish the weight to be attached to the deliberate opinion of Pearson, J. He certainly held that the board could prevent an adjoining owner from connecting with the sewer. In 1891, in the case of *Ainley* v. *Kirkheaton Local Board*, Stirling, J., held that under section 21 a right is given to the owner or occupier to drain into an existing sewer, without reference to the question of whether sewage matter, if it once enters the sewer, occasions a nuisance to a third party. This absolute right is no doubt subject to any regulations in respect of the mode of making connections and subject to the control of any person appointed to superintend the making of the connections, but no regulations can justify an absolute refusal to allow a connection to be made on any terms. No regulations under section 21 have been made by the defendants. But certain bye-laws were made by their predecessors, the local board of health, in 1864. The 20th bye-law is the only relevant bye-law, and I assume that it is in force. It prescribes no notice, and it only directs that the drains of all houses shall be connected with the sewers in such manner as the local surveyor shall direct. It is obvious that under this bye-law the surveyor can only prescribe the manner of connection—he cannot refuse to allow any connection. Upon consideration I adopt the view of Stirling, J., in preference to the view of Pearson, J., and I must follow the precedent of Fry, J., and decline to grant an injunction which would prohibit the defendants from permitting or allowing fresh connections to be made, or, in other words, would oblige the defendants to stop up all future connections. A sanitary authority, in whom sewers are vested, has only a

limited property in these sewers. It is not in the same position as an owner of a private sewer, who can absolutely prevent anyone from touching his property. It seems to me that the plaintiff has mistaken his remedy. He ought to have applied to the Local Government Board to make an order under section 299, which might ultimately be enforced by writ of *mandamus*.

There are two minor points which I have not overlooked. It is said that the defendants ought to be restrained from allowing the sewage from the town-hall to pass into the sewer. But the defendants are sued as the urban sanitary authority only, and not as owners of the town-hall. I am not satisfied that the town-hall has not a prescriptive right; but however that may be, I am not prepared to give the plaintiff a relief which is not sought by the pleadings. Again, it is said that the reversal of the gradient of the sewer in High-street for the purpose of bringing the Dog-kennel sewage into Dunstable Park increased the burden on the plaintiff's property, and was an illegal act on the part of the defendants. But I think it was really done in order to satisfy the complaints of the plaintiff and to relieve him from the legal liability which rested upon him by reason of his covenant. The houses draining into this short reversed sewer are those which drained into the unreversed sewer and are few in number, and I cannot interfere with their *de facto* enjoyment of the sewer. To grant an injunction in respect of these two matters might occasion serious damage to health without conferring any benefit upon the plaintiff, and this is a consideration to which weight ought to be attached. The result is that I must grant an injunction restraining the defendants, as the urban sanitary authority of the borough of Dunstable, from directing or authorizing any sewage or foul matter to flow or to be discharged from sewers or drains vested in them as such sanitary authority, on to Dunstable Park.

Solicitors for plaintiff, *Walls & Stallard*.

Solicitors for defendant, *Maples, Teesdale, & Co.*, for *Benning & Son*, Dunstable.

Q. B. Div.
(Darling and Channell, JJ.) May 1.

BROCK *v.* HARRISON. (*a.*)

Water company—House occupied by tenant—Water rate paid by owner—Pipe out of repair—Liability of owner—Waterworks Clauses Act, 1863 (26 & 27 *Vict. c.* 93), *s.* 17.

In the case of a house of the annual value of less than £10, the owner is liable to pay the water rate instead of the occupier. Such an owner comes within the meaning of the words "any person supplied with water" in section 17 *of the Waterworks Clauses Act,* 1863, *and in a local Act, and was rightly convicted under the local Act, which made it an offence for any person supplied with water to wilfully or negligently do or suffer any act whereby the water supplied was wasted.*

Case stated by the stipendiary magistrate for the district of the Staffordshire Potteries.

An information was laid against the appellant by the respondent, the engineer of the Staffordshire Potteries Waterworks Co., charging that the appellant being supplied with water by the company did unlawfully and negligently suffer a certain pipe to be out of repair so that the water supplied to her was wasted. The information was laid under section 51 of the Staffordshire Potteries Waterworks Act, 1853, which is to the same effect as section 17 of the Waterworks Clauses Act, 1863, and which provides that, "If any person supplied with water shall wilfully or negligently do or suffer any act so that the water supplied to him by the company shall be wasted, or the supply thereof improperly increased, he shall forfeit for every such offence a sum not exceeding £5."

The appellant was the owner of a house let to a tenant at a weekly rent amounting to less than £10 a year, including the use of the water. The company supplied the house with water, and the appellant, as owner, paid the rate in accordance with the provisions of section 72 of the Waterworks Clauses Act, 1847, which enacts that in the case of houses not exceeding £10 in annual value the owner and not the occupier shall be liable to pay the water rate. The appellant's name appeared in the company's books as the person liable to pay the rate.

One of the pipes in the house got out of repair, causing a considerable waste of water. The tenant called the appellant's notice to the leakage, but the appellant did nothing to repair the pipe.

The magistrate held that the appellant had been properly charged, and that the offence had been proved, and he fined the appellant £5.

Montague Lush, for the appellant.—The conviction was wrong. The occupier, who used the water, and not the appellant, was the person "supplied with water" within the section in question. The mere fact that the appellant is liable to pay the rate, the house being under £10 in annual value, cannot have the effect of bringing the appellant within the words "any person supplied with water." Under the Waterworks Clauses Act 1847 the mere letting of pipes get out of repair was an offence. Under the Act of 1863 and this local Act the waste must be due to some wilful or negligent act of the person supplied. This points to the occupier and not to the owner. Further, in section 7 of the Waterworks Clauses Act, 1847, a distinction is drawn between the person supplied and the person liable to pay the rate, which shows that the latter is not included in the former.

Macmorran, Q.C., and *Shearman*, for the respondent, were not called upon to argue.

DARLING, J.—I am of opinion that this appeal must be dismissed. I think that the magistrate was perfectly right in holding that the appellant came within the definition of "any person supplied with water." I do not say that the appellant was the only person supplied, but she certainly was a person supplied with water.

CHANNELL, J.—I agree. I think that the appellant was a person supplied with water.

Appeal dismissed.

Solicitors for the appellant, *Purkis & Co.*, for *Sword & Son*, Hanley.

Solicitor for the respondent, *Fiske*, for *Knight & Son*, Newcastle-under-Lyme.

Q. B. Div.
(Darling and Channell, JJ.) April 12.

THE OWNER OF 238, OLD FORD-ROAD *v.* FOOT. (*a.*)

Metropolis — Sewer — Drain — Liability to repair —

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Drainage by combined operation—Deviation from plan sanctioned—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

A plan for draining a group of houses by a combined operation was sanctioned by the vestry. The course of one of the pipes indicated in the plan, which drained more than one of the houses, was in the laying of it altered so as to run within a few feet of the course indicated in the plan.

Held, that the pipe was a drain and not a sewer within the meaning of section 250 *of the Metropolis Management Act,* 1855, *the number of houses draining into it not being added to or interfered with by the deviation from the plan sanctioned.*

Case stated by a Metropolitan police magistrate.

The appellant was summoned as owner of No. 238, Old Ford-road to abate a nuisance which existed thereon.

The existence of a nuisance was admitted, and it was also admitted that it proceeded from pipes conveying drainage under No. 238. The register containing applications to the vestry by persons desirous of draining houses by a combined operation was produced, from the proper custody of the vestry, and it contained a plan relating to the house in question and to other houses adjoining belonging to the same owner, and showing the proposed scheme of combined operation. The plan was dated the 27th of June, 1879, and was signed by the surveyor. The register contained no formal order of the vestry upon the subject, and it was proved that it had been and still is the practice of the vestry to treat a plan so signed as being approved by the vestry and as giving authority for the proposed scheme to be carried out without any formal order.

If the pipes forming the combined operation had been laid as shown upon the plan, they would, after collecting the drainage from the various houses, have passed, by making a slight bend, underneath No. 236, Old Ford-road, the house immediately adjoining No. 238; but, upon an examination being made to discover the source of the nuisance, it was found that the pipes were continued in a straight line and passed underneath No. 238, and so through into the main sewer, giving a better flow by doing away with the bend and entering the main sewer at a somewhat lower level, thus giving a better fall. There was no record in the register of the vestry of any such deviation being sanctioned, and it was not shown that there was any other deviation from the plan, nor was it shown that any houses other than those on the plan were drained by the combined operation.

It was contended on behalf of the respondent that the pipes as laid formed a drain for draining a group or block of houses by a combined operation under the order of the vestry, and that therefore it was a drain within section 250 of the Metropolis Management Act, 1855, and as such was repairable by the owner of the premises. It was contended on behalf of the appellant, the defendant, (1) that there was no "order of the vestry" within section 250; (2) that if it could be said that the dealing with the plan as above was "an order of the vestry," the system as now existing was not that authorized by the vestry, and, that, even if any part of it had been laid as authorized by the vestry, that which passed under No. 238 was not authorized, and so constituted a "sewer" within section 250.

The magistrate was of opinion (1) that the order of the vestry mentioned in section 250 need not be in any special form, but that it was quite sufficient if it appeared clear that the vestry intended to approve and had approved any plan of proposed drainage by a combined operation; (2) that the plan had been duly approved by the vestry, and amounted to an order within section 250; (3) that the alteration in the course of the drain mentioned in no way altered its character, and that it did not by reason of such alteration cease to be a system of drainage by combined operation under the order of the vestry. He therefore ordered the defendant to abate the nuisance.

Section 250 of the Metropolis Management Act, 1855, provides as follows: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, . . . and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board, and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word drain, interpreted as aforesaid, applies."

Packard, for the appellant.—The effect of section 250 is that every pipe which carries off the drainage of more than one house is *de facto* a sewer unless it is part of a combined system of drainage authorized under section 74, which is to be read with section 73: see *Vestry of St. Matthew, Bethnal Green* v. *The School Board for London*, 46 W. R. 353, [1898] A. C. 190. Unless this pipe, therefore, can be shown to be part of a combined operation made under the order of the vestry, it is a sewer, and as such it vested in the vestry by virtue of section 68, and is repairable by them by virtue of section 69. Even a wrongful and unauthorized connection of drainage to a pipe already draining one house is sufficient to convert such pipe into a sewer: *Kershaw* v. *Taylor*, 44 W. R. 28, [1895] 2 Q. B. 471; *Geen* v. *Vestry of St. Mary, Newington*, 46 W. R. 624, [1898] 2 Q. B. 1; *Florence* v. *Paddington Vestry*, 12 Times L. R. 30. In the present case it cannot be shown that the pipe was constructed under the order of the vestry. There was, in point of fact, no order, and even if there was, the act of deviating from the plan sanctioned by the vestry converted the pipe into a sewer.

Avory, on behalf of the respondent.—The cases cited by the appellant show two things—(1) that in order that a pipe draining more than one building should come within the definition of a drain there must be evidence of an order by the vestry under section 74; and (2) that a pipe ceases to be a drain and becomes a sewer if at any time the drainage of other buildings is made to flow into it. The decisions in *Kershaw* v. *Taylor* and the other cases cited are based upon the fact that other drainage was introduced into the pipe in question. Here there is evidence that an order was made by the vestry. Such order would be an order sanctioning a combined operation and not one authorizing a particular line of pipes. That this is so is shown by the words of section 74, which provides that the vestry may order that "such group or block of houses be drained and improved, as hereinbefore provided, by a combined operation." The order having been made, the owner is at liberty to lay the pipes where he pleases so long as the fall, &c., is such as has been approved by the vestry.

DARLING, J.—We are asked to decide whether the magistrate was right in holding that the pipe in question in this case was a drain repairable by the owner, and not a sewer repairable by the vestry. The question arises mainly under section 250 of the Metropolis Local Management Act, 1855, which provides that under the term "drains" are included other things besides ordinary drains—namely, drains used to drain a block or group of houses by a combined operation made under an order of the vestry—; and it is said by the respondent that this pipe is a

drain used to drain a group of houses by a combined operation, and that it was made under an order of the vestry. It does drain a group of houses. The question is, Was it made under an order of the vestry? It is said that the operation of drainage was not carried out in accordance with the plan sanctioned by the vestry, but that there was a deviation from the plan, the effect of which was to turn the pipe in question into a sewer. The facts, however, show that precisely the same number of houses are drained by the pipe in its present position, as would have been drained by it had the plan been adhered to. The cases cited to show that such a deviation as took place here, altered the character of the pipe are not cases of a mere slight deviation, but are cases in which the effect of the deviation was to increase the number of houses drained by the pipe. If in this case other houses had by means of the deviation of the pipe been added to the number of those already draining into it, I do not say that our decision would not have been different. But here that was not the case. The deviation left the pipe practically the same as before, and in no way altered its character. So long as the scheme of drainage is practically the same as that sanctioned by the order of the vestry, the deviation of one of the pipes for a foot or two does not matter. This pipe, therefore, which was originally a drain, remains so still, notwithstanding the alteration.

CHANNELL, J.—There is taken out of the definition of sewer not only ordinary drains but also pipes used to drain houses under a combined operation sanctioned by the vestry or district board. When the order for the construction of this system of drainage was obtained from the vestry the pipe in question became a drain of the house under which it ran, and the owner of that house had control over it, and had power to alter its course, just as each of the owners of the other houses, had they been separately owned, would have had the power to alter the course of the drains situated under his house. There is just as much power to alter the course of a drain in the one owner of all the houses as there would have been in each of the eleven owners had they been separately owned.

In this case we do not know whether the alteration in the course of the drain was made at the time of its construction or afterwards; whichever was the case, the alteration would not turn the drain into a sewer. The cases cited to support the proposition that it would, were all cases in which by the alteration an addition was made to the number of houses drained by the pipe in question. They were, therefore, not in point, because in this case no addition was made to the number of houses drained.

Appeal dismissed.

Solicitors for appellant, *Stanley Evans & Co.*

Solicitor for respondent, *Richard Voss.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — May 2.

In re O'GORMAN.
Ex parte BALE. (a.)

Bankruptcy—Damages in the Divorce Court—Bankruptcy of co-respondent—Provable debt—Judgment summons—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), s. 33—*Bankruptcy Act,* 1890 (53 & 54 *Vict.* c. 71), s. 10.

Damages awarded to a petitioner in a divorce suit constitute a debt provable in the bankruptcy of the co-respondent, although no order directing the damages to be paid to the petitioner has been made at the date of the receiving order.

Judgment summons.

On the 27th of February, 1897, Bale obtained a decree of dissolution of marriage in the Divorce Court, and a verdict for £1,200 damages against the co-respondent O'Gorman.

The order of the court directed the damages to be paid into the registry within fourteen days. O'Gorman failed to comply with the order, and filed his own petition upon the 6th of October, 1897, when a receiving order was made against him. Upon the 15th of January, 1898, Bale obtained an order that the damages directed to be paid into court by O'Gorman should be paid to Bale personally. Bale took out a judgment summons to enforce payment of the order.

Carrington, for the judgment creditor.—An order of the Divorce Court can be enforced by judgment summons (*Ex parte Fryer, In re Fryer,* 34 W. R. 766, 17 Q. B. D. 718); but I admit that if this is a provable debt, the summons cannot succeed. I contend, however, that it is not a provable debt. *Ex parte Muirhead, In re Muirhead,* 24 W. R. 351, 2 Ch. D. 22, decides that it is not a debt on which a petition can be founded, and in the case of *Ex parte Sacker, In re Sacker,* 37 W. R. 204, 22 Q. B. D. 179, where *Ex parte Muirhead* was considered, Lord Esher seems to treat that case as authority for the proposition that a petitioner in a divorce suit is not in any sense a creditor. Further, there was no order for the payment of damages to Bale existing at the date of the receiving order, but only an order that they should be paid into court. The liability, if any, has arisen since the receiving order. It is like a verdict for damages for a tort which does not constitute a provable debt: *In re Newman, Ex parte Brooke,* 25 W. R. 261, 3 Ch. D. 494.

Cosmo Rose Innes, for the judgment debtor.—It was held in the case of *Wood* v. *Wood,* 16 W. R. 568, L. R. 1 P. & D. 467, that damages in divorce constituted a provable debt, and also in the case of *Patterson* v. *Patterson,* 19 W. R. 232, L. R. 2 P. & D. 189.

Carrington, in reply.—*Wood* v. *Wood* was decided under section 149 of the Bankruptcy Act, 1861, which defined a creditor as any person entitled to enforce payment by process of contempt. In *Patterson* v. *Patterson* a special order was made to enable the petitioner to prove. Arrears of maintenance payable under an order of the Divorce Court are not provable: *Kerr* v. *Kerr,* 46 W. R. 46, [1897] 2 Q. B. 439.

WRIGHT, J.—This is a question of great difficulty, and one on which eminent bankruptcy judges have declined to express any opinion. It seems to me that when a petitioner claims damages in a divorce suit and obtains them by decree he does acquire a certain right against the co-respondent. I think, when he gets the judgment, he ought in some sense to be said to be a creditor of the co-respondent, although he is obliged to employ the money as directed by the court. I think this was the opinion held by Lord Penzance in *Wood* v. *Wood.*

But although he may be a creditor in some sense, it does not follow that he can be a petitioning creditor, or prove in the bankruptcy of the co-respondent. *Ex parte Muirhead* decides that he cannot be a petitioning creditor in respect of damages ordered to be paid to him, and when received to be paid by him

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

into the registry to abide the further order of court, but in deciding that case Cockburn, C.J., confines it to the case of a petitioning creditor's debt. Mellish, L.J., says in his judgment: "I do not mean at all to express any dissent or any express opinion as to the effect of such an order for the purpose of enabling a proof to be made" (which is what I have to decide to-day). "As at present advised I should rather think that there being a sum presently payable, and an order for its payment, it would in some shape be provable in bankruptcy, and that the mere uncertainty as to who was ultimately to receive it and for whose benefit it was ultimately to be applied would not prevent its being a provable debt."

Then in the case of *Ex parte Sacker* it was held that a receiver appointed in an action in the Chancery Division may not be a petitioning creditor in respect of a sum ordered to be paid to him in that character, but that does not carry the matter any further in spite of the remarks of Lord Esher (22 Q. B. D., at p. 184). Fry, L.J., refuses to consider the question.

I cannot help thinking that the matter is left entirely open; *Patterson* v. *Patterson* does not really help me. I am left without any guide, and that being so I can only say that, subject to the order of the court appropriating damages, there is a liability provable as a debt in bankruptcy, and therefore this application should fail. Then I have to consider the point that there was no liability at the date of the receiving order, the order for personal payment to the petitioner having been made some months after receiving order. But if I am right in the view I have taken on the other point the conclusion on this point must be the same. It is true that there was no direction for payment to the petitioner, but there was a decree founded on the verdict of a jury giving damages to the petitioner, which was sufficient to constitute a provable debt.

Summons dismissed.

Solicitors for the judgment creditor, *Amery, Parkes, & Powell.*

Solicitors for the judgment debtor, *Wilson, Wallis, & Co.*

Q. B. Div. (Wright, J.) April 24.

In re HARRIS.

Ex parte HASLUCK *v.* THE BOARD OF TRADE. (*a.*)

Bankruptcy—Release of trustee—Revocation of release by Board of Trade—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 82 (3); *r.* 309.

By sub-section 3 *of section* 82 *of the Bankruptcy Act,* 1883, *the Board of Trade may revoke an order releasing a trustee in bankruptcy "on proof that it was obtained by fraud or by suppression or concealment of any material fact."*

Held, that an order of release ought not to be revoked on the ground that it was obtained by "suppression or concealment of any material fact" unless there is such suppression or concealment as has in it some element of fraud.

Appeal by Mr. Hasluck, the trustee in the bankruptcy, against the revocation of his release by the Board of Trade.

Mr. Hasluck was appointed trustee in July, 1896; he collected the assets, paid two dividends of 4s. 6d. in the pound, and applied for his release upon the 19th of February, 1898.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Among the proofs which had been tendered was one by the collector of Inland Revenue which the trustee decided to reject.

On the list of proofs sent in to the Board of Trade after payment of the first dividend the trustee had marked this proof "standing over," and on the list sent in after payment of the final dividend he marked it "disallowed." He omitted, however, to give notice to the collector of rejection. He posted to the collector a notice of his application for release as required by section 309, but did not send one to the Board of Inland Revenue.

In March, 1898, the trustee received a letter from the collector, and on the 3rd and 13th of June he received letters from the Board of Inland Revenue on the subject of the proof, but being under the *bonâ fide* belief that he had rejected the proof, he paid no attention to them. His release was granted by the Board of Trade upon the 28th of June, 1898. After that date the Board of Inland Revenue complained to the Board of Trade that their proof had not been dealt with, and that they had had no notice of the trustee's application for his release. The Board of Trade, having taken *ex parte* evidence, revoked the release upon the 23rd of January, 1899, upon the ground that it had been obtained by "suppression or concealment of a material fact"; the concealment alleged being that, in the affidavit in support of his application for release, the trustee had sworn that he had posted notices of his intended application to all the creditors; whereas in fact he had (the Board of Trade alleged) sent no notice to the collector, or to the Board of Inland Revenue.

The trustee appealed.

Reed, Q.C., and *Rolland,* for the appellant.—By section 82 (3) of the Bankruptcy Act, 1883, the release of the trustee may be revoked "on proof that it was obtained by fraud or by suppression or concealment of any material fact." In this case there was no regular "proof" of anything, for the Board of Trade only took *ex parte* evidence which the trustee had no opportunity of meeting. "Suppression or concealment" can only mean wilful suppression or concealment, which is not the case here. Moreover, notice of the trustee's intention to apply for his discharge was posted to the collector, although it is now alleged that he never received it.

Sir R. B. Finlay, S.G., and *Muir Mackenzie,* for the Board of Trade.—The Board of Trade were right in revoking the discharge, for it was a grave error on the part of the trustee not to bring the letters he had received from the Inland Revenue to the notice of the Board of Trade.

Reed, Q.C., replied.

WRIGHT, J.—This is a case of some importance and involves the construction of sub-section 3 of section 82 of the Bankruptcy Act, 1883: "An order of the board releasing the trustee . . . may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact." I think those words ought to be construed "such suppression or concealment as has in it some element of fraud." If there is no true element of wrongfulness in the concealment, the discharge ought not to be revoked. I have to inquire here whether the conduct of the trustee was blameworthy. The letters he received from the Inland Revenue and did not answer, do tell against him. I think his explanation is satisfactory; he says, firstly, that he had disallowed the claim of the Inland Revenue, which is quite true; secondly, that he took no notice of the letters because he thought he had sent notice of rejection of the claim and had received no appeal against it. It is difficult to under-

stand why no notice of rejection was sent to the Inland Revenue, but such seems to have been the case. I accept the trustee's story, and am of opinion that he had no intention of concealing anything.

Appeal allowed.

Solicitors for the appellant, *George Reader & Co.*

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

Privy Council.

(*From the Supreme Court of New South Wales.*)

March 11.

BULLI COAL MINING CO. *v.* OSBORNE AND ANOTHER. (*a.*)

Statute of Limitations (21 *Jac.* 1, *c.* 16)—*Mine—Trespass—Fraudulent working of mine—Concealed fraud—Account.*

Where a colliery company wilfully and secretly took coal from an adjoining property, and the fact was not brought to light for many years afterwards, and no laches could be attributed to the adjoining owner in not discovering the existence of the wrongful workings,

Held, that the Statute of Limitations had no application, and that the adjoining owner was entitled to recover from the wrongdoers the value of the coal so wrongfully taken, and, in the case of a winding up, then to prove for that amount.

This was an appeal by the Bulli Coal Mining Co. from the Supreme Court of New South Wales. The facts are given in their lordships' judgment.

Warrington, Q.C., and *Sims Williams*, for the appellants.

Asquith, Q.C., Swinfen Eady, Q.C., and *Vaughan Hawkins*, for the respondents.

The judgment of their lordships (Lords MACNAGHTEN, MORRIS, and JAMES OF HEREFORD) was delivered by

Lord JAMES OF HEREFORD.—In this case the appellants seek to reverse a judgment or order of the Supreme Court of New South Wales dated the 10th of September, 1897, dismissing an appeal against an order of the Honourable William Owen, Chief Judge in Equity, dated the 27th of July, 1896, and allowing a cross-appeal on the part of the respondents against the said order and varying it in certain particulars.

The proceedings in the courts below were commenced by a summons issued by the respondents in the winding up of the appellant company for liberty to prove for a sum of money claimed as the value of coal alleged to have been wrongfully taken by the appellants from land belonging to the respondents. Such claim was, by an order dated the 20th of December, 1895, directed to be tried before the Honourable William Owen, Chief Judge in Equity, and it was accordingly heard before him in April, May, and June, 1896. On the 27th of July, 1896, the learned judge delivered judgment in the case, and afterwards ordered that it be referred to the master in equity to inquire and certify what was the market value at the pit's mouth of all the coal worked and gotten by the appellant company from the land of the respondents, being a portion of their land known as Watt's Grant, and that the respondents should be allowed to rank as creditors of the appellant company for such aggregate amount as should be certified by the master in equity.

During the hearings in the courts below the principal defence made by the now appellants to the claim of the now respondents was based upon an alleged champertous agreement.

It was proved that the respondents had on the 25th of March, 1895, made an agreement with a certain company called the Bellambi Coal Co. whereby it was agreed that the respondents should employ the solicitor of the Bellambi Coal Co. to conduct proceedings for the purpose of recovering damages from the appellants, and that in consideration of the respondents paying to the Bellambi Coal Co. 92½ per cent. of the amount recovered, that company would indemnify the respondents from all costs and expenses incurred by the taking of the proceedings. It was also found that by an indenture of the 15th of May, 1893, the respondents had leased to the Bellambi Coal Co. the land and the coal under it, which had been entered upon and taken by the appellants, so that by their wrongful acts the Bellambi Co. had been deprived of coal which was believed by them and the respondents to be the subject of their lease.

The chief judge held that the agreement of the 25th of March, 1895, was champertous in its character, but that its existence did not preclude the respondents from enforcing their rights against the appellants.

The full court overruled the judgment of the chief judge so far as it determined the agreement to be champertous, but agreed with him in holding that if champertous it would not preclude the respondents from enforcing their rights against the appellants.

In his argument before the committee the leading counsel for the appellants intimated that he felt he could not rely upon this defence of champerty and virtually withdrew it. Their lordships are therefore relieved from delivering any judgment upon the subject beyond saying that they see no ground for differing from the judgment delivered on this head by the full court.

Among the other grounds of defence put forward in the courts below was the plea of the Statute of Limitations. This plea was dealt with fully by the chief judge after he had disposed of the question of champerty in a preliminary judgment. It was raised again before the full court but not much pressed there, and the full court simply adopted the judgment of the chief judge on this point. It formed, however, the principal subject of discussion at their lordships' bar, where it was presented by the learned counsel for the appellants in a most elaborate and ingenious argument.

The material facts bearing on the defence of the statute appear in the findings of the chief judge, which had the entire concurrence of the full court. They were arrived at after an exhaustive inquiry lasting for eighteen days, during which much oral and documentary evidence was given. The counsel for the appellants endeavoured to some extent to contest these findings, but their arguments not only failed to show that there was manifest error in the findings of facts by the court below, in which case alone would their lordships differ from them, but being called upon by arguments of counsel to consider the correctness of these findings, their lordships are of opinion that they are in every respect correct.

It appeared that on the 1st of February, 1854, the Crown granted to John Alexander Watt fifty-one acres of land near Bulli Illawarra. By several conveyances the said fifty-one acres of land, known as "Watt's Grant," became vested in Henry Osborne, whose personal representatives are the present respondents. Henry Osborne died in 1858. Early in 1873 the

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

appellants, who were working coal in land adjoining to Watt's Grant, found that their workings were approaching the boundary between the two properties and so informed the then trustees of Henry Osborne's will, and entered into negotiations with them for the purpose of obtaining a lease of Watt's Grant. These negotiations fell through, but the appellants proceeding secretly with their workings entered upon Watt's claim, and between the years 1878 and 1880 removed the coal from under some fourteen acres of such land. The trespass was distinctly shown upon the appellants' own working plan. It was committed underground, and committed wilfully. Until the workings by the Bellambi Coal Co. under their lease of May, 1893, brought to light the fact that a trespass had been committed by the appellants, the respondents and their predecessors were ignorant of the appellants' wrongful working, and had no reason to suspect that any had occurred.

Upon these facts the courts below have come to the conclusion that no *laches* can be attributed to the respondents in not discovering the existence of the wrongful workings by the appellants, a conclusion with which their lordships entirely concur.

Accepting, however, for the purposes of argument the findings of the chief judge the learned counsel for the appellants contended that the Statute of Limitations was an answer to the respondents' claim. Their argument was to this effect: Granted, they said, that the trespass was intentional—as, indeed, most trespasses were—that circumstance of itself was no answer to the plea of the statute. To use the language of Alderson, B., in *Hunter* v. *Gibbons*, 5 W. R. 91, 1 H. & N. 459, at p. 465, there was "no distinction between trespasses underground and upon the surface." It constantly happened, as one of the learned judges observed in the case of the *Imperial Gas Light and Coke Co.* v. *London Gas Light Co.*, 2 W. R. 527, 10 Exch. 39, at p. 42, that the owner of a coal mine takes coal from an adjoining mine and by fraud prevents its being found out for more than six years. "Yet that," adds the learned judge, "is no answer to the Statute of Limitations." Clearly it was no defence at law. Why, then, should it be a defence when the claim is put forward in a court of equity. The foundation of the claim must be the same wherever the injured party may seek redress. At law he sues for damages in an action of trespass. If he comes into a court of equity still it is in respect of the trespass that he claims compensation. There being, therefore, a concurrent jurisdiction at law and in equity in respect of the very same wrong and the very same cause of action, the statute is as binding in equity as it is at law, in accordance with the views expressed by the House of Lords in the well-known case of *Knox* v. *Gye*, L. R. 5 H. L. 656, at p. 674. If, indeed, the respondents had been able to make out a case of what Pallas, C.B., terms "active or aggressive concealment"—*Barber* v. *Houston*, 14 L. R. Ir. 273, 33 W. R. Dig. 125—that might have been a different matter. Possibly relief might then have been had in accordance with the principles to be deduced from the case of *Gibbs* v. *Guild*, 30 W. R. 591, 9 Q. B. D. 59, and similar cases. But nothing of the kind was suggested here. The appellants have taken the respondents' coal. Be it so. They have done nothing more. That is the beginning and the end of their offending. It cannot be said that they have done anything actively to prevent the respondents or their predecessors in title finding out what they did.

Such was the contention of the appellants' counsel, but their lordships are unable to accede to it. It seems to ignore the nature and character of the act of which the respondents complain and to disregard the principles on which courts of equity proceed in dealing with fraud.

It will not be out of place to cite a passage from the judgment of Lord Hatherley in *Livingstone* v. *Rawyards Coal Co.*, 28 W. R. 357, 5 App. Cas. 25, at p. 34, before the House of Lords. The House was there dealing only with the measure of damage in a case of underground trespass. But in pointing out the distinction between a case of fraud and a case of inadvertence Lord Hatherley uses very plain language, and his remarks may be useful in clearing the ground. "There is no doubt," said his lordship, "that if a man furtively and in bad faith robs his neighbour of property, and because it is underground is probably not for some time detected, the court of equity in this country will struggle, or, I should rather say, will assert its authority to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if as in the present case they had been, the one working and the other permitting the working, through a mistake. The courts have already made a wide distinction between that which is done by the common error of both parties and that which is done by fraud."

In the present case the coal was taken furtively. No one can deny that it is a fraud to rob your neighbour furtively of his property or that a court of equity ought to give redress for such a wrong. "This court," as Lord Hardwicke, presiding in a court of equity, observed in *Chesterfield* v. *Jansen*, 2 Ves. sen. 125, "has an undoubted jurisdiction to relieve against every species of fraud." Where the remedy is given on the ground of fraud, Lord Westbury pointed out in *Rolfe* v. *Gregory*, 13 W. R. 355, 4 De G. J. & S. 576, at p. 579, that "it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or generally speaking by anything done or omitted to be done, so long as he remains without any fault of his own in ignorance of the fraud which has been committed."

The Statute of Limitations has really no application to a case such as this. Courts of equity are not within the words of the statute, which only apply to certain legal remedies, though they are, as it has been said, within its spirit and meaning. The way in which the statute came to be applied in proceedings of equity is explained by Lord Camden in his judgment in *Smith* v. *Clay*, 3 Bro. Ch. Cas. 639*n*, which was published from his lordship's own notes. A court of equity, he says, "which is never active in relief against conscience or public convenience," always refused its aid to stale demands. As, however, it had no legislative authority it could not define exactly the time of bar. It was governed by circumstances. But as often as Parliament prescribed a limit to proceedings at law the Court of Chancery adopted that rule and applied it to similar cases in equity. "For," he adds, "what the Legislature had fixed the time at law it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance *laches* beyond the period that law had been confined to by Parliament." Now, it has always been a principle of equity that no lapse of time is a bar to relief in the case of fraud in the absence of *laches* on the part of the person defrauded. There is therefore no room for the application of the statute in the case of concealed fraud so long as the party defrauded remains in ignorance without any fault of his own.

The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to

ave taken active measures in order to prevent detection is opposed to common sense as well as to he principles of equity. Two men acting independently steal a neighbour's coal. One is so clumsy n his operations or so incautious that he has to do omething more in order to conceal his fraud. The ther chooses his opportunity so wisely and acts o warily that he can safely calculate on not being ound out for many a long day. Why is the one to o scot free at the end of a limited period rather than he other? It would be something of a mockery for ourts of equity to denounce fraud as "a secret thing" nd to profess to punish it sooner or later and then o hold out a reward for the cunning that makes etection difficult or remote.

There is very little direct authority on the particular oint which was urged with so much ingenuity at the ar. Indeed, the case of the *Ecclesiastical Commisioners for England* v. *The North-Eastern Railway Co.*, 4 h.D. 845, 25 W. R. Dig. 158, before Malins, V.C., was ited as the only reported case in which the account was arried back beyond the period prescribed as a bar y the statute of Limitations. And their lordships re compelled to say that they are unable to rely on he decision in that case. It is very difficult to follow he reasoning of the learned Vice-Chancellor. His onour said distinctly "there was no improper intenon." He held that what was done "was done nder a mistake." Yet the defendants were visited ith all the pains and penalties of fraud. The ccount was carried back beyond the six years; the easure of damages was in accordance with the verest rule ever applied. The ground of the decision eems to have been that although there was no moral raud—no fraud in fact—yet "for the purposes of e statute the breaking of bounds into a neighbour's illiery must be considered a fraudulent act." There no foundation for that proposition. Underground espass may be committed in good faith without any inister intention or it may be committed under rcumstances which would render the wrongdoer able to a prosecution for felony. Every case must pend upon its own circumstances. There is nothing principle or in authority or in the exigencies of public licy to require that the same measure of justice injustice should be meted out to all transgressors ike, ignorant or wilful, innocent or fraudulent.

In all, or almost all, the other cases cited at the r the court held that fraud was not established. st Sir John Romilly in *Dean* v. *Thwaite*, 21 Beav. 2, and Fry, J., in *Trotter* v. *Maclean*, 28 W. R. 244, Ch. D. 574, expressed their opinion that fraud ould or might be an answer to the plea of the atute. In *Dean* v. *Thwaite*, where the learned aster of the Rolls held that the evidence of fraud as not conclusive, his honour made these observaons: "The case of fraud alleged, and the only aud that I think would justify the court in coming a conclusion that the coal gotten before that riod"—that is, before the period of limitation—ought to be accounted for, is that the defendant d intentionally taken the plaintiffs' coal and d concealed the fact, and during the process d taken steps to prevent the plaintiffs disvering it." If those observations are to be nstrued to mean that in his honour's opinion nothing more was required beyond taking the coal rtively, their lordships are unable to agree in them. t they think that is not the fair meaning of the nage cited, which must be understood as applied to e alleged facts of the case on which his honour was en commenting. In *Trotter* v. *Maclean* Fry, J., marks that the period of limitation imposed by the tute of James ought to apply to proceedings in the hancery Division in respect of a trespass unless there was some equitable ground for repelling the application of the statute. "Such an equitable ground," he adds, "has in many cases been found in fraud. When fraud or any other equitable circumstance exists undoubtedly the statute will not apply." It may be observed that in *Trotter* v. *Maclean* no fraud was suggested beyond the fraud that lies in the secrecy of wilful trespass underground, and that the plaintiffs failed to prove in that case that the trespass was wilful.

Their lordships are therefore of opinion that the Statute of Limitations cannot be set up as a bar in the present case, and they think that this conclusion is not opposed to any authority.

A comparatively minor question remains to be be noticed. By the order of 27th of July, 1896, the chief judge directed the master in equity to inquire and certify what was the market value of the coal which had been wrongly worked and gotten by the appellants under Watt's Grant, and then proceeded to order: "In making such inquiry the master is to take into consideration that the court has decided that there is not sufficient evidence to satisfy the court that the pillars were extracted or that the bords were worked otherwise than in the usual and proper mode of working."

By the order of the full court of the 10th of September, 1897, this direction was negatived, the court ordering "that the master in equity should determine the quantum and value of the coal extracted from the said land freed and unembarrassed by any direction in the said order (of the 27th of July, 1896) contained as to extraction of pillars or proper working of bords." But in the judgment delivered by the full court the following dictum occurs:

"It appears that his honour by his order directed the master in making the inquiry to take into consideration that his honour had decided that there was not sufficient evidence to satisfy his honour that the pillars were extracted or that the bords were worked otherwise than in the usual and proper mode of working. This objection is complained of and objected to on the part of Messrs. Osborne. It was pointed out that the usual mode of working would be to remove the pillars as soon as the bords were worked out, and that if they were not in fact removed it lay upon the Bulli Co. to satisfy the court as to the fact. We think that this must be so, and that once it has been proved that the coal has been worked from under the fifteen acres it should be presumed until the contrary be shown that the pillars were worked out and the roofs allowed to fall in."

Their lordships do not agree with the direction given by the chief judge or with the dictum of the full court on the subject. No presumption of any kind as to the pillars having been either left or worked, or the reverse, should be made. The master in equity in taking the account must be guided alone by the evidence before him. His task may be a difficult one — but still he must arrive at the quantum of coal taken as best he can. The evidence given by the litigants appearing before him must be his guide, and no presumptions such as have been referred to should affect his decision. Their lordships express no opinion as to the effect the master should give to any evidence—or the inferences he should draw from it—they only determine that presumption should not exist without being founded on evidence.

Their lordships will therefore humbly advise Her Majesty that the appeal be dismissed, and that the judgment of the court below be affirmed. The appellants will pay the costs.

Solicitors for appellants, *G. F. Hudson, Matthews, & Co.*
Solicitors for respondents, *Light & Galbraith.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby, L.J.) — May 17.

COOTE v. FORD. (a.)

Practice — Payment into court—Denial of liability—Acceptance by plaintiff—Counterclaim—Admission—R. S. C., ord. 22, *rr.* 1, 6, 7.

The object of payment into court, where all liability is denied, is to enable a defendant to deny a plaintiff's right to sue, yet to offer a sum as the price of peace and for the prevention of further litigation. Such an offer is not an admission of the plaintiff's title, and cannot be converted into such by the plaintiff accepting the sum paid in.

Decision of Stirling, J. (ante, *p.* 489), *affirmed.*

Plaintiff's appeal from Stirling, J. (reported *ante*, p. 489).

The action was brought by the plaintiff against nine defendants for trespass in pursuit of game and rabbits on the manor of Martin. Damages and an injunction were claimed.

The defendants in their defence alleged that as copyholders of the manor they were entitled to kill and take rabbits both by themselves or their servants, and their tenants. Furthermore, the copyholders and their tenants had exercised and enjoyed the right and privilege from time immemorial.

By paragraph 7 of the defence it was pleaded that, "denying liability, each of the defendants brings into court the sum of 1s. and says that the same is sufficient to satisfy his liability to the plaintiff (if any) in respect of the matters complained of."

The 9s. paid into court was taken out by the plaintiff, who gave notice, dated the 22nd of February, 1889, that he accepted the sum paid in, in satisfaction "of the claim in respect of which it is paid in."

Two of the defendants, tenants of copyholders, by counterclaim asked for a declaration that they had the rights and privileges which they claimed, and for an injunction.

An application by the plaintiff was made in chambers to strike out the last-mentioned part of the counterclaim on the ground that "they raise again upon the counterclaim matters already disposed of upon the claim."

The application was refused, and the decision was affirmed by Stirling, J., on motion.

The plaintiff appealed.

Butcher, Q.C., and *Terrell*, for the appellant.

Duke, Q.C., and *Kerly*, for the respondents, were not called upon.

LINDLEY, M.R.—This is an application by the plaintiff to strike out a portion of the defendants' counterclaim, and it arises in this way. The plaintiff is the lord of the manor, and he brought an action with a double aspect against the defendants for taking rabbits. He has brought an action for trespass and damages, and he has claimed in the same action an injunction to restrain the defendants from taking game. The defendants have put in a defence, and they deny the plaintiff's right, and set up a custom entitling them to take rabbits; and in paragraph 7 of their defence they say this: "Denying liability, each of the defendants brings into court the sum of 1s., and says that the sum is sufficient to satisfy his liability to the plaintiff (if any) in respect of the matters complained of." Then they go on to state the counterclaim. They repeat by reference their allegation custom entitling them to take rabbits; they ask for a declaration that they are entitled to take rabbits, and for an injunction to restrain the plaintiff from interfering. That being the case, the plaintiff takes out the 9s. in satisfaction. He has given a proper notice in proper time, and the plaintiff accepts the 9s. paid into court in satisfaction of the claim in respect of which it is paid in. Now, the plaintiff having done that, seeks to stop this counterclaim and prevent the defendants from setting up the custom which they allege, because they must be treated as having estopped themselves by the admission they made by paying the money into court, and by the plaintiff taking it out in satisfaction, from saying that he has no right to take it out in satisfaction. That would appear to me to be the legal effect of what has been done.

Now, the money is paid into court under the existing rules of 1883. The question in controversy turns on the true effect of ord. 22, rr. 1 and 6. Ord. 22, r. 1, enables a defendant to pay money into court in one of two ways. It is confined to actions to recover debt or damages; it has nothing to do with ordinary injunctions. I do not say it has nothing to do with this action because this action is an action for damages as well as for an injunction. So far as it is an action for damages it is quite within a defendant's rights to pay the money into court. He pays it in in one of two ways under this rule. He can pay it in by way of satisfaction. If he does that, it shall be taken to admit the claim or cause of action in respect of which the payment is made. That is what he has not done. He has paid it in under the next part of the rule, which says instead of paying it in that way, he may with the defence denying liability pay money into court; not a word about it being, in that case, in satisfaction which shall be taken to admit the claim or cause of action. It does not mean that at all. It is obvious why; it is utterly inconsistent to say a man may deny liability and pay money into court, and admit it at the same time. Not if he does that—if a defendant with a defence denying liability pays moneys into court, then it is subject to rule 6. Rule 6 says: "When the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into court has been made is denied in the defence, the following rules shall apply: (1) The plaintiff may accept in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided" (that refers to rule 7) "notwithstanding the defendant's denial of liability, whereupon all further proceedings in respect of such claim or cause of action, except as to costs, shall be stayed." What does that mean? Does that mean that the plaintiff can by taking the money out of court treat a denial of liability as an admission of the liability? Can he force the defendant to admit that which he has strenuously denied? That appears to me to be nonsense. It means what it says. It says, if you like to take the money out in satisfaction, all proceedings in the action, so far as it relates to the matter in respect of which the money is paid in, are at an end. You are not to fight it out if you like to take it in satisfaction of all damages, and then the action is stopped. One sees the sense of that from the plaintiff's point of view and the defendant's point of view. The defendant says "I am not going to admit your right, but it is not worth fighting so far as the damages are concerned, and I shall pay 1s. into court and get rid of it so far." He cannot get rid of it so far as the injunction is concerned.

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Whether the plaintiff can in this action, as Stirling, J., thinks he can, go on with a view to an injunction may be possibly a question. I should think he could, because you cannot properly pay into court as a defence to an injunction. You can only treat a payment into court as in respect of that in which it can be properly paid in—the claim for damages.

Supposing the plaintiff cannot be wrong, which is not my view, and is not Stirling, J.'s, view so far as the injunction is concerned, what right has the plaintiff to ask us to strike out the counterclaim and prevent the defendant in his counterclaim setting up the custom on which he relies? It appears to me if the court were to accede to the plaintiff's contention it would enable the plaintiff to put the defendant in a position which the defendant carefully avoided being put in. That is to say, it is the plaintiff forcing upon the defendant an admission contrary to the protest of the defendant, who denies the whole thing. I think Stirling, J.'s, view is quite right, and I do not think that the cases referred to have really any bearing upon the present controversy.

I cannot help thinking, so far as the working out of these rules is concerned, the view taken by Cotton, L.J., in *Berdan* v. *Greenwood*, 26 W. R. 902, 3 Ex. D. 251, is right. That is to say, if the plaintiff goes on with this action for an injunction, or if the defendant goes on—if either goes on—and the plaintiff succeeds in establishing his right, there is no reason that I can conceive of why he should not get the costs of that controversy. Neither can I conceive why the defendant should not, if he is right—that being the real question—set up the custom of this manor; and to say that the custom of this manor cannot be investigated either now or hereafter because the plaintiff has taken this money in satisfaction of the damages is illogical and unreasonable, and altogether wrong.

RIGBY, L.J.—I agree with all that the Master of the Rolls has said, and I shall add only a few observations of my own. First of all I say that ord. 22, r. 1, is confined to the case of an action brought to recover damages. It does not mean that where an action is brought to establish a right, the consequences involved in rule 1 shall be that that right shall be established by the payment into court of money accompanied by a denial of liability. It would be very strange to me if it were so. I have no doubt that the money paid in here with a denial of liability was paid in respect of the action so far as it is an action for damages. That being so, I see really no difficulty on the construction of the rules as they stand. We were invited to consider several cases; but they are all distinguished from the present by the fact that down to the latest time before issuing the rules there was no such thing as payment of money into court which is now rendered legal along with a denial of liability. If you paid the money into court, it must be taken in satisfaction. Then the Judicature Act permitted of several inconsistent defences. The difficulty was first of all how to reconcile them. What they said in fact was, this is money paid in satisfaction. Another defence was denial of the right.

All the cases cited, so far as I can see, are absolutely and entirely right, and not in the least inconsistent with the new state of things that has permitted payment into court otherwise than in satisfaction along with denial of liability. It is contrary to the whole purport of the rule to suppose that a claim of right is settled because damages in respect of a past alleged infringement are settled by payment of the money and taking it out. I can see no reason, as far as I am concerned, why the plaintiff should not go on with his claim for right, and I can see no reason why the defendant should not go on with his counterclaim.

The result is, I consider Stirling, J., to have been right throughout, and as regards this appeal it is dismissed with costs.

Appeal dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Fulton & Pye-Smith*, Salisbury; *Horne & Birkett.*

From Q. B. Div. (Lindley, M.R., and Rigby, L.J.) — May 16.

WYATT v. PALMER. (a.)

Practice—Striking out statement of claim—Action to set aside judgment by default on ground of fraud—R. S. C., 1883, *ord.* 27, *r.* 15—*Payment into court—Action for malicious presentation of bankruptcy petition—Allegation of special damage.*

Notwithstanding the provisions of ord. 27, *r.* 15, *which provides a short method of setting aside a judgment by default, an action to set aside such a judgment on the ground of fraud is still, subject to the discretion of the court as to costs, maintainable without leave. The court will not, therefore, strike out as frivolous the statement of claim in an action for that purpose, though it may order the plaintiff to pay into court the amount of the judgment impeached. Nor will the court strike out as frivolous a statement of claim in an action for damages in respect of bankruptcy proceedings maliciously taken, on the ground that it does not contain an allegation that the plaintiff has sustained special damage.*

Appeal from Kennedy, J., at chambers.

The plaintiff in the above action, on the 14th of December, 1895, signed an agreement in writing by which he agreed the costs due by him to the defendant, a solicitor, for professional services, at £650, and executed an instrument of charge upon certain shares to secure that sum and interest.

In May, 1897, the solicitor delivered to the plaintiff two further bills of costs, amounting respectively to £275 3s. 9d. and £201 11s. 5d. for services alleged to have been rendered after the date of the agreement. In June, 1897, the solicitor commenced an action against the present plaintiff claiming payment (with certain small deductions) of those two further bills. The present plaintiff allowed judgment in that action to go by default, and on the 12th of July, 1897, judgment was entered for the solicitor accordingly for £221 1s. 8d. and costs.

On the 11th of November, 1897, the solicitor presented a bankruptcy petition against the present plaintiff, alleging that the plaintiff was indebted to him in the sum of £844 7s. 6d. for moneys due under the said agreement and the said judgment, and also alleging that the plaintiff had, with intent to defeat and delay his creditors, departed out of England on or about the 31st of July, 1897, and remained out of England till November.

On the 24th of March, 1898, the petition was dismissed, and the petitioner was ordered to pay the plaintiff's costs.

In March, 1898, the plaintiff commenced proceedings against the defendant to have the agreement set aside, and to have the defendant's costs and charges taxed. In July, 1898, an order was made setting aside the agreement and directing the defendant to deliver bills of the costs covered by the agreement. When the taxation took place and an account was taken between the plaintiff and the defendant it was found that there was due to the plaintiff a balance

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

which (including the plaintiff's costs of the taxation payable by the defendant) amounted to £75 5s. 1d. This the defendant was ordered to pay to the plaintiff.

In February, 1899, the plaintiff commenced the present action against the defendant in the Queen's Bench Division claiming damages for the bankruptcy petition, which he alleged to have been presented falsely, maliciously and without reasonable and probable cause; that the judgment of July, 1897, which he alleged to have been fraudulently obtained, should be set aside; and that the bills of costs for £275 3s. 9d. and £201 11s. 5d. should be ordered to be taxed. The defendant applied that so much of the statement of claim as claimed damages for the malicious presentation of the petition should be struck out on the ground that without an averment of special damage it disclosed no reasonable cause of action; and that the remainder of the statement of claim should be struck out unless the money secured by the judgment was paid into court or secured. On the 11th of April, 1899, the master refused this application, and, on the 1st of May, Kennedy, J., at chambers, dismissed an appeal against the master's order, but gave leave to appeal. The defendant appealed accordingly.

It was stated that both the master and the learned judge expressed themselves inclined to stop the plaintiff's action, but considered that they were bound by the case of *Cole* v. *Langford*, [1898] 2 Q. B. 36, 46 W. R. Dig. 133, to decide otherwise.

Joseph Walton, Q.C., and *Montague Lush*, for the appeal.—An action to set aside a judgment by default will not lie. The proper procedure is under ord. 27, r. 15. The old practice, which required an affidavit of merits, was not altered by that rule. Leave to commence such an action is necessary: *Flower* v. *Lloyd*, 25 W. R. 793, at p. 794, 6 Ch. D. 297, at p. 300. The claim for damages for malicious bankruptcy proceedings is frivolous, because to support such an action in respect of civil proceedings, special damage must be proved: *Cotterell* v. *Jones*, 11 C. B. 713.

They also cited *Cole* v. *Langford*; *Flower* v. *Lloyd*, 27 W. R. 496, 10 Ch. D. 327; *Baker* v. *Wadsworth*, 67 L. J. Q B. 301; 46 W. R. Dig. 133; and *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, 31 W. R. 668, 11 Q. B. D. 674.

Lawson Walton, Q.C., and *Muir Mackenzie*, for the plaintiff, were not called upon.

LINDLEY, M.R.—I do not think we should gain anything by taking further time to consider this case. It seems to me that it is certainly not a case for summarily striking out the statement of claim, which means putting an end to the plaintiff's action, on the ground that it is reasonably plain he has really no chance of success. I do not think we can at this stage say that the plaintiff here has no chance. I do not, of course, say anything about the merits of the dispute; but I do not think we can deal with the case on such a ground. The facts, so far as we have to consider them, are simple. Here is a judgment by default, which has been obtained by the present defendant against the present plaintiff. The present plaintiff has now brought an action to impeach that judgment on the ground of fraud. On behalf of the present defendant it is then said that that action will not lie. That proposition, I must say, was quite new to me as an equity lawyer, and I confess I was startled by it. I of course knew perfectly well that there were summary methods of getting rid of a judgment which had been obtained by default; but the broad proposition that a judgment by default could not be impeached by bill on the ground of fraud, certainly startled me. On refreshing my memory by reference to the books on pleading, I find that my first impression is right. In equity a judgment might be impeached by original bill without leave. Why, then, should not a judgment by default be so impeached? Suppose the default was of this sort—that a man was induced by fraud not to appear in the action, whereby judgment was got against him. To say that a judgment obtained in that way could not be impeached by an action would, I think, be quite wrong. I am not prepared to say that because the rules now provide a shorter method of setting aside a judgment by default, you cannot any longer have recourse to the old method. Although the old method of proceeding by bill is now called an action, the old jurisdiction to set aside a judgment by default has not been touched or taken away.

But there is another subordinate question. There being now a short method of doing, by an application which the court would grant only upon terms, what the plaintiff seeks to do by this action, it is worthy of consideration whether, if the plaintiff chooses not to avail himself of that procedure, but prefers to have recourse to the longer, more expensive, and more dilatory method of an action, he should not be put upon the same terms which the court would have imposed if he had adopted the shorter method—*i.e.*, the terms of paying into court the amount of the judgment he seeks to set aside. But the answer to that question is that it would not be right here to order payment into court, because the defendant has himself admitted that he is a secured creditor. Therefore I pass over that part of the case, which, in view of the actual facts, it seems to me it is not necessary to consider. As a general proposition, it strikes me as dangerous and unadvisable for any court to stop summarily an action brought on the ground of fraud. An allegation of fraud is a very serious matter, and ought not to be made except where there is some adequate proof to substantiate it. But for us to say to the plaintiff that he shall not have an opportunity of substantiating such an allegation would not, in my opinion, be right.

Then there is another point which is less important. It is said that the plaintiff's action is frivolous so far as it is grounded upon a malicious proceeding in bankruptcy. It is said that an action would not lie for such a proceeding, even if malicious, without proof of special damage to the plaintiff. I do not know whether an action will lie or not; but even if it will not, it by no means follows that we can now declare the action to be frivolous. The suggestion that we can, does not at all commend itself to me. The question whether the plaintiff's action is maintainable on such a ground requires careful consideration, especially since the alteration in the law relating to bankruptcy which enables people who are not traders to be made bankrupt. To ask us summarily to stop this action and to strike out the statement of claim, or to do what is asked for here in the alternative, is plainly hopeless. A long argument would be necessary before we could ascertain what we ought to do. Now, applications of this kind ought to be made only for the purpose of stopping actions which are evidently frivolous. This action is one which must be tried on its merits, both on the questions of law and on the facts. In my opinion, therefore, this appeal ought to be dismissed.

RIGBY, L.J.—I agree. This case is certainly one in which we can arrive at a conclusion only by a consideration of both sides.

Appeal dismissed.

Solicitors, *Lindo & Co.*; *Sydney R. Pollard.*

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) May 13.

EDWARDS v. GODFREY. (a.)

Master and servant—Employers liability—Accidental injury to workman—Dismissal of action under the Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42)—*Subsequent proceedings under the Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37).

Where a workman has brought an action against his employer to recover damages independently of the Workmen's Compensation Act, 1897, *for personal injuries caused by accident, and the action is dismissed, the workman cannot subsequently take proceedings to recover compensation under the Act of* 1897 *in respect of the same injuries, the only remedy being to apply, under section* 1, *sub-section* 4, *of the Act of* 1887, *as soon as the previous action was dismissed, to the court in which the action was tried to assess compensation under the Act of* 1897.

Appeal from an award of the judge of the Wandsworth County Court under the Workmen's Compensation Act, 1897.

The respondent, who was a workman in the employment of the appellant, was, on the 12th of September, 1898, injured by an accident arising out of and in the course of his employment.

He brought an action against the appellant in the Wandsworth County Court to recover compensation, under the Employers' Liability Act, 1880, when verdict and judgment were entered for the appellant.

The respondent did not then apply to the judge under section 1, sub-section 4, of the Compensation Act, 1897, to assess compensation under that Act, but subsequently took proceedings to recover compensation under the Act of 1897, and on the hearing before the judge of the Wandsworth County Court an award of 11s. a week was made in favour of the respondent.

Frank Gover, for the appellant.—The respondent having brought an action against the appellant under the Employers' Liability Act, 1880, cannot take fresh proceedings to recover compensation under the Workmen's Compensation Act, 1897. Section 1, sub-section 2 (*b*), of the Act of 1897 gives a workman the option of taking proceedings under the Act of 1897 or of bringing an action independently of that Act, but he cannot take both proceedings. If an action is brought independently of the Act and fails, then by sub-section 4 the court in which the action is tried shall, if the plaintiff so choose, proceed to assess compensation under the Act of 1897, and in such case the costs of the action may be deducted from the compensation. This is the only mode in which a workman, who has brought an action against his employer to recover damages for personal injuries and failed, can get compensation under the Act of 1897 for those injuries. If the workman were allowed to take fresh proceedings under the Act of 1897, after having failed in his action, a great hardship would be inflicted on the employer, as the costs of the action could not be deducted from the compensation: Schedule I., clause 14. The claim under the Act of 1897 is therefore barred.

Colam, for the respondent.—The dominant idea in section 1, sub-section 2 (*b*), of the Act of 1897 is to prevent the common law liability of the employer or his liability under the Employers' Liability Act, 1880, being taken away. This sub-section only refers to a case where there is negligence or a wilful act on the part of the employer or of some person for whose act or default the employer is responsible. But there is no provision that the workman may not take proceedings under the Act of 1897 after having failed in an action against his employer. The sub-section only says that the employer shall not be liable to "pay" compensation twice over. A double remedy is given, but not double compensation. Sub-section 4 does not apply, because the plaintiff in the action did not ask to have compensation under the Act of 1897 assessed. The claim therefore is not barred.

A. L. SMITH, L.J.—The respondent first brought an action against his employer under the Employers' Liability Act, 1880. In that action the respondent failed, the action being dismissed, and in ordinary circumstances that would have been an end of the matter, for in any other proceedings in respect of the same cause of action the employer could have pleaded *res judicata*. Subsequently, however, the respondent took fresh proceedings under the Workmen's Compensation Act, 1897, in respect of the same cause of action, and an award was made in the respondent's favour. It is contended on behalf of the employer that the respondent, having exercised his option of taking proceedings independently of the Act of 1897, cannot now, when he has failed in those proceedings, revert back to the Act of 1897. Whether the respondent can do so or not depends upon section 1, sub-sections 2 (*b*) and 4, of the Act of 1897, and some light is thrown on the matter by clause 14 of Schedule I. Section 1, sub-section 2 (*b*), gives the workman the option in the circumstances there mentioned of proceeding under the Act or independently of it. In the present case the respondent exercised his option by bringing an action against the employer under the Employers' Liability Act, 1880. In that action he failed. In such a case sub-section 4 comes to the aid of the workman, and gives him an advantage when he has failed in the action—it gives him a *locus penitentiæ*—by empowering the court which has seisin of the action, if requested by the workman, to assess compensation under the Act of 1897. If it had not been for that sub-section the matter would have been *res judicata*. While giving the workman that benefit the sub-section confers a benefit also upon an employer by giving the court jurisdiction to deduct from the compensation awarded the costs caused by the workman having wrongly brought the action. This seems to me to be the true construction of the Act. Any other construction would entail serious consequences. If a workman, having failed in an action, could take fresh proceedings under the Act of 1897, the result would be that he would never apply under section 1, sub-section 4, to the court that tried the action to assess compensation under the Act of 1897, but would take fresh proceedings under the Act of 1897, when there would be no power to deduct the costs of the former action from the compensation awarded. The claim under the Act of 1897 is therefore barred, and the appeal must be allowed.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitor for the appellant, *E. J. H. Carter*.

Solicitor for the respondent, *G. Aplin Nichols*.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) May 10, 13.

In re BRITISH GOLDFIELDS OF AFRICA (LIMITED). (*a*.)

Company—Winding up—Proof—Costs of proceedings commenced before winding up—Contingent liability—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.

An application under section 35 *of the Companies Act*, 1862, *to rectify the register and for a return of money paid is not a claim for unliquidated damages.*

After a successful application to rectify the register of shareholders, sums paid by applicants for shares are provable debts in the liquidation of the company; and the costs of rectifying the register, being costs of obtaining an order without which the debts could not be recovered or admitted to proof, may properly be added to the provable debts.

Appeal from Wright, J.

In November, 1896, an application was made under section 35 of the Companies Act, 1862, by certain shareholders of the company that the costs incurred by them in proceedings taken before the winding up for the purpose of having their names removed from the register of shareholders might be paid by the liquidator. These shareholders had applied for shares on the faith of representations contained in the prospectus of the company and had, after allotment, commenced proceedings against the company for the purpose of having their names removed on the ground of misrepresentation.

Fifty-six shareholders had commenced proceedings against the company—two of these actions were proceeded with, the other fifty-four applicants consenting to postpone their claims till these two cases had been settled. No order was made that they should abide the result of the two actions which were to be tried, nor as to the costs of the actions which were to stand over. These two actions were successful, and these two shareholders' names were ordered to be removed from the register.

Before, however, the other fifty-four could proceed with their actions, in January, 1898, a petition was presented and a compulsory winding-up order was made against the company.

The liquidator admitted their right to have their names removed from the register, and admitted the liability of the company to repay the money they had given for their shares. They now claimed the right to be repaid the costs they had incurred in the actions commenced when the company was a going concern. This the liquidator opposed on the ground that the bankruptcy rule applied to a winding up, and that costs incurred in proceedings before bankruptcy cannot be proved, and that therefore the applicants were not entitled to add such costs, which did not come within section 37 of the Bankruptcy Act, 1883, to the amount of their debt.

On the matter being referred to Wright, J., his lordship held that the liquidator should add to the debts the taxed costs incurred before the winding up, and that the applicants might prove for the same in the winding up of the company.

Section 37 of the Bankruptcy Act, 1883, enacts as follows: "(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy. (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice. (3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

The liquidator appealed.

Gore-Browne, for the appellant.—This is not a debt or liability, present or future, or contingent, within the meaning of the Act. Until there is an order for payment of costs it is not a liability, and after a winding-up order the costs cannot be proved for. Prior to 1875 the question would have been governed by section 158 of the Companies Act, 1862, where no distinction was made between debts incurred before and after bankruptcy; that is now cut down by section 10 of the Judicature Act, 1875, in the case of an insolvent company: *Ex parte Bluck*, 35 W. R. 720, 57 L. T. Rep. 419.

Kenyon Parker, for the respondents.—I rely upon section 35 of the Companies Act, 1862, under which my application was made. The Bankruptcy Act has nothing to do with it; but even if it has, this is a contingent liability which can be proved for.

Cur. adv. vult.

May 13.—The written judgment of the court was delivered by

LINDLEY, M.R., who stated the facts and continued: Upon carefully examining section 37 of the Bankruptcy Act, 1883, and the decisions upon it and corresponding sections in earlier Bankruptcy Acts, I am satisfied that the order appealed from is correct.

The 10th section of the Judicature Act, 1875, has rendered section 37 of the Bankruptcy Act, 1883, the enactment by which the question must be determined; section 158 of the Companies Act, 1862, is no longer the governing section in a case like this. The decisions on section 37 have established the following rules which are consistent and reasonable and quite in accordance with the language of the section. If an action is brought against a person who afterwards becomes bankrupt for the recovery of a sum of money and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise. If, therefore, what is recovered is unliquidated damages "arising otherwise than by reason of a contract, promise, or breach of trust" that sum is not recoverable unless judgment, or at least a verdict for it has been obtained before adjudication, or, now, the receiving order; and if the sum recovered is not provable, neither are the costs of recovering it: *In re Newman, Ex parte Brooke*, 25 W. R. 261, 3 Ch. D. 494; *In re Bluck*. On the other hand if what is recovered is provable so are the costs of recovering it: see *Emma Silver Mining Co.* v. *Grant*, 29 W. R. 481, 17 Ch. D. 122. If the action against a person who becomes bankrupt is unsuccessful no costs become payable by him or out of his estate, and no question as to them can arise. But if an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt, they are provable: *Ex parte Peacock*, 23 W. R. 755, L. R. 8 Ch. App. 682. On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy, nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy. This was the case of *Vint* v. *Hudspith*, 33 W. R. 738, 30 Ch. D. 24.

An application under section 35 of the Companies Act, 1862, to rectify the register and for a return of money paid is not a claim for unliquidated damages. It is a claim for two things—viz., first, for the removal of an impediment which prevents the demand for a return of the money from being successful; and, secondly, it is a demand for the repayment of a liquidated sum, and not for unliquidated damages. The register being rectified, the sums paid by the applicants are clearly provable debts, and the costs of rectifying the register are costs of obtaining an order without which these debts cannot be recovered or admitted to proof. The costs are, therefore, properly added to the debts provable. It is hardly necessary to add that the ordinary bankruptcy rule by which the costs of proving debts in bankruptcy have to be borne by the proving creditors (Schedule II., rule 6) has no application to such costs as are in question here. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, *Cheston & Sons; Wyatt-Digby, & Co.*

From Prob. Div. & Adm. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — May 10.

LOWE *v.* LOWE. (*a.*)

Divorce — Wife's petition — Answer alleging wife's adultery with third party, and no claim for cross-relief — Co-respondent — Intervention — Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 *Vict. c.* 32), *s.* 2.

If, on the presentation of a petition for divorce, a respondent merely puts in an answer to the petition asking that the petition shall be dismissed and no further relief, the intervention of a third party, whose name has been mentioned in the answer, is not permissible. He can only intervene if the answer claims such further relief as would admit of the answer being treated as a cross-petition.

Harrop *v.* Harrop, [1899] *P.* 61, *approved.*

Appeal from Jeune, P.

A wife presented a petition praying for the dissolution of her marriage on the ground of her husband's adultery and cruelty. The husband, in his answer, denied the charges brought against him, and alleged that the wife had committed adultery with a gentleman whom he named. He asked simply for the wife's petition to be dismissed, and claimed no further relief. The gentleman charged with adultery with the wife denied the charge on oath, and took out a summons for leave to intervene in the suit.

The summons being adjourned into court, Jeune, P., said that no case had been cited in which leave to intervene had been granted, unless the applicant had some direct pecuniary interest in the suit, and such was not the case here. Personally, he should be very glad to see a right of intervention given to anyone whose name was introduced into a suit. Being bound by the authorities, he must dismiss the application.

By section 28 of the Matrimonial Causes Act, 1857, "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage the court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent." By section 2 of the Matrimonial Causes Act, 1866, "In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought, on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife, on the ground of her adultery or cruelty, the court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief."

The applicant appealed.

Carson, Q.C., and *Barnard*, for the appellant.—It is not right that this charge of adultery should be tried in the appellant's absence. By section 2 of the Matrimonial Causes Act, 1866, the court may treat an answer to a petition as if it were a cross-petition, and may give the same relief as might have been given had a cross-petition been presented. The contention on the other side is that, if a respondent asks for any other relief beyond a dismissal of the petition against him a third party may intervene; but if he asks simply for a dismissal of the petition on grounds stated, a third party, although his name is mentioned, may not intervene. This cannot have been the intention of the Legislature.

They referred to *Wheeler* v. *Wheeler and Rhodes*, 14 P. D. 154, 38 W. R. Dig. 71; *Grieve* v. *Grieve*, [1893] P. 288; and *Harrop* v. *Harrop*, [1899] P. 61.

Inderwick, Q.C., and *Willock*, for the respondent.—In the old ecclesiastical cases there is no case in which any alleged adulterer, man or woman, has been a party to the suit either on his own application or originally. A party was only allowed to intervene where he or she had some direct pecuniary interest in the suit. Here the husband is only defending himself; he does not attack the third party, nor does he wish to have the marriage dissolved.

Barnard, in reply.—There was a recent case, not reported, in which leave to intervene was given under precisely similar circumstances. The Queen's Proctor cannot intervene until after decree: the appellant ought not to be forced to wait until after a decree has been made before he has an opportunity of defending himself.

LINDLEY, M.R.—I do not think we shall gain anything by taking time to consider this case. We have considered the sections and arguments carefully, and it seems to me that we cannot disturb the judgment appealed against. There appears to me to be a crying injustice in investigating in public the conduct of a person who is accused of adultery without his being able to defend himself. The present state of things has grown up out of the practice of the old Ecclesiastical Courts in cases of divorce. The inquiry in such cases was not technically a private inquiry, but there were no jury, no witnesses, and no scandal, and it did not take place under any statute. It was not really a trial, but only an inquiry into the conduct of the husband and wife with other people, and nothing was heard about it; but now that is all altered. Everything is in public; and the injury is enormous, and very great and serious injustice is done to a person whose conduct is assailed with the publicity of modern times, when he is not able to say a word in his defence. That, however, is for the Legislature, not for us.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

The object of section 2 of the Matrimonial Causes Act, 1866, is plain enough; it is simply to relieve a husband or a wife against whom a petition was presented from the necessity of presenting a petition for cross-relief. Under the old practice if a husband was assailed by his wife he could put in a defence, but could not without a cross-petition obtain any relief against her. It was felt that it would simplify matters if the defence were treated as a cross-petition, and the object of the section was to provide for that. The section says: "If the respondent shall oppose"—that must, I suppose, mean by putting in a defence in the ordinary way—the court may "on his or her application," give the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief. When is the application to be made? The expression "on his or her application" is ambiguous. If the constructi n put upon it is that which has always been put upon it by the Divorce Court, if it is read literally, everyone knows that all the husband has to do is to apply for the relief he seeks, and in that case the section has full effect given to it. If, on the other hand, the husband chooses not to take advantage of the section, no injustice is done at all. That is to say, if, when he puts in his defence, he asks the court to treat it as a cross-petition, it will be so treated; but if he does not ask that, and says nothing at all about it, it is treated as an ordinary defence, and he cannot ask for it to be treated otherwise. I do not mean to say that the court could not give leave to amend, but I cannot conceive that it would listen to an application for leave to amend after the trial. That could not have been intended. It would be opposed to all the principles of justice. Before trial the court could give leave to amend up to the last moment.

The practice has always been to treat the defence simply as a defence unless and until it is amended, or unless it is so worded as to show that the husband wished it to be treated as something more. If we were to accede to the argument of counsel for the applicant, we should compel the husband to embark on a much wider inquiry. He need not ask for any relief at all. Why should the court force his hands and say he must? To do that does not strike me as good sense at all. It comes to this, therefore: If a husband puts in a defence, and does not ask by that defence for any relief further than the dismissal of the petition, he is at liberty to do so, and no one can force him to do more. But if, on the other hand, as in the case of *Wheeler* v. *Wheeler and Rhodes*, he draws his defence in such a way that it can be fairly construed as asking for some relief further than the dismissal of the petition, the intervention of a third party can be allowed.

When we look into the authorities, and notwithstanding the ambiguous expressions in "Shelford on Marriage" which have been alluded to, I prefer to follow the recent decisions, including *Harrop* v. *Harrop*, before Barnes, J. I think that Jeune, P., was right, and that the appeal must be dismissed with costs.

RIGBY, L.J.—I am of the same opinion.

COLLINS, L.J.—I am of the same opinion, and I have nothing to add to the reasons already given.

Appeal dismissed.

Solicitors for the applicant, *Walters, Deverell, & Co.*

Solicitors for the respondent, *Janson, Cobb, Pearson, & Co.*

High Court of Justice.

Chan. Div. Stirling, J. } Feb 15, 16, 22; April 19.

BOOSEY v. WHIGHT & CO. (a.)

Copyright—Infringement—"Book"—"Sheet of Music"—Perforated sheets for use in a mechanical musical instrument—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 15.

Rolls of perforated sheets were used as parts of a machine sold by the defendants for the production of musical sounds. It was possible, with considerable trouble, to read the notes denoted by the perforations.

Certain words (indicative of pace and expression) which were found in the sheets of music published by the plaintiffs were also printed on some of the defendants' rolls.

Held, that the Copyright Act, 1842, *did not prevent the defendants from making or selling the rolls so far as they contained perforations, but that there ought to be an injunction to restrain them from adding the words taken from the plaintiff's music sheets.*

This was an action by the proprietors of the copyright in the music of three songs, known as "My Lady's Bower," "The Better Land," and "The Holy City," to restrain an alleged infringement. No question was raised as to the plaintiffs' title to the copyright, or to their right to sue for infringement. The sole question in the action was whether the copyright had or had not been infringed.

The facts as stated by Stirling, J., were as follows: "The acts complained of consist in the sale by the defendants of perforated sheets of paper for use in an instrument called the Æolian, which externally bears a considerable resemblance to a piano, but is a wind instrument worked mechanically, but furnished with stops, swells, and pedals, by means of which changes in time and expression are effected. It contains forty-six pipes and reeds, each of which sounds a particular note. The sheets in question are made in the form of rolls, and when placed in the instrument are unrolled by its action. They are so prepared that whenever a perforation passes under a particular pipe and reed the appropriate note is sounded. The perforations are made in straight lines parallel to the edges of the rolls, so that all perforations in the same line give the same note. The perforations are of different lengths, so that if the same time be kept, as would be the case if the machine is left to itself, the length of the perforation indicates the duration of the note. At the beginning of each roll is printed a statement as to the key in which the piece of music is written. The object of this is stated to be, and I see no reason to doubt it, to enable a person desirous of so doing to obtain the vocal music to which the instrumental music is an accompaniment. The rolls contain no indications of any change of key which may occur. There are, however, printed on some of them, though not on all, certain words which are found in the sheets of music published by the plaintiffs, such as *andante, moderato, piano, crescendo*, indicating the pace and expression at and with which the music ought to be played. These words are visible to the player, and, indeed, are obviously intended for his guidance. If one of these rolls be introduced into the instrument, the music will in ordinary course be produced at the same pace and with the same degree of loudness; these are altered by the use of the stops;

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

and the skill of the player appears mainly to consist in availing himself of these aids so as to produce the best effect. The Æolian is made in two sizes. The rolls used in both are constructed on the same principle; the only difference appears to be that in one case they are about an inch broader than in the other. It was admitted by the defendants' counsel that it is quite possible to prepare a key by which the notes corresponding to the perforations can be copied down, and, in fact, such a key has been prepared and applied to one of the pieces of music in question. No witness was called who professed to be able to read these rolls in the same way as an ordinary sheet of music, and, indeed, all that is said by Mr. Boosey, one of the plaintiffs, was that 'any person acquainted with the perforation of the sheets sold by the defendants could write out the music in the ordinary notation therefrom.' The defendants' witnesses said that these rolls conveyed no idea of music to them; but they were accustomed to the ordinary notation, and all, or most of them, admitted on cross-examination that they would be able to say the same thing of music written in the tonic sol-fa notation or that used by the blind. I think it is possible that with considerable trouble a person might so far master the scheme according to which the perforations are made as to be able to read the notes thereby denoted, but no one is shown ever to have done so. The result of the evidence appears to me to be that the information conveyed by the rolls to the mind of the reader would, to a substantial degree, be the same as that afforded by a sheet of music in the ordinary notation, but would be in various ways less complete. It also appears to me that for this purpose the rolls constitute an extremely cumbrous system of writing music, hardly available without the use of some mechanism which at present does not exist. I think it is improbable that anyone would ever go to the trouble of acquiring the art of reading these rolls."

The Copyright Act, 1842, s. 2, provides: "That in the construction of this Act the word 'book' shall be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published; . . . that the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied; . . ."

Butcher, Q.C., and *Scrutton*, for the plaintiffs.—This is a question of infringement of copyright. These rolls amount to a system of notation, and can be reproduced in ordinary notation. The right conferred by the Copyright Act, 1842, ss. 15, 17, is to prevent any form of multiplication of copies: *Novello* v. *Sudlow*, 12 C. B. 177; *Warne* v. *Seebohm*, 36 W. R. 686. 39 Ch. D. 73; *Nicols* v. *Pitman*, 32 W. R. 631, 26 Ch. D. 374. These cases show that the symbols used are of little importance. The real question is whether you are multiplying copies. The particular notation or form of symbols used is immaterial. There is more than one system of notation, and these sheets merely amount to a new system of notation: *Hanfstaengl* v. *Empire Palace Co.*, 42 W. R. 681, [1894] 3 Ch. 109. The object of all copyright is to prevent anyone stealing the brains of the author: *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420, 43 W. R. Dig. 350; *Bach* v. *Longman*, Cowp. 623; *D'Almaine* v. *Boosey*, 1 Younge & Coll. Ex. 288.

They also referred to *Wall* v. *Taylor*, 31 W. R. 712, 11 Q. B. D. 102.

E. Cutler, Q.C., *Moulton, Q.C.*, *T. Terrell, Q.C.*, and *Eustace Smith*, for the defendants.—These rolls or sheets are purely mechanical. They do not represent music, but cause it. They are not intended to be, and cannot be, read. The Act only grants copyright in a book which is there defined so as to include a piece of music. The author of a piece of music has also a right to restrain public performances, but the question of public performance is not raised here. No one could believe that the word "book" includes a barrel organ, but that case is practically identical with the present. Reproduction of musical sounds by mechanical methods was purposely omitted from the scope of the Act: *Maple* v. *Junior Army and Navy Stores*, 31 W. R. 70, 21 Ch. D. 369; *Dicks* v. *Brooks*, 29 W. R. 87, 15 Ch. D. 22; *Davis* v. *Comitti*, 54 L. J. Ch. 419, 33 W. R. Dig. 54. The last case cited governs the present case. These rolls are of no use without the machine. This is a question of interpretation of the section. At the time the Copyright Act of 1842 was passed mechanical methods of reproducing tunes were well known. These rolls are part of a machine, and are not included in the Act.

They also referred to *Scott* v. *Stanford*, 15 W. R. 757, L. R. 3 Eq. 718.

Butcher, Q.C., in reply.—The main question is what is a sheet of music. The sheet need not be of paper, it may be of metal. The sheet may be of any form; it includes a sheet of any material or shape. It is such as includes any record of notes that can be reproduced as music. Something is required to intervene between symbols and sounds—it need not necessarily be a human intelligence. The record itself is not of importance, but its capacity to be reproduced into sound. The precise notation of the record is not of importance, or the means by which it is done. The copyright is not in the symbols but in the air.

STIRLING, J., stated the facts as above, and continued: No question arises as to the right of performance of these pieces under section 20 of the Copyright Act of 1842. What is in dispute is whether the sale of these rolls constitutes an infringement of the copyright vested in the plaintiffs under the earlier part of the Act. This turns on the construction of section 2, by which the word book is to be construed to mean and include (amongst other things) every sheet of music separately published, and the word copyright is to be construed to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which the word is applied in the Act, including, therefore, a sheet of music. The contention of the plaintiffs is that the rolls are copies of a substantial part of what is found in the sheets published by them, though expressed in a somewhat unusual and difficult form of notation, and consequently that the sole and exclusive liberty of multiplying copies is infringed, just as the publication in shorthand of an ordinary piece of letterpress would be an infringement of the copyright therein: see *Nicols* v. *Pitman*. For the defendants it is urged that the rolls really form parts of machines for the production of musical sounds, and that the Legislature in passing the Copyright Act shows no intention of interfering with such mechanism. In my opinion the latter view is in the main to be preferred. It was decided in *Bach* v. *Longman* that the copyright conferred by the statute 8 Anne, c. 19, on the authors of printed books extended to printed music. This decision has been embodied in section 2 of the Act of 1842, as quoted above. The copyright conferred by that Act appears to me to be the exclusive liberty of multiplying copies of something in the nature of a book. The rolls, so far as they contain perforations, are, in fact, used simply as parts of a machine for the production of musical sounds, not for the purpose of a book. They are used as a means of appealing to the mind directly through the ear; not, as in the case of

a book, through the eye of an ordinary reader, or through the sense of touch in the case of a blind person. Some mechanical instruments for the production of musical effects, as, for example, the musical-box and the barrel-organ, seem to have been well known in the last century, long prior to the passing of the Act of 1842. It was admitted by Mr. Scrutton in his able argument for the plaintiffs that, if the construction sought to be placed by them on the Act be correct, the cylinder of a musical-box is a sheet of music within the statute. If this had been within the contemplation of the Legislature I cannot but think that the framers of the Act, who were careful to point out what the word "book" was to mean and include, would have been no less careful to explain that the term sheet of music was to mean and include something which would not fall within the ordinary acceptation of the words. There is no decision in this country precisely in point. In *Hollinrake* v. *Truswell* it was held that a cardboard pattern sleeve containing on it scales, figures, and verbal directions for adapting it to sleeves of any dimensions was an instrument or tool incapable of copyright under the Act of 1842, though possibly the subject-matter of a patent. In the statutes relating to copyright in paintings and engravings limitations of various kinds have been placed on the meaning of the word "copy": see *Dicks* v. *Brooks*; *Hanfstaengl* v. *Empire Palace Co.*; and *Hanfstaengl* v. *Baines*, [1895] A. C. 20, 43 W. R. Dig. 52. In my judgment the Act of 1842, fairly construed, does not prevent the defendants from making or selling these rolls so far as they contain perforations. I think, however, that in adding to them words, taken from the plaintiffs' music sheets, for the purpose of indicating to the player on the instrument the pace and expression at and with which the music ought to be played, the defendants have gone beyond their rights, and that there ought to be an injunction to restrain them from so doing. Under all the circumstances I propose to make no order as to costs.

Solicitors, *Howlett & Wilkinson*; *Maples, Teesdale, & Co.*

Q. B. Div.
(Darling and Channell, JJ.) May 16.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BISHOP (SURVEYOR OF TAXES) (a.)

Inland Revenue—Income tax—Life Assurance company—Annual profits and gains—Mutual assurance—Returns of premium as "rebate or discount"—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sched. D.*

A life assurance company by its charter limited the interest payable to the holders of its capital stock to 7 per cent., and the earnings and receipts of the company over and above this fixed dividend, and the losses and expenses on the year's trading were to be accumulated. The insurance business of the company was expressed to be conducted upon the mutual plan, and every five years each policy-holder was to be credited with a share of the accumulated surplus to be applied by him either in the purchase of an additional amount of insurance payable at his death, or at his option to the purchase of an annuity in reduction of his future premiums. The amount of the surplus funds to be so divided at these quinquennial distributions was to be entirely a matter for the discretion of the directors of the company.

Held, that the accumulated funds of the company were not the property of the policy-holders, and that the returns from surplus did not pass to them by the constitution of the company, but were payments made them arising out of the "profits" earned by the company, and the money so to be divided had rightly been assessed to income tax under Schedule D.

Last v. London Assurance Co., 34 *W. R.* 233, 10 *App. Cas.* 438, *followed*; New York Insurance Co. v. Style, 14 *App. Cas.* 381, 38 *W. R. Dig.* 89, *approved and distinguished.*

Case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London, after meetings held on the 6th of August, 1896, and the 6th of May, 1897, when the Equitable Life Assurance Society of the United States appealed against three assessments made upon them under Schedule D of the Act 16 & 17 Vict. c. 34, for the years ended the 5th of April, 1895, 1896, and 1897. The assessments were in respect of what were said to be "profits" for the three years in question at the rate of £80,000 a year, but it had been agreed that if the society were held liable there should be an inquiry into the exact figures.

The facts were thus stated: The company was established by charter under the insurance laws of the State of New York. The principal office for the transaction of business was located in the city of New York.

Article 3 of the charter provided that the capital of the company should be 100,000 dols. in cash divided into 1,000 shares of 100 dols. each, which should be personal property transferable only on the books of the company in conformity with its bye-laws. The holders of the capital stock might receive a semi-annual dividend on the stock so held by them not to exceed 3½ per cent. of the same, such dividends to be paid at the time and in the manner designated by the directors of the company. The earnings and receipts of the company over and above the dividends, losses, and expenses were to be accumulated.

By article 4 it was provided that the corporate powers of the company should be vested in a board of directors and should be exercised by them and by such officers and agents as they might appoint.

By article 5 the directors were empowered to elect annually a president and vice-president, and to appoint a secretary and other officers, and to determine the rates of premium and the amounts to be insured on any one life, and the terms of such insurances.

Article 6 was as follows: "The insurance business of the company shall be conducted upon the mutual plan. . . . The officers of the company within sixty days from the expiration of the first five years from the 31st of September, 1859, and of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, which shall exhibit its assets and liabilities, both present and contingent, and also the net surplus after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policy-holder shall be credited with an equitable share of the said surplus, and such equitable share, after being ascertained, shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself) expressing the reversionary value of such equitable share at such interest as the directors may designate, or, if any policy-holder so direct, such equitable share of surplus shall be applied to the purchase of an annuity to be applied in the reduction of his or her future premiums. In case of death the amount standing to the credit of the party insured at the last preceding striking of balance shall

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

be paid over to the person entitled to receive the same, and the proportion of surplus equitably belonging to him or her at the next subsequent striking of balance shall also be paid when the same shall have been ascertained and declared."

It was also provided that the officers of the company every five years were to cause a general balance statement of the affairs of the company, which should show the amount received during the preceding five years for premiums, interest, and annuities, and the amounts paid for losses, expenses, and otherwise, and the balance remaining in the treasury, together with the manner in which the same is invested. A share capital of 100,000 dols. was required to be subscribed by every insurance company by the laws of the State of New York (being chapter 463 of the year 1853), and the capital was always invested in United States Government bonds and deposited with the Controller of the State of New York. A branch or department of the company for Great Britain and Ireland had been established, and carried on business at No. 6, Prince's-street, in the City of London, under the management of a London board of directors, with a chairman, secretary, general manager, and trustees. It was admitted that the board of directors alone by their officers manage the affairs of the company. They declared the amount that should be divided amongst the policy-holders, who had no power to interfere in the management, and the amount to be set aside for the reserve. The undivided surplus over and above the company's liabilities amounted to £7,787,458 for the year 1894, £8,442,502 for 1895, and £8,995,245 for 1896. Policies were also granted by the company to persons without right of participation in the profits of the company. It was not contended, on behalf of the company, that they were exempt from income tax in respect of this source of profit. The net premiums and interest after provision for liabilities, including death claims, &c., are applied to pay expenses, as determined by the directors in their discretion, and to provide a reserve as required by the regulations of the Insurance Department of the State of New York, then a dividend not exceeding 7 per cent. is paid to the shareholders on their capital, then the balance, as the directors may determine, is invested to provide for a division amongst the participating policy-holders of the company by way of bonus on or increase to the amount insured according to such principles as may from time to time be adopted by the society (through the directors) for such distribution.

The contentions on the part of the Inland Revenue were that the company and its assets were not the property of the policy-holders, and that they have neither control, power, liability, nor right except such as the shareholders by their directors choose to give them; that the policy-holders were not members of the company, but were third persons who contract with the company. That the accumulated funds of the company were not the property of the policy-holders, but were accumulated profits, and that the company could not properly claim to be a mutual insurance company; that the provision of article 6 of the charter that the insurance business of the company should be conducted upon the mutual plan could only relate to the division of such portion of the profits as the directors might determine; that the division of a portion of the profits over and above the fixed dividend payable to the shareholders did not alone make the company a mutual insurance company; and that the net surplus so far as the same was derived from premiums received in the United Kingdom was a profit or gain of the company liable to be assessed to income tax under Schedule D to the Act 16 & 17 Vict. c. 34.

The company cited the case of *New York Life Insurance Co.* v. *Styles*, 14 App. Cas. 381, 38 W. R. Dig. 89, and thereupon contended that premiums paid to the company were contributed as an estimated amount required to cover the risks for the year and the necessary expenses, and that any surplus or balance is not profit or gain liable to assessment, but is merely an excess of contribution over expenditure, which they contended would be ultimately returned to the contributors.

The Commissioners of Taxes were of opinion that the company was not a mutual insurance company within the meaning of the case above cited and was liable to be assessed to income tax on profits or gains made in the United Kingdom, and they confirmed the assessments.

From that decision the company appealed.

Sir Robert Reid, Q.C. and *C. H. Neish* (with them *Foote, Q.C.*).—We submit that premiums paid to the company are contributed as an estimated amount required to cover the risk for the year and the necessary expenses; they appear in the balance-sheet as "profits" because there is a statutory duty to return them in the credit account, but it does not follow that any surplus or balance which appears in the balance-sheet under this head is a profit and gain liable to assessment, for it may be merely an excess of contribution over expenditure which, as we contend is the case here, will ultimately be returned to the contributors. These return of premiums or bonuses, call them by what name you like, are in the nature of a discount or rebate—in fact, an inducement offered to get persons to deal with the company—and the company making no "profit" therefrom, these sums have been improperly included in the assessment. A close examination of the judgment given in the House of Lords in the cases of the *New York Life Insurance Co.* v. *Styles* and *Last* v. *The London Assurance Corporation*, 34 W. R. 233, 10 App. Cas. 438, shows this, and decides that where such surplus over expenditure has been contributed by the policy-holders and is disposed of by the constitution of the company itself, such assets are not profits. We agreed for the purpose of deciding and shortening the argument in this case, although we believe the point is open to argument, that if such assets are held by the court in fact to be disposed of by this society by the shareholders then that they are "profits" of the company in such a sense that they are liable to be assessed.

Cripps, Q.C., and *Danckwerts*, for the commissioners.—The true distinction to be drawn between the two cases cited—the judgments in which appear at first to be at conflict, as the facts in both are almost identical—is this: in *Styles' case* the articles of the company affected only the policy-holders, and the surplus was rightly held to be not profits in which the shareholders of the company participated or had any control over; whereas in *Last's case*, there being shareholders as well as policy-holders interested, it was held, and rightly, that the surplus was "profit," and the company in respect therefor was properly assessed to income tax. We say the facts in this case are shown to be the same as in *Last's case*, and the assessment ought therefore to stand. The decision given in the *Mersey Dock and Harbour Board* v. *Lucas*, 32 W. R. 34, 8 App. Cas. 891, supports our contention.

DARLING, J.—In this case I think there must be judgment for the surveyor of taxes. Here there was an independent distinct body, which was the company, independent of and distinct from the policy-holders. Whether that distinguishes this case from

Styles' case I will not say as a fact, but to my mind it certainly does distinguish it from the reasoning of the majority of the learned lords who have given judgment in *Styles' case*, because over and over again there are such expressions as this of Lord Macnaghten, "I do not think that that decision"—*i.e.*, the decision in *Last's case*—"compels your lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons," and so on. Whatever may have been the facts in *Styles' case*—whether it was, as they assumed, a mutual undertaking pure and simple—I do not think it can be contended that the present case is that of a mutual undertaking, and it was conceded that if it were, and that the people had merely agreed to assure one another, and had overpaid in the matter of insurance, they could from time to time, by some process of re-adjustment, give back to one another, in equitable shares, what they had overpaid—that is perfectly plain—and what they received back could not in any sense be called profit, and would not be assessable to income tax. But here there are two distinct bodies, and I think this case is governed by *Last's case*, which was so much discussed during the argument. Here there was a surplus which was paid by the policy-holders to the company as distinct from the policy-holders themselves. When that was done I think that was the profits, and I think the surplus was the profits in the hands of the company. It was true that the company, having got it, chose to pay it back, or to pay a certain portion of it back—not all of it—because there always is something accumulating in the hands of the company; but they paid back a portion of it—as I say, not all of it—which is perhaps worth observing. They paid some of it back to the policy-holders who were outsiders, but that fact did not prevent it from remaining profit; it was a surplus which became profits in the hands of the company. The fact that they chose to pay away their profits in order to extend their business I do not think entitles them to say that they never were profits at all. Sir Robert Reid, on behalf of the company, argued that because this was done to attract business, and by virtue of particular contracts, that therefore the things, even if they had once been profits, could not properly be considered as profits any longer. That would lead to this kind of argument—that even realized profits in any business if, having been decided to be realized profits, the company, whatever it was, decided, or any business person decided to employ a certain part of his profits not in living on them or distributing them, but in enlarging his business with them, then at once they could be said to be not profits at all, but capital in the business. I cannot think so. It seems to me that the surplus became profits. What was done with it did not prevent it from being profits, even although it was done by virtue of a prior agreement that it should be done; and this case therefore is indistinguishable from *Last's case*. Whether *Last's case* was indistinguishable or not from *Styles' case*, certainly the learned lords who gave judgment in *Styles' case* do affect to distinguish it, and I must say that it seems to me that the judgments in these two cases are perfectly distinguishable one from the other. I think that the conclusion I have come to in the case we are now considering is consistent with the decision in *Last's case*, and certainly with the reasoning of the majority of the House of Lords in *Styles' case*.

CHANNELL, J.—I am of the same opinion. I think we must assume that both the cases in the House of Lords which have been cited are right, and that there is a real distinction between them. Then the House of Lords point out what that distinction is, and I cannot help thinking that the judgment that throws most light upon the whole matter is that of Lord Bramwell in the second case, because he tells us there, he being the dissenting judge in *Last's case*, what was the principle of *Last's case*, and he says: "I understand the principle of that decision to be that there was a company making profits, meaning to make profits, not from its own members, but from those it dealt with, that although it returned two-thirds of those profits to those it dealt with they were not the less profits, and that therefore income tax was payable on them. I thought and still think that wrong; I thought that the profits were only what remained after the return they had agreed to make on what was divisible among the shareholders. But whichever opinion is right . . ." and so on. Now he tells us what that principle was, and assuming that to be the principle of *Last's case* it seems to me quite clear that the present case now before us, comes within that principle. Here was a body of shareholders—true, very small in number and with very small capital in proportion with the business which they did, but they associate themselves for the purpose of carrying on the business of life insurance, and carrying it on in this way. They say: "We will limit our profits to 7 per cent. upon the capital which we put into it. By offering to divide all profits over 7 per cent. we shall no doubt do a very large business, and although we shall never make for ourselves more than 7 per cent., we shall make our 7 per cent. very secure. It will be a portion of a very large income," and so it is in this particular case. "We shall be absolutely secure upon it, and we shall give away all our profits beyond it." Now, it might well be said before *Last's case*, as Lord Bramwell there pointed out, that the sums which they had contracted with the people with whom they did business to give back to those persons were business outgoings and must be taken into account before you arrive at any profits at all. The House of Lords said that was not so. Having regard to that, it seems to me the present case comes within the principle of that decision. The subsequent decision in *Styles' case* simply said that where, as they assumed was the fact in that case—and whether they were right or wrong is quite immaterial to us—it was the case of a mutual insurance pure and simple, where parties agreed to do business insuring themselves and nobody else, the sums that they in a certain sense divided among each other, not divided by taking them in cash necessarily but by adding them to their policies or by altering the proportion which was to be contributed during the next year, are not to be taken on their part to be profits. I assume that to be correct; if so it does not govern the present case. The present case comes within the first decision and not within the second. On those grounds I think the judgment must be for the Crown.

Appeal dismissed.

Solicitors for the appellants, *Nelsh, Howell, & Macfarlane.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Q. B. Div.
(Darling and Channell, JJ.) May 15.

CAMERON (TRADING AS THE CO-OPERATIVE COAL CO.) v. TYLER. (a.)

Weights and measures—Sale of coal—Ticket or note—Seller's name—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 21; *Schedule* III.

In the ticket or note required by section 21 *of the Weights and Measures Act*, 1889, *to be delivered by the seller of coal to the purchaser, the name under which the seller trades may be inserted instead of his real name.*

Case stated by justices of Middlesex.

An information was laid against the appellant under section 21 of the Weights and Measures Act, 1889, charging him with causing to be delivered a quantity of coal exceeding 2cwt. to a purchaser by means of a vehicle and unlawfully neglecting to deliver or cause to be delivered a ticket or note according to the form in the third schedule of the Act.

The following facts were proved:

On the 18th of November, 1898, one of the appellant's carmen delivered to a purchaser in the parish of Old Brentford a quantity of coal exceeding 2cwt.—to wit, one ton—by means of a vehicle on which the defendant's name, Cameron, appeared. The carman, before any of the coal was unloaded, delivered to the purchaser a ticket, partly in writing and partly in print, wherein the seller of the coal was described as the Co-operative Coal Co. Before the ticket was so delivered to the purchaser the name of the person in charge of the vehicle had been inserted thereon.

The appellant had for several years before the 18th of November, 1898, carried on business as a coal merchant on his own account at 107, Pancras-road, Ealing Dean, and at other places in London under the name of the Co-operative Coal Co., and four other different names. There was, in fact, no company limited in existence.

Shortly before the 18th of November, 1898, the purchaser had ordered from an office where the appellant was trading under the name of the Co-operative Coal Co., at Ealing Dean, one ton of coal.

The justices, being of opinion that in order to satisfy the requirements of section 21 and of the third schedule of the Act the real name of the appellant, Frederick Brough Cameron, ought to have appeared on the ticket, convicted the appellant.

Kershaw, for the appellant, was stopped.

Earle, for the respondent.—The statute was passed for the protection of purchasers. That would not be effectually accomplished if a coal dealer could put a name other than his own upon the ticket. If that were so, a person trading under several different names, as the appellant did in this case, if he had been convicted under one name, would be able to use afterwards one of the other names, and so avoid the extreme penalties usually imposed upon second offenders. The proper name to be inserted on the ticket is the seller's own name, and, in the case of a firm, the names of all the partners should be inserted.

DARLING, J.—This conviction was wrong. When the statute says that the name of the seller must be put upon the ticket, that is sufficiently complied with when the name under which the seller carries on business is inserted. It would be equally correct to insert the seller's own name—in this case, Cameron.

CHANNELL, J.—I am of the same opinion. The general law is that a man may adopt any name he chooses in which to carry on his business. I do not think that any alteration is intended to be introduced into the law in that respect in this Act of Parliament.

Conviction quashed.

Solicitors for the appellant, *Woodbridge & Son.*

Solicitor for the respondent, *Sir R. Nicholson.*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Darling and Channell, JJ.) May 3.

MATHER v. LAWRENCE. (a.)

Education—Employment of child—Purposes of gain—Domestic work—Elementary Education Act, 1876 (39 & 40 *Vict. c.* 79), *s.* 47.

A child aged thirteen, who had not obtained the certificate mentioned in section 5, *sub-section* 2, *of the Education Act*, 1876, *and who did not come within the exemption in section* 9, *was kept at home by her father and employed in household work, whereby the child's mother was enabled to go out to work and to earn a weekly wage.*

Held, that the father had not employed his child in any labour for the purposes of gain within the meaning of section 47 *of the Act, and was not liable to conviction under that section.*

Case stated by two justices of the County of London.

The respondent was charged with an offence under section 6 of the Elementary Education Act, 1876, which provides that "every person who takes a child into his employment in contravention of this Act shall be liable on summary conviction to a penalty not exceeding 40s."

The following facts were proved: The respondent worked as a venetian blind painter. His family consisted of his wife; two sons, aged respectively twenty-one and eighteen years, who lived at home with their parents and went out to work; a daughter, Edith, between thirteen and fourteen years of age; and two younger children. The respondent's wife at times went out to work, for which she received an average wage of 10s. a week, and in order to enable her to do so, the respondent kept his daughter Edith at home, during the whole of the day, from the 7th of November to the 16th of December, 1898, and during such time she was occupied under the respondent's directions in doing the housework and in preparing the meals of the family. Edith Lawrence had not obtained a certificate as provided by section 5, sub-section 2, of the Act, nor did she come within the exception in that sub-section or in section 9 of the Act.

It was contended for the appellant that the respondent employed his daughter for the purposes of gain, inasmuch as he made use of her services at home for the purpose of enabling his wife to earn money, and that he came within section 47 of the Act.

The justices dismissed the information.

The Elementary Education Act, 1876, provides:

Section 4.—It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty he shall be liable to such orders and penalties as are provided by this Act.

Section 5.—A person shall not after the commencement of this Act, take into his employment (except as

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

hereinafter in this Act mentioned) any child—(2) Who, being of the age of ten years or upwards, has not obtained such certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school, as is in this Act in that behalf mentioned, unless such child, being of the age of ten years or upwards, is employed and is attending school in accordance with the Factory Acts or of any bye-law of the local authority (hereinafter mentioned) made under section 74 of the Elementary Education Act, 1870, as amended by the Elementary Education Act, 1873, and this Act, and sanctioned by the Education Department.

Section 6.—Every person who takes a child into his employment in contravention of this Act shall be liable, on summary conviction, to a penalty not exceeding 40s.

Section 47.—A parent of a child who employs such child in any labour exercised by way of trade or for the purposes of gain shall be deemed for the purposes of this Act to take such child into his employment.

Marchant (*Ram* with him), for the appellant.—The justices ought to have convicted the respondent. The child was employed by him "for the purposes of gain" within the meaning of section 47, because by reason of the child being employed in the household work the mother was enabled to go out to work and so earn wages The fact that the gain to the husband was only obtained indirectly, does not prevent the case from coming within section 47. The section makes a distinction between employing a child in labour exercised by way of trade, and for the purposes of gain. The object of this distinction was to prevent children being kept from school by such employment as occurred in this case.

The respondent did not appear.

DARLING, J.—In this case the justices have found that the respondent kept his child at home and employed her to do household work so that his wife might be free to go out to work by which she was enabled to earn 10s. a week. If the child had not been kept at home to do the household work, the respondent's wife could not have earned this money. The summons against the respondent was taken out under section 6 of the Elementary Education Act, 1876, which says that every person who takes a child into his employment in contravention of the Act shall be liable on summary conviction to a penalty not exceeding forty shillings, section 5 having said that a person shall not take a child into his employment except under the conditions specified. Then, in section 47 the Act goes on to provide that a parent who employs his child in any labour exercised by way of trade or for the purposes of gain shall be deemed for the purposes of the Act to take such child into his employment.

The magistrates refused to convict the respondent, and I think they came to a right decision. The employment of children—that is to say, real, definite employment—is forbidden by sections 5 and 6. Then it was thought, probably, that those sections could be evaded by a father employing his child in his own factory, and therefore section 47 was enacted to meet that case. But in order to come within the section the child must be employed in some trade or for the purposes of gain. There must be some direct employment resulting in direct gain to the employer. It does not make any difference whether, in reading the section, the words "for the purposes of gain" are read with "employs" or with "labour," for it cannot be said that in this case the labour of the child was labour for gain, or that the child was employed for gain. It is true that the result of what the child did was that someone else—namely, the mother, was enabled to be employed for gain, but that does not cause it to be the child who was employed for the purposes of gain.

It is to be remarked that the respondent could have been made liable to penalties for not sending his child to school. It is said that those penalties are inadequate, and that that is why proceedings were taken under section 47. That may be so, but that is not a matter which the court can take into consideration.

CHANNELL, J.—I am of the same opinion. I think section 47 was expressly framed to exclude the domestic employment of children. The real offence committed by the parent was the not sending of the child to school. If the fine which can be imposed for that is not large enough to meet the case any alteration must come from the Legislature.

Appeal dismissed.

Solicitor for the appellant, *C. E. Mortimer.*

Q. B. Div.
(Darling and Channell, JJ.) April 13.

SYKES & SON v. SOWERBY DISTRICT COUNCIL. (a.)

Local government—Sewer constructed by landowner for his own profit—Vesting in local authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-section* 1.

By section 13 *of the Public Health Act,* 1875, "*all existing and future sewers within the district of a local authority . . . except* (1) *sewers made by any person for his own profit . . . shall vest in and be under the control of such local authority.*"

Held, that a sewer constructed by quarry owners for the purpose of preventing surface water entering their quarry was not a sewer made by them for their profit.

Appeal by the defendants in an action for an injunction tried in a county court.

The plaintiffs, who were quarry owners, laid down a pipe to carry off water which formerly flowed down a lane situated above their quarry and found its way into the quarry. The pipe was connected with the main sewer belonging to the defendants. Some time afterwards the defendants redrained some cottages which stood close to the pipe laid down by the plaintiffs and connected the drains with the pipe. The result was that in times of flood the pipe was unequal to the task of carrying off both the surface water and the drainage of the cottages, and a portion of the water flowed back again into the plaintiffs' quarry.

The plaintiffs thereupon, brought this action for an injunction to restrain the defendants from draining the cottages into their pipe. The defendants pleaded that the pipe was vested in them by virtue of section 13 of the Public Health Act, 1875. The plaintiffs admitted that the pipe was a sewer within the meaning of section 13, but contended that it was laid down for their profit within the meaning of the first exception.

The county court judge granted the injunction.

Lawson Walton, Q.C. (*Waugh* with him), for the defendants.—The sewer does not come within the exception to section 13 as being made for profit. It was not made for profit, but merely for the purpose of getting rid of water, just as the drains of a house are made for the purpose of getting rid of sewage and

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

urface water. If by draining off the water and preventing it entering the quarry the value of the quarry was increased, such increase of value is only equivalent to the increase in the value of a house when it is properly drained. The line of pipes, consequently, vested in the defendants: see *Acton local Board* v. *Batten*, 28 Ch. D. 283, 33 W. R. Rep. 128; *Bonella* v. *Twickenham Local Board*, 35 W. R. 578, 18 Q. B. D. 577; *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580, [1893] 2 Q. B. 135.

Butcher, Q.C. (*Byrne* with him), for the plaintiff.—This sewer was made for the profit of the plaintiffs, and therefore comes within the first exception to the vesting clause: see *Minehead Local Board* v. *Luttrell*, 42 W. R. 667, [1894] 2 Ch. 178, and *Croysdale* v. *Sunbury-on-Thames Urban District Council*, 46 W. R. 667, [1898] 2 Ch. 515.

DARLING, J.—After some hesitation I have come to the conclusion that this appeal must be allowed. I have a difficulty in reconciling some of the decisions with the words of the Act. I have come, however, to the conclusion that this sewer was not one made for profit, using the word as it is intended to be used in the Act.

It appears to have been a sewer made in the first instance to prevent surface water which came down a lane from running into a quarry. If the water were to run into the quarry it would cost more to work the quarry than if it were excluded. That the sewer was not directly profitable is apparent because nothing was brought by it on to the land which could be sold at a profit; but that it would be detrimental to the quarry to allow the water to enter it there can be no doubt. What the plaintiffs did was to prevent the water entering the quarry. Suppose that instead of preventing the entrance of the water they had allowed it to enter and had used a pumping-engine to pump it out again, it would be difficult then to say that the pumping-engine was not used for profit, and it is difficult to see how what is true in the one case is not also true in the other. I can only say that it is not true of the sewer because a restricted meaning has been put upon the meaning of the word "profit" by the cases. In *Ferraud* v. *Hallas Land and Building Co.*, Smith, L.J., said that if a sewer made for the purposes of draining houses, and for no other purpose (as in the case before him), were to be held to be an exception to the provisions of section 13, the result would be that the exceptions would eat up the rule. So here, if we were to hold that this sewer came within the exception, the exception would eat up the rule. Therefore, a more restricted meaning must be given to the word "profit." In *Minehead Local Board* v. *Luttrell* Romer, J., says: "This is a case where the defendant has laid out money for the purpose of making sewers, intending to be compensated and paid directly for his expenditure on the sewers by receiving payments from all persons, whether they are his tenants or not, who avail themselves of the benefit of his sewers, and where he intended to receive, and did receive, payment direct to him from the persons using his sewers for the benefit of his sewers, and where he has, by reason of his expenditure, received direct remuneration for the expenditure in the way I have indicated." Thus a distinction is drawn between a direct and an indirect benefit. If that doctrine is applied to this sewer it will be seen that this sewer did not yield a direct profit, but only an indirect one. So that the case is not covered by *Minehead Local Board* v. *Luttrell*.

The decision mostly in favour of the plaintiffs' contention is *Croysdale* v. *Sunbury-on-Thamas Urban District Council*. Stirling, J., in giving judgment in that case, says: "When the object of making the sewer is not sanitary or ordinary drainage purposes, but to enable the land to be occupied more profitably, or to avoid an expenditure which would otherwise be incurred in order that the occupation might be equally beneficial, it seems to me that the sewer is made for the profit of the occupier." If those words are taken alone they are amply wide enough to cover the present case. The sewer was not made for a sanitary or ordinary drainage purpose. It was made in order to avoid an expenditure which would otherwise have been incurred. But the learned judge was dealing with a case where a man conveyed water by means of a pipe, not in order to get rid of it, but in order to form a pond to water his cattle, thereby obviating the expense of supplying his cattle with water in other ways. Having regard, therefore, to the facts of the case under the consideration of Stirling, J., in that case, I do not think that the language used by him can be held to cover the present case.

CHANNELL, J.—I am of the same opinion, and I agree with what my brother has said. I think that the cases have decided that in this exception to section 13 "profit" means not necessarily a money profit, but some advantage other than that which is derived from using a drain or sewer as a drain or sewer simply. To take away sewage and to take away water so that it may not interfere with the use of land or premises—these are the ordinary purposes of a sewer. The cases seem to say that if a sewer is made for any of the ordinary purposes it does not come within the exception as being made for profit. It is clear that the cases have decided that a sewer constructed to carry away sewage is not within the exception; but it is suggested that that is because there is a duty to carry away sewage. But the term sewer applies equally to pipes which carry off water as to those which carry off sewage, and I can therefore see no distinction between this case and the cases referred to.

Appeal allowed.

Solicitors for the defendant, *Jubb, Booth, & Helliwell*, Halifax.

Solicitors for the plaintiff, *Longbotham & Sons*, Halifax.

Court of Appeal.

From Q. B. Div. (Bkcy.) (Lindley, M.R., Jeune, P., and Romer, L.J.) — June 2, 9.

In re RHOADES.

Ex parte THE OFFICIAL RECEIVER (TRUSTEE). (*a.*)

Bankruptcy — Insolvent estate — Executor's right of retainer—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.

The executor of an insolvent testator, against whose estate an order for administration in bankruptcy has been made, is entitled to exercise his right of retainer, notwithstanding that, in ignorance of his rights, he has paid over to the official receiver all the assets he has collected, and has put in a proof (afterwards withdrawn) for the amount of the debt due to him.

Judgment of Wright, J., ante 432, *affirmed.*

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Appeal from a decision of Wright, J. (*ante*, p. 432, where the facts are sufficiently stated).

Levett, Q.C., and *F. Whinney*, for the official receiver, who appealed, referred to 1 Williams on Executors (9 ed.), p. 885; *Wilson* v. *Coxwell*, 23 Ch. D. 764, 32 W. R. Dig. 82; *Burge* v. *Brutton*, 2 Hare, 373; *In re Williams, Ex parte Lewis and Evans*, 8 Morrell 65; *In re Gilbert, Ex parte Gilbert*, 46 W. R. 351, [1898] 1 Q. B. 282.

[LINDLEY, M.R., referred to 1 Williams on Executors, p. 891.]

Herbert Reed, Q.C., and *J. Rolt*, for the executrix, referred to section 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77); *Woodward* v. *Darcy*, Plowden 184; *Davies* v. *Parry*, *ante* p. 429, [1899] 1 Ch. 602; *Croft* v. *Pyke*, 3 P. Wms. 180, at p. 184*n*; *Hasluck* v. *Clark*, *ante* p. 471, [1899] 1 Q. B 699; and *In re May, Crawford* v. *May*, 38 W. R. 765, 45 Ch. D. 499.

[ROMER, L.J., referred to 2 Williams on Executors, pp. 1180-81.]

Levett, Q.C., in reply, cited *Sander* v. *Heathfield*, 23 W. R. 331, L. R. 19 Eq. 21; and *Lee* v. *Nuttall*, 27 W. R. 805, 12 Ch. D. 61.

Cur. adv. vult.

June 9.—LINDLEY, M.R., read the judgment of the court as follows: This appeal raises the important question whether an order made under section 125 of the Bankruptcy Act, 1883, for the administration of the estate of a deceased person in bankruptcy deprives his executor of his right to retain out of assets in his hands a debt due to him from the deceased. Wright, J., has held that the section has not deprived the executor of his right of retainer in such a case, and we have arrived at the same conclusion.

The testator in this case died in April, 1898. His widow was his executrix, and she proved his will. She was a creditor of his for £600 odd. She opened an account in a bank in her own name, and she got in assets to the amount of about £1,100, and this amount, representing the assets got in, was standing to her credit in July, when an order was made for the administration of the deceased's estate in bankruptcy under section 125 of the Bankruptcy Act, 1883. The official receiver claimed the money in the bank, and she paid it over to him, not knowing she had any right of retainer. She proved for her debt in the bankruptcy, but she afterwards withdrew this proof, and then demanded back the £600 paid over in ignorance of her rights. Two questions therefore arise. The first and most important is whether she had a right to retain her debt as against the trustee in bankruptcy. The second is whether, if she had, she lost this right by paying the whole £1,100 over to the trustee and by afterwards proving for her debt.

It is not denied that she had a right to retain, and might have exercised it before the order was made, or, to be more accurate, before she knew that an application for such an order had been made. *In re Gilbert, Ex parte Gilbert*, settled this; but it is contended that as she had not exercised this right before that date she could not do so afterwards. The older common law authorities go far to show that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt (and all others of a higher degree, if any) such debt was treated as extinguished. Sufficient assets to pay his own debts and properly applicable thereto being in the executor's hands, such assets were treated, without more, as applied by him to such payment. Blackstone says so distinctly: vol. 3, p. 18. His words are, "So much as is sufficient to answer his own demands is by operation of law applied to that particular purpose." Plowden goes further, and says that the property in the assets is changed: see *Woodward* v. *Darcy*, Plow. 184, at p. 186. But this can only be true if the assets spoken of can be identified and appropriated to the debt which they have satisfied, and this presupposes the exercise of the right in fact, and in the case in Plowden it had been so exercised: see p. 184. The facts in the case of *Woodward* v. *Darcy* were as follows: Luttrell, obligor; Woodward, obligee, and plaintiff; Windham, Luttrell's executor; Windham was was dead, and defendant was Windham's executor; Windham was a creditor of Luttrell, and had retained assets sufficient to pay himself, leaving nothing for Woodward; the debts were all specialty debts; held that the defendants were entitled to judgment.

Until the executor does some act to show which assets he retains it is obvious that the property in them cannot be changed. This has been noticed before: see *In re Gilbert, Ex parte Gilbert*, [1898] 1 Q. B. at p. 286; Wentworth's Office of Executor, cited in the margin of Plowden, p. 185. But it was settled that an executor sued by a creditor could give a retainer by himself in satisfaction of his own debt in evidence under a general plea of *plene administravit*, and that he need not plead a retainer specially: 1 Wms. Saund. 333, n. 6. The extent to which the doctrine that his debt was extinguished was carried is further illustrated by the cases collected in 2 Williams on Executors, 1180, and which show that an executor having assets sufficient and properly applicable to pay a debt due to him from his testator could not sue the testator's heir, nor any third person who might be liable with the testator, for the debt in question. It is quite plain from these authorities that the executor's right to retain assets in his hands was as against him treated as enforced as soon as he could properly enforce it. It would be very strange if it were held that he had lost his right because he had done nothing to assert it before there was any occasion to do so. It is only when someone seeks to take assets out of the executor's possession that it becomes necessary for him to assert his right of retainer; and if he asserts it then his right must be protected, unless, of course, he has released it, or done something to deprive himself of it.

In the present case, when the order for the administration of the testator's estate was made, his executrix had assets in her hands to the value of £1,100. This sum was standing to her credit at her bankers. We attach no importance to the fact that the account was not in form opened in her name as executrix. The £1,100 represents the assets of the testator, and if the executrix had herself become bankrupt the whole of this sum would not have passed to her trustee and been distributable as her property amongst her creditors. She, however, was a creditor of the deceased for £600. This is admitted. She had a right to retain this sum out of the £1,100 as against the other creditors of the deceased. This is quite clear. If it were to the interest of other people to say she was paid, as it might be if she were claiming interest on the £600 after she had assets sufficient to pay it, the authorities show that she could be treated as having paid herself, but then only the balance of £1,100 could be treated as the testator's assets. On what principle can the trustee in bankruptcy claim more than the balance? We can discover none. The question is, What property vested in him by virtue of section 125, sub-section 5? His only claim is as trustee for the testator's creditors. The property vested in him by section 125, sub-section 5, has to be distributed amongst them. What they have no right to he has no right to: see section 44 of the Bankruptcy Act, 1883. Section 125 does not enlarge the property in

be distributed or deprive third parties of any right which they have acquired to withdraw from distribution assets in their possession which they have a right to retain: *Hasluck* v. *Clark* shows this.

It is true that an executor with a right of retainer has not all the rights of a secured creditor: see *Lee* v. *Nuttall*. He has no right of retainer against creditors of a higher degree than himself, but his right to retain is a right to withdraw from the assets in his hands, and distributable amongst himself and other creditors of equal degree, enough to pay himself in full. His right to retain does not extend to assets which he has not got in, and which are not in his possession, nor to equitable assets; but no question as to them arises here. His right extends, both at law and in equity, to all legal assets which he has in his hands; and there is nothing in section 125 to deprive him of this right. The judgment of Vaughan Williams, L.J., in the case of *In re Williams, Ex parte Lewis and Evans*, supports this conclusion. Mr. Levett relied on authorities which are collected in 1 Williams on Executors 885, and which show that if an executor dies without having exercised his right his executor cannot exercise it, unless he also represents the testator. But, whatever difficulty there may be in reconciling these cases with Blackstone's statement above referred to, they are quite consistent with the right of this executrix to retain her debt as against the trustee claiming her testator's assets. A similar observation applies to Wigram, V.C.'s, judgment in *Burge* v. *Brutton*. The only person who has a right of retainer is the legal personal representative of the testator, and if such representative is dead his representative cannot himself first exercise the right unless he also represents the testator: *In re Compton, Norton* v. *Compton*, 30 Ch. D. 15. This doctrine has no application to this case. There is no analogy between death and an order for administering assets in bankruptcy under section 125 of the Bankruptcy Act. For these reasons we have come to the conclusion that the executrix in this case had a right to retain her debt out of the assets in her hands as against the appellant, and that only the balance of those assets vested in him under section 125, subsection 5.

The second question presents no real difficulty. The executrix, not knowing her rights, paid the whole £1,100 over to the trustee. He, however, has not distributed the assets, and no injustice will be done to him or to anyone if he is ordered to repay her the amount which she was entitled to retain. *Ex parte James, In re Condon*, 22 W. R. 937, L. R. 9 Ch. App. 609, and *Ex parte Simmonds, In re Carnac*, 34 W. R. 421, 16 Q. B. D. 308, are distinct authorities to show that mistakes of this kind, although attributable to ignorance of law, can and will be set right by the court so long as the officer of the court still has the money in his hands. Still less can the proof by the executrix in the bankruptcy, withdrawn as it was when she discovered her error, deprive her of her right to have her money back.

The judgment appealed from is right on all points, and the appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Solicitors, *Adams & Adams; Thomson, Brooks, & Danby.*

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) June 6.

In re WALLER.
WHITE *v.* SCOLES. (*a.*)

Will — Construction — Misdescription of legatee — Extrinsic evidence—Former wills.

A testator by his will bequeathed legacies to such of the daughters of his late friend, I. S., as should survive the testator and be unmarried. The testator's friend, I. S., survived the testator, and had never been married. I. S. had five unmarried sisters, daughters of J. J. S., deceased.

Held, on the construction of the will and on the evidence of a previous will of the testator, which gave legacies to the daughters of J. J. S. by a correct description, that those daughters were entitled to the legacies.

Decision of Kekewich, J. (ante, *p.* 182), *reversed.*

Appeal from a decision of Kekewich, J. (*ante*, p. 182, where the facts are sufficiently stated).

P. F. S. Stokes, for the daughters of J. J. Scoles, who appealed.

Stewart Smith, for the British Home for Incurables, contended that the legacies were void, and referred to 1 Jarman on Wills (5th ed.), p. 412, and *Drake* v. *Drake*, 8 H. L. Cas. 172, 9 W. R. H. L. Dig. 18.

G. W. Brabant, for the trustees.

No reply was called for.

LINDLEY, M.R.—I cannot bring my mind to entertain any doubt about this case. I have not the slightest doubt about the true construction and effect of this will. There is really no room for doubt about the meaning of the language used. The testator has given a legacy to "such of the daughters of my late friend Ignatius Scoles, deceased, as shall be living and unmarried at my decease." Now, it so happens that there was at the date of the will no person answering the description of "my late friend Ignatius Scoles, deceased." The testator had a friend or acquaintance named Ignatius Scoles, but that friend was not "late" but living, had no daughters, because he was a bachelor, and could not very well have any, because he was a Roman Catholic priest. So, when you come to try to apply that description "my late friend Ignatius Scoles," you find that there was no man whom it really fitted. What, then, is to be done? Are we to cast about and see who was known to this testator whose name could have been mistaken and called Ignatius? The difficulty caused by the introduction of the name Ignatius sets you upon inquiry. There was a gentleman named Scoles—Joseph John Scoles—the father of Ignatius Scoles. Joseph John Scoles had a number of daughters. This testator had been placed, shortly after the death of the father Scoles, with his widow and family, and had lived with them until his death. They were Roman Catholics, and the testator knew of the existence of daughters of the late Scoles (the father of Ignatius). Apparently Scoles, the father, was a friend of the testator. The evidence is not very explicit on that point; but at all events it seems that Scoles the father might not unnaturally be described by the testator as his "late friend Scoles," deceased. The testator had shown by former wills that he not only knew of the existence of those daughters, but knew who their father was. In one of those former wills—all of which are perfectly legitimate evidence of his knowledge and state of

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

mind—we find that he described them, not as daughters of Ignatius, but by a correct description as daughters of one Scoles, an architect, who was deceased, but who had formerly lived at Crofton Lodge, Hammersmith. Now, the question is, are we to say that because there is no person (and never was any person) who answers completely to the description, "daughters of my late friend Ignatius Scoles," we cannot by legitimate methods find out who the intended legatees were? The introduction of that evidence is legitimate, not to show what was the testator's intention, but to show what he knew of the state of the Scoles family. I have not the slightest doubt myself that, according to the authorities and according also to commonsense, when you find a description which will not accurately apply to anybody, and you are placed in the position of having either to say that it means nothing or to find to whom it was probably meant to apply, you ought to admit evidence of the testator's knowledge to assist you in finding out what he meant. I think, therefore, that the decision of the learned judge in the court below was wrong owing to too much caution. Because he cannot find anyone named Ignatius Scoles who can be meant, he calls it guessing to put in the name of Joseph John instead. I do not think it is guessing at all, and, moreover, I do not care whether the actual name Joseph John is assumed to be in the will or not.

The appeal, therefore, must be allowed.

Sir F. H. Jeune, P.—I entirely agree with the judgment just delivered by the Master of the Rolls. It appears to me that this is a very simple case, and, indeed, I am surprised that it is not still more simple, because I should have thought it an extremely likely thing that the persons interested would apply to the Probate Court on granting probate to leave out the word "Ignatius." I am very much inclined to think that that application would have been successful, and that the word "Ignatius" would have been left out as having been inserted by mistake. Then the gift in the will would have run, "daughters of my late friend, — Scoles," and there could not in the circumstances have been any dispute about the meaning of that. But even as the matter stands it appears to me that this case is clear. The evidence which has been let in was admitted in accordance with the very well known principle of law, that when you have to construe a document you are entitled to look at the surrounding facts. When you look at the surrounding facts, you find that there is no class of persons in existence who could have been correctly described as "the daughters of my late friend Ignatius Scoles." Such a class of persons does not exist. But you find that there is a class of persons consisting of the daughers of Joseph John Scoles, and that Joseph John Scoles was, or may have been, properly described as the "late friend" of the testator. Those daughters, at any rate, are persons whom the testator knew and regarded in at least a friendly spirit. Having regard to those facts, I think there is no difficulty in applying the description, though it is an inaccurate description, to the daughters of Joseph John Scoles.

Romer, L.J., concurred.

Appeal allowed.

Solicitors, *A. C. Scoles; Devonshire, Monkland, Davies, & Sanders; Caprons, Hitchins, Brabant, & Hitchins.*

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — May 11, 13, 15.

In re An Arbitration between F. Baring-Gould and The Sharpington Combined Pick and Shovel Syndicate (Limited). (*a.*)

Company — Winding up—Purchase of undertaking—Dissentient shareholder — Arbitration — Award of umpire—Validity of award—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *First Schedule* (c) (d)—*Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 161, 162.

The articles of association of a company do not constitute an agreement within section 162 *of the Companies Act,* 1862.

The appointment of an umpire by arbitrators constitutes an act in the arbitration within the meaning of clause (c) *in the First Schedule to the Arbitration Act,* 1889.

Decision of Stirling, J. (ante, *p.* 23, [1898] 2 *Ch.* 633), *reversed.*

Appeal by the company from a decision of Stirling, J. (*ante,* p. 23, [1898] 2 Ch. 633).

Baring-Gould also gave a cross-notice of appeal.

The facts are fully set out in the report in the court below.

Mattinson, Q.C., and *Beddall,* for the company.—Article 128 constitutes a contract within the meaning of section 162 of the Companies Act, 1862. Gould having induced the company to accept him as a shareholder is bound by the articles of association (*Isaacs' case,* 40 W. R. 518, [1892] 2 Ch. 158; *Cotton* v. *Imperial, &c., Corporation,* [1892] 3 Ch. 454, 41 W. R. Dig. 36); and since he has asked for the award to be remitted on the ground that it is invalid he cannot now appeal. *Eley* v. *Positive Government Security Life Assurance Co.,* 24 W. R. 338, 1 Ex. D. 88, and *Browne* v. *La Trinidad,* 36 W. R. 289, 37 Ch. D. 1, were not intended to lay down that the articles were not a contract between the member and the company.

[Lindley, M.R., referred to *Welton* v. *Saffery,* 45 W. R. 508, [1897] A. C. 299.]

Buckley, Q.C., and *Gore-Browne,* for the respondent.—The necessary parties to such an agreement as is required by section 162 of the Companies Act, 1862, would be the member and the liquidator. We contend that it is not possible before a dispute has arisen to decide what is to happen when a dispute shall arise. Article 128 is *res inter alios acta* so far as section 162 is concerned. No set of articles can be an agreement between parties who are disputing about them, because when they sign the articles there is no dispute. The agreement under the section must be between the disputants. *Cotton* v. *Imperial, &c., Corporation* merely decided that if the memorandum gives power to sell or divide shares then section 162 need not be applied; but here, whether the company has the power or not, it has not used it, and therefore the aid of the section is required. Any such provision as article 128 is therefore *ultra vires;* but if that is not so, it has really nothing to do with this case.

Lindley, M.R.—One question of considerable importance was raised and another not of so great importance, but they both require attention. The first question was whether clause 128 of the articles of association can be regarded as an "agreement" within section 162 of the Companies Act. I think that by an agreement was meant something very different from articles of association. It meant, I

(*a.*) Reported by J. F. Iselin, Esq., Barrister-at-Law.

think, an agreement between the dissentient member and the liquidator. It was attempted by means of section 16 of the Companies Act to establish that clause 128 was an agreement between the company and the dissentient member. Section 16 has given rise to a great deal of difficulty, but it has been held in several cases that it does not mean that the articles are to be treated as an agreement between the company and the members. On the other hand, articles have been treated as expressing the terms upon which the directors became such. The effect of section 16 has not been clearly laid down, but I do not understand that the company could sue a member upon the articles as an agreement. But treating the articles as some sort of an agreement between the members, they are not such an agreement as is meant by section 162. In my opinion the true construction of the section denotes an agreement between the liquidator and the dissentient member. To say that means a clause binding *en bloc* all members, assenting or dissenting, would be an unwarrantable construction. On the other point I cannot agree with Stirling, J. In my opinion the appointment of an umpire is an act in the arbitration within clause (c). Consequently the three months had expired, and the jurisdiction of the umpire had arisen.

RIGBY and COLLINS, L.JJ., concurred.

The court dismissed the appeal with costs, and allowed the cross-appeal with costs, giving the shareholder leave to enforce the award with costs, he having already received the £100 payable under it.

Solicitors, *Booth & Smee; S. S. Seal.*

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) } May 4.

PENNY *v.* WIMBLEDON URBAN DISTRICT COUNCIL. (a.)

Negligence—Principal and agent—Contractor, negligence of—Paving road—Liability of local authority—Practice—Payment into court by one defendant—Verdict against both for smaller sum—Ord. 22, rr. 1, 6.

A district council employed a contractor to make up a road, which was being used by the public, under section 150 of the Public Health Act, 1875. In the course of the work the contractor negligently left a heap of earth unfenced and unlighted on the road, over which one of the public, while passing along the road at night, fell and was injured. In an action against the district council and the contractor to recover damages for the personal injuries so sustained,

Held, that as the work which the contractor was employed to do would, unless precautions were taken, cause danger to the public passing along the road, an obligation was thrown upon the district council to see that the necessary precautions were taken, and they were therefore liable for the negligence of their contractor in not taking proper precautions, such negligence not being merely a casual or collateral act of negligence.

The defendants delivered separate defences, both denying liability. The contractor, with a denial of liability, paid £75 into court. The district council did not pay money into court, but pleaded that their co-defendant, while denying liability, had paid £75 into court, and that sum was sufficient to satisfy the plaintiff's claim. The jury found a verdict for the plaintiff for £50.

Held, that as the district council had not paid money into court, the plaintiff was entitled to judgment against them; but, as the £50 had been recovered from their co-defendant, the judgment must be limited to costs.

Judgment of Bruce, J., [1898] 2 *Q. B.* 212, *affirmed.*

Appeal from the judgment of Bruce, J., in an action to recover damages for personal injuries caused by the negligence of the defendants: reported [1898] 2 Q. B. 212, 46 W. R. Dig. 138.

The defendants, the Wimbledon Urban District Council, preparatory to taking over a road in their district, entered into a contract with the defendant Iles, who was a contractor, by which Iles agreed to make up the road under section 150 of the Public Health Act, 1875, the owner of the adjoining land having failed to comply with a notice requiring him to execute the works.

By the contract Iles was to provide all materials, plant, labour, watching, lighting, fencing, and everything necessary for the speedy and effectual completion of the work.

Iles, in the preliminary process of "cleaning up" the road, trimmed the surface and put the surface soil and grass in heaps on the road. The plaintiff, while walking along the road after dark, fell over one of the heaps and was injured. There was no light or protection near the heap, but the day after the accident lights were placed on some of the heaps by order of the district council's surveyor.

The defendants delivered separate defences. Both denied liability, and Iles with a denial of liability paid £75 into court. The district council pleaded that Iles was an independent contractor and not their servant; they did not pay any money into court, but pleaded that "the defendent Iles, while denying liability, has paid into court £75, and these defendants say that sum is sufficient to satisfy the plaintiff's claim." The jury found a verdict for the plaintiff for £50 damages.

Bruce, J., entered judgment for the defendant Iles; and upon further consideration he held that the district council were liable for the negligence of Iles, and that, having put in a separate defence, they could not avail themselves of the payment into court by Iles, and that therefore the plaintiff was entitled to judgment for £50 and costs. As, however, the £50 had been recovered from Iles the judgment against the district council was confined to costs only.

The district council appealed.

Macmorran, Q.C., and *C. T. Giles,* for the district council.—There was only one cause of action against both defendants, who were in the same position as joint tortfeasors. The cause of action was the right to recover damages for the injuries sustained. As soon as there was a payment into court in respect of the one cause of action, the question was whether the sum paid in was sufficient. If the plaintiff had taken the £75 out of court in satisfaction, the district council could have pleaded accord and satisfaction. If £25 or more had been paid in by each of the defendants, the defendants would have been entitled to judgment, as the jury found that £50 was sufficient. They referred upon this point to *Brinsmead* v. *Harrison,* 20 W. R. 784, L. R. 7 C. P. 547; *Duck* v. *Mayeu,* 41 W. R. 56, [1892] 2 Q. B. 511. Secondly, the district council are not responsible for the negligence of their contractor. To make a principal liable for the act of a contractor, the work contracted to be executed must in itself be a source of danger to the public unless proper precautions are taken: *Hardaker* v. *Idle District Council,* 44 W. R. 323, [1896] 1 Q. B. 335; *Pickard* v. *Smith,* 10 C. B. N. S. 470; *Black* v. *Christchurch Finance Co.,* [1894] A. C. 48. Here the contractor was employed to make up a road, which

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

could be done without any danger to the public at all. The contractor chose to leave heaps of earth at the side of the road and so caused the plaintiff's injuries, but that need not have been done. It was a casual or collateral piece of negligence, like leaving a pickaxe in the road over which one of the public might stumble. The manner in which the work was done was dangerous, not the work itself. *Gray* v. *Pullen*, 13 W. R. 257, 5 B. & S. 970, was also referred to.

Lord Coleridge, Q.C., and *A. W. Dunn*, for the plaintiff, were not called upon.

A. L. SMITH, L.J.—The jury have found that there was negligence on the part of the defendant Iles, and returned a verdict for the plaintiff for £50 damages. I will first deal with the question as to the form of the pleading. It seems to me to be a novel form of pleadings. Iles paid £75 into court with a denial of liability. The district council set up, in addition to a denial of liability, a totally different defence from that set up by Iles. They set up the defence that the negligence, if any, causing the accident was that of an independent contractor, and that they were not, therefore, liable. They further pleaded that Iles, while denying liability, had paid £75 into court, and that that was sufficient to satisfy the plaintiff's claim. The jury found that there had been negligence on the part of Iles, and assessed the damages at £50. As Iles had paid £75 into court, judgment was entered for him. The question then arose as to the position of the district council. The question whether they were responsible for the negligence of Iles remained to be argued, and the learned judge held that the defence, that Iles was an independent contractor for whose negligence the district council were not responsible, failed. The position, therefore, of the district council was this, the special defence of non-liability for the negligence of Iles had failed, and they had not paid any money into court. That being so, they had no answer to the plaintiff's claim. As, however, the plaintiff had recovered the £50 from Iles, he cannot get it twice over. The learned judge was therefore right in entering judgment against the district council for costs only.

The second question is whether the district council are responsible for the negligence of their contractor. In my opinion Bruce, J., arrived at a right conclusion. He first stated his finding of fact as follows: "The district council employed the contractor to do work upon the surface of a road which they knew was being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the traffic, and some danger unless means were taken to give due warning to the public." He then laid down the law applicable to that state of facts thus: "The principle of the decision in *Pickard* v. *Smith* I think is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." That seems to me to be a sound proposition of law, though I would add this qualification to it: except in the case of acts of negligence which are merely casual or collateral acts—such as the dropping of a hammer on a person passing along the highway, or leaving a pickaxe in the road over which a passer-by might stumble. I cannot think that leaving a heap of earth on the highway, which would necessarily be done in the execution of the work, unlighted and unfenced is a casual or collateral act of negligence. For these reasons I think that both points fail, and the appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I entirely agree. With regard to the first point, the fallacy of the defendants' contention seems to me to lie very much in assuming that the payment of money into court, with a defence denying liability, under ord. 22, r. 1, is itself a defence. When money is paid into court with a defence denying liability, the defence is the denial of liability. The importance of that here is that both defendants have put in separate defences denying liability. One of them chose with that denial to pay money into court. He did so for the sake of peace, and as the jury awarded the plaintiff less than the amount which that defendant paid into court, though defeated upon the question of liability, he is not by the rules placed in the position of a defeated party. By that payment into court he improved his position and reaped the benefit of it when the question of costs came to be dealt with. I see no reason why his fellow defendants should have a similar benefit when they have not paid money into court. The authorities, where there has been an accord and satisfaction, have no application.

As regards the second question, it is very rare indeed to find the course of the authorities upon a question of law so uniform and clear as it is on the question of the liability of the district council for the negligence of its contractor. The principle is laid down in *Pickard* v. *Smith*, where Williams, J., in delivering the judgment of the court, said: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." That principle was applied in *Gray* v. *Pullen*; *Bower* v. *Peate*, 1 Q. B. D. 321, 24 W. R. Dig. 226; *Dalton* v. *Angus*, 30 W. R. 191, 6 App. Cas. 740; *Hughes* v. *Percival*, 31 W. R. 725, 8 App. Cas. 443; and quite lately by this court in *Hardaker* v. *Idle District Council*. When a statutory authority are by their contractor doing work on a road under their statutory powers which will be a source of danger to the public unless precautions are taken it cannot be doubted that it is the duty of the statutory authority to take care that the public are not injured by the carelessness of the contractor in the execution of the very work which he was, as contractor, employed to do. Apply that principle to the present case. The road had to be made up. It was obvious that the time would arrive when it would become a source of danger to the public using it by reason of the digging on its surface. It would be the duty of the district council to fence the dangerous spots or otherwise to warn the public against the danger. I agree entirely with the judgment of Bruce, J., who has stated the law so accurately and tersely that I do not think I can add to it.

ROMER, L.J.—Having regard to the present state of the authorities, I think that the following is a correct statement of the law on the subject: When a person through a contractor does work which from its nature

is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions. I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule. Applying the above statement of the law to the facts of the present case, it is clear that the work of making up this road, frequented as it was by the public, would be likely to cause danger to the public, because it was almost inevitable that, in doing the work, inequalities in the level of the road must arise, and heaps of earth be placed on the road. It is usual in such cases to guard the dangerous places by putting up lights or proper fencing. In my opinion it is unreasonable not to take those precautions, and the passages contained in the contract show that this is so.

Upon the other point I have nothing to add except to say that the case before us is not one in which the district council have adopted the defence of their co-defendant, and have treated the payment into court as made on their behalf, and have offered to abide by all the consequences of so doing.

Appeal dismissed.

Solicitor for the plaintiff, *S. A. Jones.*

Solicitor for the district council, *W. H. Whitfield.*

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — April 12.

REG. v. COMPTROLLER-GENERAL OF PATENTS. (a.)

Patent — Opposition to grant — Right to be heard as opponent — Person having no interest — Application by comptroller to Attorney-General for directions — **Mandamus** *to comptroller — Patents, &c., Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 11, 95 — *Patents, &c., Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 4.

Opposition to the grant of a patent under section 11 *of the Patents, &c., Act,* 1883, *on the ground that the invention has been patented in this country on an application of prior date, can only be made by a person having an interest in the earlier patent.*

Where, on an application by the Comptroller of Patents to the Attorney-General for directions in a matter of doubt or difficulty under section 95 *of the Patents, &c., Act,* 1883, *the Attorney-General directs that the comptroller shall not hear a particular person as an opponent to the granting of a patent, the court will not grant a* mandamus *to the comptroller to hear such person.*

Appeal from an order of a Divisional Court (Grantham and Kennedy, JJ.) discharging a rule *nisi* for a *mandamus* to the Comptroller-General of Patents to hear and determine the matter of an opposition by the prosecutor, John D. Tomlinson, to the grant of a patent on an application by Felix Meyer.

The prosecutor gave notice at the Patent Office of opposition to the grant on the ground that the invention had been patented in this country on an application of prior date. The prosecutor had no interest in the prior patent.

The comptroller applied to the Attorney-General under section 95 of the Patents, Designs, and Trade-Marks Act, 1883, as to whether he should hear the prosecutor in opposition to the grant. The Attorney-General directed that the prosecutor should not be heard, and the comptroller accordingly declined to hear him.

By section 11, sub-section 1, of the Patents, &c., Act, 1883, as amended by section 4 of the Patents, &c., Act, 1888, "Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the Patent Office of opposition to the grant of the patent on the ground of the applicant having obtained the invention from him, or from a person of whom he is the legal representative, or on the ground that the invention has been patented in this country on an application of prior date, or on the ground that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification, but on no other ground."

The question was whether the prosecutor was entitled to oppose the grant on the ground that the invention had been patented in this country on an application of prior date, he himself having no interest in that prior patent.

There were a series of decisions by the law officers of the Crown that persons who admitted that they had no interest in the alleged anticipating patent were not entitled to be heard as opponents: *Glossop's Patent,* Griffin's Pat. Cas. 285; *Heath & Frost's Patent,* Griffin's Pat. Cas. 288; *Stewart's case,* 13 Rep. Pat. Cas. 627.

C. A. Russell, Q.C., and *E. A. Parkin,* for the prosecutor.

The Attorney-General (*Sir R. E. Webster, Q.C.*), and *H. Sutton,* for the comptroller.

W. F. Hamilton, for the applicant, Meyer.

A. L. SMITH, L.J.—In this case a rule *nisi* was obtained by the prosecutor, Tomlinson, for a *mandamus* to the Comptroller of Patents, who had declined to hear an objection on the part of the prosecutor to the granting of a patent which had been applied for. The Divisional Court discharged the rule. Two facts are undisputed. The first is that Tomlinson had no interest whatever in the subject-matter of the patent, but was merely one of the public. The second is that the comptroller was in doubt whether Tomlinson had any *locus standi* to oppose the application. Under these circumstances the comptroller brought into play the provisions of section 95 of the Patents, Designs, and Trade-Marks Act, 1883, which says that "the comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers for directions in the matter." With regard to the position of the Attorney-General, I wish to point out that, besides being the head of the bar of England, he has had from the earliest times to perform high judicial functions, as to which he has an absolute discretion. For instance, if a man who has been tried for his life and convicted is in a position to allege that there is error on the record, he cannot take advantage of it unless he first obtains the *fiat* of the Attorney-General, and no court has any jurisdiction to review the discretion of the Attorney-General in such a matter. Again, the Attorney-General, and he alone, has power to enter a *nolle prosequi,* and that power is not subject to any control. Again, the filing of a criminal information is a thing which is done by

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the Attorney-General *proprio motu*, and which is entirely within his discretion. Coming now to the Patents, Designs, and Trade-Marks Acts of 1883 and 1888, it seems to me that throughout those Acts the ultimate court of appeal in matters relating to the granting of patents is the Attorney-General or Solicitor-General. In the present case a matter has come before the Attorney-General, and we are asked to overrule it. I find that in the case of *In re Van Gelder's Patent*, 6 Rep. Pat. Cas. 22, Bowen, L.J., dealing with the position of the Attorney-General under these Acts, said: "At common law the Attorney-General is, when he is exercising his functions as an officer of the Crown, in no case that I know of, a court in the ordinary sense." Here the Comptroller, being in doubt whether he ought to hear the prosecutor, who desired to oppose this patent, applied under section 95 to the Attorney-General for directions. The Attorney-General answered that if the prosecutor was merely a member of the public and had no interest in the subject-matter of the patent, the comptroller ought not to hear him. We are now asked to grant a prerogative writ to order the comptroller to do what the Attorney-General has said he ought not to do. In my opinion we ought not to grant a *mandamus* contrary to the determination of the Attorney-General, who is the tribunal appointed by the Act to determine such a question. That alone is a sufficient ground for discharging the rule for this discretionary writ. But I am also led to the same conclusion from the consideration of the true construction of section 11 of the Act of 1883, as amended by section 4 of the Act of 1888. I am of opinion that the true meaning of the enactment is that a mere member of the public who has no interest in the subject-matter of a patent is not entitled to be heard in opposition to the grant. I think that the words "any person," with which the section commences, must, when the whole section is read as amended, be construed as limited to any person having an interest in the subject-matter of the patent, and that a mere member of the public having no such interest has not a right to intervene. I therefore think the rule was rightly discharged, and the appeal must be dismissed.

COLLINS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitors for the prosecutor, *Radford & Frankland.*

Solicitor for the comptroller, *Solicitor to the Board of Trade.*

Solicitors for the applicant, *Wilson, Bristows, & Carpmael.*

High Court of Justice.

Chan. Div. } Kekewich, J. } May 9, 10.

ALLEN v. GOLD REEFS OF WEST AFRICA (LIMITED). (a.)

Company—Deceased member—Notices—Service—Calls—Forfeiture—Special resolutions.

Where the articles of association of a limited company define "member" as "a registered holder of any stock or share of the company," and provide that the company may serve notices "upon any member, either personally or by sending the notice prepaid by post addressed to such member at his registered address as appearing in the register of the company," but make no provision as to the service of notices in the case of a deceased member, notices relating to calls, forfeiture, and special resolutions affecting a deceased member's shares, will not be effectively served by being sent by post addressed to such member at his registered address, if the company, at the time of sending the same, know that such member is already dead.

Where one of the articles of association provides that the company "shall have a first and paramount lien for all debts, obligations, and liabilities of any member to or towards the company upon all shares (not being fully paid) held by such member," and there are calls upon partly-paid shares due from a member who is also the only holder of fully-paid shares in the company, the other members cannot by special resolution alter the article by striking out the words "not being fully paid" so as to retrospectively affect, to the prejudice of the non-consenting holder of such fully-paid shares, his rights already existing under the said article.

New Zealand Gold Extraction Co. *v.* Peacock, [1894] 1 *Q. B.* 622, *and* James *v.* Buena Ventura Nitrate Grounds Syndicate (Limited), 44 *W. R.* 372, [1896] 1 *Ch.* 456, *considered.*

Action.

The plaintiffs were the executors of one Emilio Zuccani, who, at the time of his death, on the 5th of February, 1897, held 27,885 fully-paid shares, and also 36,435 partly-paid shares in the defendant company. Previous to E. Zuccani's death the defendant company had from time to time made calls upon him in respect of his partly-paid shares, and the sum remaining unpaid in respect of the balance of payments due upon allotment and calls amounted at the time of his death to £6,072 10s.

The company's articles of association defined "member" as "a registered holder of any stock or share of the company," and article 170 provided that a notice might be served by the company "upon any member either personally or by sending it prepaid by post addressed to such member at his registered address as appearing in the register of the members of the company."

The articles of association further provided that the executors or administrators of a deceased member (not being one of several joint holders) should be the only persons recognized by the company as having any title to the shares registered in the name of such member, and that any person becoming entitled to a share in consequence of the death of any member might elect either to be registered as the holder or to have some person nominated by him registered as the transferee, and that a person so becoming entitled should be entitled to receive dividends, bonuses, or other moneys payable in respect of the share, but should not be entitled to receive notices of, or attend or vote at any meeting of the company, or, save as aforesaid, to any of the rights or privileges of a member unless and until he should have been registered as a member in respect of such share.

The executors of E. Zuccani had not been registered as the holders of his shares.

Article 29 of the articles of association provided that the company should have "a first and paramount lien for all debts, obligations, and liabilities of any member to or towards the company upon all shares (not being fully paid) held by such member."

E. Zuccani was the only holder of fully paid-up shares in the defendant company.

By a special resolution passed and confirmed at general meetings of the company held in the months of February and March, 1897, article 29 was altered so as to omit the words "not being fully paid," and subsequently thereto the defendant company claimed

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

to have a lien on the 27,885 fully paid-up shares in respect of what was due on the 36,435 partly paid-up shares. Notice that these meetings were about to be held had been sent by registered letter to E. Zuccani's registered address, after his death was known to the company.

Article 74 of the articles of association provided that notices of general meetings should be given to such members as were, under the provisions therein contained, entitled to receive notices, but the accidental omission to give such notice to, or the non-receipt of such notice by, any member should not invalidate any resolution passed at such meeting.

After the defendant company had notice of E. Zuccani's death they issued a notice dated the 29th of March, 1897, demanding payment of the unpaid calls due in respect of his shares, and threatening forfeiture in the event of non-payment. The plaintiffs thereupon commenced an action claiming relief against the company. The company, however, gave up the notice of the 29th of March, 1897, and no longer relied upon it, but subsequently issued another notice dated the 4th of June, 1897, demanding payment of £6,876 16s. 11d., being the £6,072 10s. then due, together with £804 6s. 11d. interest on the same as from the 16th of August, 1895, and stating that unless the amount due was paid on or before the 21st of June then next the shares in respect of which the same was demanded would be liable to be forfeited. Copies of this notice were sent by registered letter to the deceased member's registered address, and to his executors collectively, and to each of them separately.

The articles of association further provided that if any member failed to pay any call, instalment, or interest, the directors might serve a notice, on such member requiring him to pay the same with further interest from the date of the notice, and that the notice should state that in the event of non-payment the shares would be liable to be forfeited, and that if the requisitions of the notice were not complied with any share in respect of which such notice was given might be forfeited by a resolution of the directors to that effect.

No payment was made in respect of the sum demanded by the notice of the 4th of June, and at a board meeting, held on the 23rd of July, 1897, the directors of the defendant company, in exercise of the power in that behalf conferred on them by the articles of association, purported to forfeit the 36,435 partly paid-up shares for noncompliance with the said notice. As a result of these proceedings on the part of the company, the plaintiffs commenced a second action claiming relief against the company.

The two actions now came on for trial as a consolidated action, and the plaintiffs' claim was as follows: (1) a declaration that the partly paid-up shares had not been forfeited; (2) an injunction to restrain the defendant company from treating or dealing with the said shares as forfeited; (3) damages for conversion; and (4) a declaration that the defendant company were not entitled to a lien upon the said fully paid-up shares.

At the trial a dispute arose between the parties as to the day from which interest on the moneys due began to run. The defendant company contended that the allotment was complete on the 9th of August, 1895, and that therefore interest began to run from the 16th of August, 1895, seven days' grace being allowed; on the other hand, the plaintiffs alleged that the allotment was not complete till the 31st of August, 1895, and that consequently the interest did not begin to run till the 7th of September following. Evidence was produced in support of each contention.

On the further questions raised by the action the following arguments were delivered.

Renshaw, Q.C., and *Kerly*, for the plaintiffs.—The provisions of the articles require that before a member's shares can be forfeited notice must be given to that member; but a deceased member's executors, who have not been registered, are not members within the definition clause. After the company knew of the death of Zuccani, notice sent by them to his registered address is not sufficient: *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q. B. 622; *James* v. *Buena Ventura Nitrate Grounds Syndicate* (*Limited*), 44 W. R. 372, [1896] 1 Ch. 456; *In re Bowling and Welby's Contract*, 43 W. R. 417, [1895] 1 Ch. 663. The company can have no lien over the fully-paid shares. That is a matter of contract. The company cannot alter the vested rights of a member retrospectively, though they may be able to do so prospectively: *James* v. *Buena Ventura Nitrate Grounds Syndicate* (*Limited*), per Rigby, LJ., [1896] 1 Ch., at p. 466. Moreover, no notice of the proposed special resolution dealing with the alteration in the articles was given to the executors, notwithstanding that the company knew that Zuccani was dead.

Warrington, Q.C., and *Dunham*, for the defendant company.—The notice was properly served by being sent addressed to the deceased at his registered address. We rely upon that as a proper service. Until there has been a change in the register, the deceased member was the only person to be served with the notice: *James* v. *Buena Ventura Nitrate Grounds Syndicate* (*Limited*). Lord Herschell says ([1896] 1 Ch.) on p. 464 that "member" as used in some of the articles of the company must be held to include those whose names are on the register, though they are no longer living. This is an instance in point. If in this case such a service is not good, then the whole of the business of the company might be brought to a standstill. Notice of the special resolution was also sent to the registered address, and article 74 provides that the non-receipt of such a notice should not invalidate the meetings. This was not a special resolution which was to fundamentally alter the company, and it is valid: *Andrews* v. *Gas Meter Co.*, 45 W. R. 321, [1897] 1 Ch. 361. It was part of Zuccani's contract with the company that the articles might be altered: *Pépé* v. *City and Suburban Building Society*, 41 W. R. 548, [1893] 2 Ch. 311.

Renshaw, Q.C., replied.

KEKEWICH, J., after reviewing the facts of the case, came to the conclusion that the allotment was not complete until the 31st of August, 1895, and that interest did not begin to run until the 7th of September; that the company were wrong in charging interest from the 16th of August; that their power to forfeit for non-payment of interest depended on an erroneous calculation; and that therefore the forfeiture was invalid. On the remaining questions raised, his lordship continued as follows: Now as to the question of notice. Before this notice of forfeiture was issued—that is to say, the notice of the 4th of June, 1897—Zuccani was dead. The company served the notice by sending it in a registered letter to him at his registered address; they also served a copy of the notice on all the executors jointly and on each of them severally. Mr. Warrington was content to rely only on the notice to the dead man. The service on the executors shows that the company knew that Zuccani was dead. Now, the question is this, Was the notice to the dead man sufficient? In the interpretation clause of the articles there is an interpretation of a "member." "Member" is stated to mean "a

registered holder of any share or stock of the company." To my mind it is a mischievous practice to try to define any word like "member," which is already defined by section 23 of the Companies Act, 1862. The word does not mean anything more than a registered holder of a share in the company, and Zuccani was on the register though he was dead, and for some purposes he continued to be a member through his estate. But then, can you treat him as being a member so as to give him notice? To a certain extent you can. The case of *James* v. *Buena Ventura Nitrate Grounds Syndicate* (*Limited*) settles that, for very many purposes, the estate of a dead member is entitled to the privileges and subject to the liabilities of membership. That seems to me to go a very little way towards deciding this question. Can a company give a dead man notice so as to alter his rights and otherwise impose, not a new liability, but a liability arising out of the articles of association so as to be able to enforce it against his estate? The Court of Appeal in *New Zealand Gold Extraction Co.* (*Limited*) v. *Peacock* showed the importance of holding that a notice to a dead man was good if there was not anyone else to whom notice could be given—that is, if the company at the time had not had notice that he was dead. The present Master of the Rolls says ([1894] 1 Q. B.) on p. 631, "The articles are so drawn that they do not provide for dead men, nor for notice to dead men, nor for notice to anybody in the place of dead men. It is said that it is part of the bargain between the shareholders and the company that if a member dies and the company are going on and have no notice of his death, his estate cannot be called upon to pay calls. On the construction of the articles I think it obvious that no such bargain was intended. We must put a reasonable construction on the articles, and I have no doubt that the key to the difficulty is to be found in the suggestion made by Mr. Buckley, and that until notice of his death reaches the company calls may be made in respect of his shares by notice sent to his registered address just as if he were still a member. I have no doubt at all that that is the true construction of the articles. In order not to make these articles absurd, we must hold that a deceased member remains a member until notice is given." The Master of the Rolls does not say whether, if the company had notice of the death, a notice sent to the deceased's registered address would be sufficient; but he implies that in that event such a contention would be no longer tenable, and later on Lord Davey supplies the omission, for on p. 632 he says, "I do not think that if they had notice of the death of the member they could rely on service upon him at his registered place of address, and nothing that we say in this case touches that question," and further on he says, "I am prepared to adopt Mr. Buckley's suggestion and to hold that a deceased member or his estate remains a member for the purpose of the articles so long as his name remains on the register without notice to the company of his death." I see that, on p. 633, Lord Davey says, "It is the duty of the representatives of a deceased member to give notice of his death to the company at the earliest possible opportunity; and, if they wish the company not to go on treating him as still on the books, it is the duty of the executors to give notice to the company of their desire to become members in his place." I am not sure that I quite appreciate the full meaning of that, but it does not alter what I have read, and I take this to be the decision and the expression of the Court of Appeal, that when once the company have notice of the death of the member, they cannot serve notice of calls on him so as to bind his estate. Then there was the case of *James* v. *Buena Ventura Nitrate Grounds Syndicate* (*Limited*), and the case with which I have just dealt was there referred to in the arguments of counsel for both the appellants and respondents, and by the learned judges. Lord Herschell says, on p. 464: "It is, no doubt, the fact that, strictly speaking, although Mr. James's name was at the time of the resolution of April, 1893, still on the register, he was not, being dead, a member of the company. It seems to me, however, perfectly clear that the word 'member,' as used in some of the articles of the company, must be held to include those whose names are on the register, though they are no longer living." That has been quoted to me as meaning that the deceased shareholder was still a member for all purposes; but Lord Herschell expressly confines it to some purposes. Rigby, L.J., also deals with the point, for on p. 467 he says: "The liability for calls exists notwithstanding the fact that the required notice cannot be given to a dead man, because it may be given to his representatives; though, if the company is not aware of his death, notice served at his registered address is sufficient when the articles provide for such service upon members"; and he cites the case of *New Zealand Gold Extraction Co.* v. *Peacock*. Therefore I think I may say that the Court of Appeal not only did not mean to depart from the prior case, but they adopted it, and I take those two cases as saying that a company cannot, after they have notice of the death, effectively serve a notice of call on the deceased member, and the same proposition seems to me to apply equally well to a notice of forfeiture for non-payment of calls. In this case the articles provide for what is to be done on the death of a shareholder by his executors. It sometimes happens that the executors do not want to be registered. Mr. Buckley, in his comments on article 12 of Table A, points out the necessity of carrying the article further, and on p. 497 (7th ed.) he says: "To escape the disadvantage under which the company is thus placed in having for holders of its shares merely representative members, whose liability is limited by the amount of the assets of their testator, provisions have been commonly introduced into articles of association putting upon executors a pressure either to transfer their testator's shares or to become in their own persons proprietors in respect of them, by attaching the penalty of forfeiture to a neglect to do either one or the other within a limited time." My recollection of the old chartered companies is that there was a very special clause always inserted providing that the executors must come in within a certain time, and there was a strong power given to the company not to pay dividends to those who did not come in. But there is no special clause here, and its absence puts the company in a considerable difficulty. If they cannot call on the executors to come in and they cannot give notice to the dead man, there is a deadlock, but I cannot help that. I think it would be wrong for me to say that because the company are brought to a deadlock by their constitution, therefore the company can give notice to a dead man. I am of opinion, therefore, that this notice is bad, both for this reason and for the reason with which I have already dealt.

Now as to the question of lien. It has been argued that Zuccani had fully-paid shares which by contract were excepted from the lien which the company otherwise would have, and that he could not be deprived of the benefit of that exception by special resolution. Article 29 provides for that. That defines his right; but it was also his right—or rather his liability—to have the articles altered by special resolution. I think that *Pépé* v. *City and Suburban Building Society* shows that the liability to have the

articles altered by a special resolution cannot be got rid of by calling it a contract. Notice of the intended alteration was given to Zuccani after he was dead, and after the company knew that he was dead. What I have already said when dealing with the notice of forfeiture applies also to this notice. But there is another consideration, and that is that Zuccani was the only holder of fully-paid shares, and he owed the company money in respect of shares which were not fully paid. It appears that the only object of passing this special resolution was to get payment of what was due on the shares not fully paid up by a lien on the fully paid-up shares, and that this resolution was aimed at that object and no other. I think there is a good deal of substance in the question whether you can alter the articles in such circumstances. In his judgment in *James* v. *Buena Ventura Nitrate Grounds Syndicate* (*Limited*) Rigby, L.J., says: "But even if this were not so, no majority of the shareholders, even by special resolution purporting to alter the regulations of the company, could retrospectively affect, to the prejudice of non-consenting owners of paid-up shares, the rights already existing under article 27" (*i.e.*, article 27 of Table A). I take the liberty of saying that the remarks of the learned lord justice commend themselves to my views of justice. This part of the case has not been so fully argued before me as the rest of the case, and I have come to my decision on other grounds, but I think it would be a monstrous injustice to the circumstances to say that all the other members of the company can meet and decide that the article can be altered, and that the fully paid-up shares, which one, and only one, member holds, shall from a certain day be held as a security for what is due from that one member in respect of his other shares which are not fully paid up. However, I have said enough on other grounds to come to a conclusion in this case.

Solicitors, *Kerly, Son, & Verden; Mayo & Co.*

Chan. Div.
Bozens-Hardy, J. } June 7, 14.

VIDITZ v. O'HAGAN. (*a*.)

Infant—Marriage articles—Covenant to settle after-acquired property—Married woman—Repudiation—Reasonable time—Austrian law—Post-nuptial settlement—Rectification.

Marriage articles entered into by the intending wife, an Irish woman), the intending husband (an Austrian), the father of the lady, and English trustees, drawn up English form, but executed in Switzerland, will be treated as governed by English law as regards property in this country.

Marriage articles of the above kind cannot be revoked by a post-nuptial document executed by the husband and wife in conformity with the law of Austria, where both parties were domiciled, although the document is by that law valid and effective.

A covenant in marriage articles by the intending wife, an an infant, to settle after-acquired property is as against her voidable, not void, and binds her after the marriage, unless repudiated within a reasonable time after coming of age.

Cooper v. Cooper, *L. R.* 13 *App. Cas.* 88, 36 *W. R.* 98, *explained.*

To repudiate such a covenant upon becoming entitled to property many years after coming of age is not repudiating within a reasonable time.

Smith *v.* Lucas, 30 *W. R.* 451, *L. R.* 18 *Ch. D.* 531, *considered.*

Semble, *that repudiation of such a covenant must be made once for all.*

Action.

This was an action by a married lady, her husband, and children (who were all of age), to obtain payment from the trustees of her marriage settlement of certain sums of money which the trustees considered were part of the settled funds under a covenant on the part of the lady to settle her after-acquired property. The trustees were defendants. The lady, Mrs. Viditz, the only child of an Irish peer and an infant of eighteen years, married her husband, the plaintiff Charles Viditz, who was a domiciled Austrian, on the 24th of November, 1864. Shortly before the marriage, articles were entered into at the British Embassy at Berne, between Charles Viditz of the one part, Mrs. Viditz, then a spinster, of the second part, certain trustees of the third part, and the lady's father of the fourth part, and it was thereby declared and agreed, and Mr. Viditz covenanted with the trustees, that in case the intended marriage should take place all such personal property as Mrs. Viditz was then entitled to in possession, reversion, remainder, or expectancy, and also all such sums of money, stocks, funds, or other personal property, whether in possession, remainder, or expectancy, as might at any time during the joint lives of the husband and wife come to the wife or to her and her husband in her right under any will, settlement, or by gift or otherwise (save and except pecuniary legacies), should be assured to and vested in the trustees upon the usual trusts for the benefit of the wife for life for her separate use, with a restraint upon anticipation, and after her death upon certain trusts for the issue of the marriage, with an ultimate trust for her father absolutely. There was a provision empowering the father to alter and vary any of the provisions, clauses, matters, or things therein contained, and to add or supply any other provisions, clauses, matters, or things which might be deemed necessary or proper. These articles were duly executed by the lady, who attained twenty-one in 1867. In 1870, on the death of the lady's mother, she became entitled to a sum of money which was paid over to the trustees of the deed of 1864 and invested in Consols. In 1880 a deed in English form was executed in Paris, and it purported to be a settlement in pursuance of the articles. Mr. and Mrs. Viditz and the trustees and her father were all parties. It recited the investment of the Consols and declared trusts of that sum similar, so far as material, to the trusts in the articles, and it contained a covenant to settle after-acquired property different from the covenant in the articles, inasmuch as pecuniary legacies were not excepted. In 1882 the father died, and Mrs. Viditz thereupon became entitled in possession to a sum of about £2,000, which was received by the trustees of the settlement and invested. The two sums above mentioned were sums to which Mrs. Viditz was at the date of her marriage entitled in reversion contingently upon attaining twenty-one. The father by his will left all his property to charity. Litigation ensued, and Mrs. Viditz sought to set aside the will. The result was that a compromise of the probate action was effected in March, 1884, under which a sum of £13,000 was to be settled upon her and her children, and a sum of £5,000 was to be paid to her. No part of this sum had been received, however. In 1892 Mrs. Viditz became entitled under the will of an aunt to a legacy, which also had not yet been received. In the same year the trustees informed Mrs. Viditz that the £5,000 expressed to be payable

(a) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

to her under the compromise would have to be paid to the trustees of her marriage settlement. This led to advice being taken, and on the 18th of November, 1893, a document was executed by Mr. and Mrs. Viditz in Austria by which they purported to annul and put an end to the settlement. It was proved that according to Austrian law it was competent to a husband and wife to revoke a marriage contract, notwithstanding the birth of issue.

The plaintiffs Mr. and Mrs. Viditz and others now asked in this action a declaration that the settlement created by the deeds of 1864 and 1880 had been got rid of by the transaction of 1893, or, alternatively, they asked for the rectification of the settlement so far as it went beyond the articles, and in particular they asserted that the settlement, if binding at all, was only b nding to the extent of the funds actually in the hands of the trustees, and that it was competent to the lady to repudiate the settlement so far as the £5,000 and the legacy were concerned.

Eve, Q.C., and *Micklem*, for the plaintiffs.—Mrs. Viditz being an infant when she entered into the articles, they would not bind her until ratification: *Cooper* v. *Cooper*, L. R. 13 App. Cas. 88, at p. 106, 36 W. R. Dig. 98; *Smith* v. *Lucas*, 30 W. R. 451, 18 Ch. D. 531. In 1880, when Mrs. Viditz ratified the articles by the settlement of the 12th of June, her domicil was Austrian, and consequently the ratified contract would be governed by Austrian law. According to that law a husband and wife can revoke the marriage contract, and consequently the notarial act of the 18th of November, 1893, annulled the marriage articles and the settlement of 1880. Ratification of a contract by a married woman does not operate once and for all, but *pro tanto* as regards property to which the lady becomes for the time being entitled: *Smith* v. *Lucas*. Even if the trustees were right in retaining the funds already in their hands, they are bound to pay over the £5,000 and the legacy to Mrs. Viditz.

Hughes, Q.C., and *Ingpen*, for the trustees.—The articles being in English form are governed by English law: *Van Grutten* v. *Digby*, 11 W. R. 230, 31 Beav. 561. They are voidable, but not void, as against Mrs. Viditz: *Edwards* v. *Carter*, [1893] A. C. 360; *In re Hodson*, 42 W. R. 531, [1894] 2 Ch. 421; *In re Vardon's Settlement*, 33 W. R. 297, 28 Ch. D. 124. In *Smith* v. *Lucas* the settlement was post-nuptial, and therefore executed while the lady was under coverture: see observations of Pearson, J., in *Burnaby* v. *Equitable Reversionary Interest Society*, 33 W. R. 639, 28 Ch. D., 416, at p. 423.

They also cited *Seaton* v. *Seaton*, 36 W. R. 865, 13 App. Cas. 61; *Sottomayor* v. *De Barros*, 26 W. R. 455, 27 W. R. 917, 3 P. D. 1, 5 P. D. 94; *Harvey* v. *Farnie*, 31 W. R. 433, 8 App. Cas. 43; and *Udney* v. *Udney*, L. R. 1 H. L. Sc. 441, 17 W. R. H. L.

G. D. Lynch, for other defendants (mortgagees of a share of one of the children).

Cur. adv. vult.

June 14.—COZENS-HARDY, J.—The articles before marriage were obviously drawn up in English form, and must be treated as governed by English law, without reference to the formalities or the substantial provisions which would have been required either by the law of Austria or that of Switzerland: *Van Grutten* v. *Digby*. The first question which arises for my decision is this—What was the effect of the deed of 1864 executed by Mrs. Viditz while a spinster and a minor? So far as I am concerned this is settled by authority which is binding upon me. In *Edwards* v. *Carter* it was decided by the House of Lords that a covenant in a marriage settlement by a male infant is voidable and not void, that it is not necessary to show ratification or confirmation by the infant after attaining majority, and that unless he repudiates within a reasonable time he is absolutely bound. In *In re Hodson* Chitty, J., applied this doctrine to the case of a covenant by a female infant. In the present case it is clear that, if actual intention to ratify or confirm was necessary—although I hold it to be unnecessary—such intention is abundantly proved. In my judgment it is wholly unnecessary to consider whether, according to the law of Austria, Mrs. Viditz could have made a new disposition of her property at the time when she ratified and confirmed. The question is, Was there repudiation within a reasonable time, and not, has there been ratification or confirmation? To the extent, therefore, of the sums of money received by the trustees in 1870 and 1882, I think the settlement of 1864 is binding, and the attempted revocation in 1893 is inoperative. It remains to consider whether the £5,000 payable under the compromise and the legacy under the will of 1892 are or whether either of them is bound by the settlement. As to the £5,000 it is urged that Sir George Jessel in *Smith* v. *Lucas* held that the right to repudiate exists during the coverture, and may be exercised from time to time in respect of any property which may fall in. But this seems to me to be inconsistent with the decision of the House of Lords in *Edwards* v. *Carter*—see especially the observations of Lord Herschell at p. 365. It is not a covenant by an infant married woman, which would be void—*Seaton* v. *Seaton*—but a covenant by an infant spinster, which is no longer voidable. I must treat the case just as if the lady had attained twenty-one when she executed the articles. I am not sure that it is necessary to add that, according to Austrian law, Mrs. Viditz has absolute power to dispose of all her property, notwithstanding coverture.

I prefer to treat the £5,000 as bound in equity by the covenant in the deed of 1864. Reliance was placed by counsel for the plaintiff on the case of *Cooper* v. *Cooper*, and especially upon a passage in the judgment of Lord Watson at p. 106. In that case an Irish lady, while an infant, was married in Dublin to a Scotchman. A deed was executed by her in 1846 by which the husband covenanted to pay her £80 a year, in the event of her surviving him, during life, and by which she accepted that provision in full satisfaction of all terce of lands, half or third of movables, and every other thing that she *jure relictæ* or otherwise could ask, claim, or demand from the husband in case she should survive him. On the husband's death the widow sought to reduce the contract of 1846, and it was held by the House of Lords that she was entitled to this relief. It is to be observed that this was not a contract disposing of her property, and probably was not a contract for her benefit, and that it may well have been held that it was time enough for her to repudiate when her husband had died, for, had she predeceased him, there would have been nothing to repudiate. Lord Watson says at p. 106, "I agree with your lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scotch widow. The rule seems to be clear that an infant cannot, during minority, effectually subject herself to any contractual obligation which cannot be shown to have been for her benefit. She may ratify the contract after attaining twenty-one and so become liable to implement it, but in the circumstances of the present case any such ratification of the contract would, according to the law of Scotland, have been revocable by her as a donation *inter virum et uxorem*." These observations may have had reference to a transaction between the husband and wife in 1863, but in any

event they were not necessary for the decision of the case. As Lord Macnaghten observed at p. 108, "*Primâ facie*, Mrs. Cooper was not bound by the settlement. *Primâ facie*, it was voidable by her, and she is elected to avoid it. It is not alleged that she has done any act to confirm it, if not binding upon her at the time of its execution." I do not think there is any inconsistency between *Cooper* v. *Cooper* and *Edwards* v. *Carter*. I may add that Lord Watson was a party to the decision in *Edwards* v. *Carter*.

As to the legacy, different considerations apply. It is expressly excepted from the covenant to settle after-acquired property in the articles of 1864. It is only covered by the wider covenant in the settlement of 1880. At that date Mrs. Viditz was a married woman. The deed of 1880 was invalid according to Austrian law and according to French law. And according to the law of England at that date it was also inoperative as to future separate estate. The deed of 1880 goes beyond the articles of 1864 in a material respect. [His lordship had intimated during the argument that the clause in the articles enabling the father to alter the provisions would not enable him to enlarge the scope so as to bring in fresh property.] Rectification was asked at the bar, though this relief is not distinctly included in the claim. I do not understand that, assuming the articles of 1864 to bind Mrs. Viditz, any objection is raised to the terms of the deed of 1880 except in respect of the covenant. I therefore propose to rectify the settlement of 1880 by expressly excluding all pecuniary legacies. I think I shall be justified in directing the trustees to pay the costs of the plaintiffs as between solicitor and client and to retain their own costs and costs, charges, and expenses properly incurred out of the trust estate standing in their names.

Solicitors for the plaintiffs, *Kearsey, Hawes, & Walsh*.

Solicitors for the defendants, *Blount, Lynch, & Petre*.

Chan. Div.
Cozens-Hardy, J. } May 10, 11, 16.

HARTLEY *v.* MADDOCKS. (*a.*)

Deed—Construction—Feoffment—Rent-charge—Eviction from part of land—Apportionment of rent-charge—Distinction between grant and reservation of rent.

By a deed of feoffment made in 1840 *A., in consideration of the rent thereinafter reserved, enfeoffed land to B. and his heirs, to the use that A. and his heirs should receive thereout the said rent, and subject to and charged as aforesaid, to the usual uses to bar dower in favour of B.; and, by the same deed, for the consideration aforesaid, B. granted to A. and his heirs the above-mentioned rent and covenanted to pay the same rent. Part of the land having been recently recovered by title paramount, a question arose whether the rent-charge ought to be apportioned or still continued to be payable in full.*

Held, that, a rent-charge being reserved to A. on the face of the deed in priority to B.'s estate in fee, no effect could be given to B.'s grant to A. of the same rent.

Held, therefore, according to the distinction drawn in Co. Litt., p. 148b, *between the grant of a rent and the reservation of a rent in respect of apportionment, that the above-mentioned rent, being a rent reserved, was apportionable.*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Action.

The substantial claim in this action was for a declaration apportioning a chief rent created by means of a limitation taking effect under the Statute of Uses as the consideration for a feoffment of land of the 29th of September, 1840, part of the land having been recently recovered by title paramount. This part of the land enfeoffed was, in fact, leasehold, held under an old lease for years, on the expiration of which the reversioner brought ejectment. The terms of the feoffment are sufficiently stated in the judgment.

Methold, for the plaintiff.—Co. Litt. 148*b* distinguishes between the reservation and the grant of a rent, and shows that rent reserved is apportionable on eviction of part of the land by title paramount, but *secus* where there is a grant of the rent.

Hugo Young, Q.C., and *Clare*, for the defendant.—Rent reserved out of freehold and leasehold land is charged on the freehold only (Co. Litt. 147*b*, *Butt's case*, 7 Rep. 23*a*), so the rent now in question was never charged on anything but the freehold portion, of which there has been no eviction. [COZENS-HARDY, J.—Was not this a tortious conveyance of the whole fee?] Moreover, this rent is granted as well as reserved, and the defendant is entitled to rely on the grant. The grantor would be estopped from denying that he had the land on which he had charged the rent-charge, and so are his successors. The passage on apportionment cited from Coke refers to common law reservation, and does not apply to reservation by the Statute of Uses.

They also referred to Davidson's Precedents, vol. 2, part 1, and to Burton's Real Property (ed. 1850), 349.

Methold replied.

COZENS-HARDY, J.—By a feoffment dated the 29th of September, 1840, and made between George Bramwell of the first part, John Bailey of the second part, and Thomas Mycock of the third part, it was witnessed that in consideration of the rent thereinafter reserved and limited in use, and of the covenants thereinafter contained on the part of Bailey, Bramwell granted, bargained, sold, enfeoffed, and confirmed unto Bailey and his heirs certain property at Stockport to hold to Bailey, his appointees, heirs, and assigns, to the use, intent, and purpose that Bramwell, his heirs and assigns, should for ever receive and take thereout one clear yearly rent of £12 1s. 2½d., and there were the ordinary legal powers to enter and distrain and receive the rents and profits; and the deed proceeded: "And subject to and charged as aforesaid" to the usual uses to bar dower in favour of Bailey. By a second witnessing part "for the consideration aforesaid" Bailey granted to Bramwell, his heirs and assigns, for ever, "the clear yearly rent of £12 1s. 2½d. hereinbefore mentioned to be issuing out of and payable from the land hereby enfeoffed," and Bailey covenanted to pay the clear yearly rent as and in manner thereinbefore appointed. Part of the property comprised in the conveyance has been recovered by title paramount, the interest of Bramwell in 1840 in this part having been in truth only for the residue of an expired term of years. In these circumstances the question which arises for my decision is whether the rent-charge ought to be apportioned, or whether it still continues to be payable in full, although the purchaser or persons claiming through him have been deprived of part of the land. In my opinion this is a case in which the rent is apportionable. In Co. Litt., p. 148*b*, a distinction is drawn between the grant of a rent and the reservation of a rent, it being pointed out that in the former case the rent will continue payable notwith-

standing that the grantor may not have a title to the whole of the land "for against his own grant he shall not take advantage of the weakness of his own estate in part," but in the latter case "seeing the rent is reserved out of and for the whole land it is reason that when part is evicted by an elder title that the donee should not be charged with the whole rent but that it should be apportioned rateably according to the value of the land." And a little further down Coke says: "If the king gave two acres of land to another in fee, reserving a rent, and the one acre is evicted by a title paramount, the rent shall be apportioned." It was argued that the doctrine thus laid down by Coke applies only where the rent is strictly reserved, and not to a case where the rent is created by means of a limitation taking effect under the Statute of Uses. I think, however, this is too narrow a view. On the face of the deed of 1840 the rent is treated as "reserved or limited in use." The rights of the parties ought not to depend upon the mode in which, that which in effect is a reserved rent-charge, was created. It took effect out of Bramwell's estate in fee by virtue of his own assurance, and Bailey took nothing except subject to and charged with the rent. It was further argued that the second witnessing part operated as a grant by Bailey, so that the passage quoted from Coke was really an authority against the apportionment. I am unable, however, to give any meaning or effect to this second witnessing part. The rent-charge was prior to Bailey's estate in fee. Bramwell already had that rent-charge, not by virtue of any grant from Bailey, but by means of Bramwell's own conveyance to uses. It was absurd for Bailey "for the consideration aforesaid" to grant that which was already vested in Bramwell. The result is that, in my opinion, the rent must be apportioned. The apportionment ought to be, not according to acreage, but according to the respective values of the properties at the date of the eviction.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Oliver Coppock*, Stockport; *Arnould & Son*, for *Henry Maddocks*, Coventry.

Q. B. Div.
(Day and Lawrance, JJ.) } May 31.

BREARLEY v. MORLEY. (a.)

Licensing law—Public entertainment—Singing and music—Pianoforte in hotel smoking-room—User by customers—Public Health Act Amendment Act, 1890 (53 & 54 *Vict. c.* 59), *s.* 51.

The appellant, who was the occupier of a fully-licensed inn, kept a pianoforte in the smoking-room of the inn. Pianoforte music and singing was frequently performed in the room, the performers being the ordinary customers of the inn giving their services gratuitously, and performing for the entertainment of their friends and the other customers of the inn then using the smoking-room. No charge was made for admission to the room. The room was not licensed for public singing or music.

Held, that the room had not been "kept or used" for public singing or music within the meaning of section 51, *sub-section* 1, *of the Public Health Act Amendment Act*, 1890.

Case stated by justices for the borough of Batley, in the West Riding of Yorkshire.

An information was preferred by the respondent against the appellant charging that the appellant, on the 17th of December, 1898, was the occupier of a certain room situate and forming part of a house known as the West End Hotel, in Upper Commercial-street, Batley, which room was then unlawfully kept and used for public singing and music without a licence. The justices convicted the appellant, and fined him five shillings.

The following facts were proved at the hearing: Part IV. of the Public Health Act Amendment Act, 1890, had been adopted and was still in operation in the borough.

The appellant was a licensed victualler and the occupier of the fully-licensed inn, alehouse, or victualler's house and premises known as the West End Hotel. No licence for public singing and music or for any other public entertainment of the like kind had been granted to the appellant for the house or any room or part thereof pursuant to Part IV. of the Public Health Act Amendment Act, 1890. The appellant, at the date in question and for some time past, kept a pianoforte in one of the rooms of the hotel, which room was used by the public, being the smoking-room of the hotel.

At 10.25 p.m. on the 17th of December, 1898, being an hour at which the house and premises were open to the public for the sale of intoxicating liquor, a number of men were assembled in the room; one man was playing on the pianoforte an accompaniment for another man who was singing a song, and the other men were sitting round the room apparently listening, though some of them may have been talking. The performers were ordinary customers at the house, and were not servants of the appellant or paid or in any way remunerated by him for their performance, and they performed quite gratuitously and of their own free will and accord. Pianoforte music and singing of the same nature by customers for the entertainment and amusement of themselves and their friends and the customers present in the said room was performed almost always on Saturday evenings, and sometimes on Friday evenings and generally at feast times and holidays. No charge was made for admission to the room when such music and singing took place; the usual charge being made for the actual refreshments ordered by, and supplied to, the customers. The appellant knew of the facts and knowingly permitted the room to be used in the manner stated. It was contended for the appellant that the room was not kept or used for public singing and music within the meaning of the Act of 1890.

The justices were of opinion that the user of the room for singing and music had been and was so frequent and regular that it was in fact ordinary and habitual; that it formed a substantial part of the entertainment for which the room was used; that the music and singing were open freely and without restrictions to such of the public as were customers at the inn. The justices on these grounds convicted the appellant of the offence charged.

The Public Health Act Amendment Act, 1890, section 51.—For the regulation of places ordinarily used for public dancing or music or other public entertainment of the like kind the following provisions shall have effect—namely,

(1) After the expiration of six months from the adoption of this part of this Act, a house, room, garden, or other place whether licensed or not for the sale of wine, spirits, beer, or other fermented or distilled liquors, shall not be kept or used for public dancing, singing, music, or other public entertainment of the like kind without a licence for the purpose or purposes for which the same respectively is to be used first obtained from the licensing justices of the licensing district in which the house, room, garden, or place is situate, and for the regis-

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

tration thereof a fee of five shillings shall be paid by the person applying therefor:

(5) Any house, room, garden, or place kept or used for any of the purposes aforesaid without such licence first obtained, shall be deemed a disorderly house, and the person occupying or rated as occupier of the same shall be liable to a penalty not exceeding five pounds for every day on which the same is kept or used for any of the purposes last aforesaid.

Beverley, for the appellant.—It was not necessary for a licence to be obtained for this room. The room was not kept or used for music or singing, and no public entertainment took place.

Roskill, for the respondent.—The justices have rightly found on the facts proved that the room was kept and used for the purpose of public singing and music within the meaning of the Act of 1890, and the appellant was therefore rightly convicted. The publicity of the entertainment was the gist of the offence. It is immaterial that the customers themselves performed the music, provided that the entertainment was public, as it was. It is to be observed that the language of the former Act (25 Geo. 2, c. 36, s. 2) was merely "kept," whereas in the Act of 1890 the words "or used" are added, and the effect of this is to enlarge the scope of the enactment considerably, for the occupier may now be be convicted, although the user may have been not by him, but by other persons.

He cited *Marks* v. *Benjamin*, 5 M. & W. 565; *Bellis* v. *Beal*, 2 Esp. 592; *Bellis* v. *Burghall*, 2 Esp. 722; *Shutt* v. *Lewis*, 5 Esp. 128; *Hall* v. *Green*, 9 Ex. Ch. 247, 2 W. R. Dig. 175; *Gregory* v. *Tavernor*, 6 C. & P. 280; *Gregory* v. *Tuffs*, 6 C. & P. 271; *Archer* v. *Willingrice*, 4 Esp. 186; *Guaglieni* v. *Matthews*, 13 W. R. 679, 6 B. & S. 474.

DAY, J.—I am of opinion that this conviction cannot be supported. The facts do not show that the room was "kept or used" for public singing or music. There was no providing of a public entertainment in any shape or form. All that happened was that the appellant kept a piano in the smoking-room, and the customers who came to his house used the piano. They were, in my opinion, entitled to do so, just as much as they were entitled to use the chairs and stools. There was not, however, anything in the nature of a public entertainment of any sort or kind, and the case does not come within the statute.

LAWRANCE, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the appellant, *Ullithorne & Co.*, for *James Law*, Batley.

Solicitors for the respondents, *Badham & Williams*, or *Trevor Edwards*, Wakefield.

Q. B. Div.
(Wills and Kennedy, JJ.) April 12, 14.

In re AN APPLICATION UNDER THE SOLICITORS ACT, 1843. (a.)

Solicitor—Certificate—Suspension of solicitor—Application after suspension for certificate—Discretion of Incorporated Law Society to refuse—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 23, 24.

A solicitor was suspended from practice for professional misconduct, and during the period of suspension he became bankrupt. After the period of suspension had expired, he—being an undischarged bankrupt—applied, under section 23 of the Solicitors Act, 1843, to the registrar of the Incorporated Law Society for a certificate, but the registrar refused to grant the certificate upon the ground that the applicant was an undischarged bankrupt; the applicant thereupon applied under section 24 to the court for an order that the certificate should be granted.

Held, that the registrar was not bound under section 23 to issue a certificate, but had a discretion to refuse to issue the same, and that, upon application to the court under section 24, the court were not bound to make an order for the issuing of the certificate, but could make such order "as shall be just"; and that in this case the discretion of the registrar should not be interfered with.

Application under section 24 of the Solicitors Act, 1843, for an order directing the Incorporated Law Society to issue a certificate to the applicant enabling him to practise as a solicitor.

On the 3rd of August, 1896, the applicant, a solicitor, was suspended from practice for two years as from the 3rd of November, 1896. He was so suspended for professional misconduct, and during the time of his suspension he became a bankrupt. At the time when his suspension expired he applied to the Incorporated Law Society for the renewal of his certificate. At the time when he so applied he was an undischarged bankrupt, and the registrar refused to issue the certificate to him upon the ground that he was then an undischarged bankrupt. He then made the present application to the court under section 24 of the Solicitors Act, 1843, and at the date of the application he was still an undischarged bankrupt.

The Solicitors Act, 1843 (6 & 7 Vict. c. 73), provides—section 23: "For the purpose of obtaining such registrar's certificate as aforesaid, a declaration in writing, signed by such attorney or solicitor or by his partner . . . shall be delivered to the said registrar . . . and the said registrar shall, after the expiration of six days after the delivery of such declaration (unless he shall see cause and have reason to believe that the party applying for such certificate is not upon the said roll of attorneys or solicitors), deliver to the said attorney or solicitor, or to his agent, on demand, a certificate, &c."

Section 24: "In case the said registrar shall decline to issue such certificate as he is hereinbefore directed and required to give, the party so applying for the same, if an attorney, shall and may apply to any of the said courts of law at Westminster, or to any judge thereof, or if a solicitor, to the Master of the Rolls, who are hereby respectively authorized to make such order in the matter as shall be just, and to order payment of costs by and to either of the parties, if they shall see fit."

Robson, Q.C., and *C. E. Jones*, for the applicant.

Hollams, for the Incorporated Law Society.

Cur. adv. vult.

April 14.—WILLS, J.—An application has been made to us in this case under section 24 of the Solicitors Act, 1843, to make an order in the following circumstances: The Incorporated Law Society, acting as the Registrar of the Roll of Solicitors, has refused to deliver to the applicant the certificate the delivery of which is provided for by section 23 of the Act, the result of which is that he cannot practice. The application is made under section 24, which says that if the registrar shall decline to issue a certificate the solicitor may apply to any of the courts of common law at Westminster—now to the High Court—who are authorised to make

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

such order in the matter as shall be just. It has been suggested that that section is no longer operative. I need not go through the sections of subsequent Acts which were relied upon as supporting that proposition, as I have no doubt that the section is still operative. Then we have section 25 of the same Act which refers to cases where a solicitor neglects, for more than the prescribed time, to take out a certificate, and provides that in those circumstances the registrar shall not issue his certificate except upon the order of the Master of the Rolls, or of the court. That section has been repealed by subsequent legislation, and the substituted sections now provide that if the certificate is not taken out for more than twelve months it shall be necessary, if the registrar refuse to grant it, to apply to the Master of the Rolls for an order that the solicitor shall be allowed to take out his certificate afresh. That, however, is now immaterial. What is material to the present purpose is that the Act of 1843 contained both the provision under which the application is now made to us and a provision substantially the same as that which is now in force—namely, that where there was a neglect on the part of the solicitor to take out his certificate within the specified period, then it should not be granted by the registrar without the leave of a court or a judge and without the leave of the Master of the Rolls. It has been argued that under section 23 the only case in which the registrar is at liberty to refuse to deliver a certificate is where there is a question as to the identity of the person applying with somebody who is on the rolls, and that the registrar has an absolute statutory duty, if there be no difficulty of that kind, to deliver the certificate; and the tenour of the argument has rather been that under section 24 the jurisdiction of the judge or of the court is limited to dealing with that question. I cannot take that view. It would be as absurd and unsatisfactory a piece of legislation as one could imagine that where a man has simply failed at the proper time to take out his certificate he should not be allowed to do so without inquiry and without satisfying the court that there is no reason against his being re-admitted, where there is nothing known against him, and where he has only failed to take out his certificate within the proper time, and yet that in a case in which he has been guilty of grave offences which have brought upon him the serious consequence of suspension from practice, he should have an absolute unqualified right upon the expiration of the period of suspension to go back to practice. The proposition answers itself, and nothing but the strongest words in an Act of Parliament could induce a court to take such a view of the legislation. Is there anything in sections 23 and 24 which requires us to take such a view? I think not. The two sections must be looked at together, and although section 23, if it stood by itself, and were not supplemented in any way by section 24, might well be invoked as casting upon the registrar a positive statutory duty—except in the cases there provided for—to deliver a certificate, yet when we take section 24 in conjunction with it that cannot possibly have been the intention of Parliament. If section 23 had stood by itself, and if the registrar had failed to fulfil his statutory duty, he would have been liable to an action, or to proceedings by way of *mandamus* to compel him to perform his statutory duty. But under section 24, if the registrar fail to deliver a certificate, application is to be made to the court or judge, who is to make such order as seems just. It seems to me that that was intended to substitute section 24 for that which would otherwise be the remedy—namely, a *mandamus* to compel him to perform his statutory duty—and I cannot suppose that the Legislature ever intended that the courts should, under the Solicitors Act, 1843, part with the jurisdiction which they have always exercised of superintending the rolls of those who are entitled to practise in their own courts, or that it was intended to remove from them the original jurisdiction to see that these important functions were not entrusted to persons who presumably were not fit to exercise them. I think the meaning of the sections, taking the two together, is clear—namely, that *primâ facie* it shall be the duty of the registrar, except in cases of disputed identity, to deliver the certificate as a matter of course, but that if circumstances are brought to his knowledge which, in his opinion, render it necessary or desirable that the jurisdiction of the court or judge under section 24 should be invoked before he performed that which was *primâ facie* his duty in the regular course of things, then he should be at liberty to bring the matter before the court or a judge, and that the court or judge, having all the circumstances brought before them, should say whether or not it was a proper thing to do, and should make such order as should seem to them to be just. I have been assuming that a failure to apply for or to take out a certificate in circumstances like the present is not what is meant by "neglect" in section 25, and in those sections which have been substituted for it. It is not necessary to decide that specifically in this case; but that is my impression, and that impression is not qualified by what we are told has been the course pursued by the Master of the Rolls when applications have been made in circumstances like these under the sections of the Solicitors Act of 1888 (51 & 52 Vict. c. 65) which undoubtedly give to the law society in the first instance, and to the Master of the Rolls afterwards on appeal from them, jurisdiction to entertain questions of this kind. Whether or not such cases strictly fall within the section, the only cases in which there can be an appeal to the Master of the Rolls are cases where the solicitor, as the applicant, has invoked the assistance of the law society under those sections and has failed there, and when he himself is the appellant to the Master of the Rolls. Naturally in such a case the Master of the Rolls, without going into the question whether it was originally a proper application or not under the section having reference to neglect, would say that it was an appeal and that being an appeal to him to exercise his jurisdiction he should impose such conditions as seemed to him to be proper. It is to be observed, also, that under section 19 of the Solicitors Act, 1888, the general inherent jurisdiction of the Master of the Rolls and of the judges of the High Court in respect of their control of the conduct of solicitors is expressly preserved. Therefore their general disciplinary jurisdiction remains exactly what it was before, and it has always been exercised to prevent improper persons from coming upon the rolls, and to see that improper persons upon proper application are removed from the rolls. I cannot doubt that that jurisdiction must also extend to seeing that, when the occasion has arisen for invoking the assistance of the court on behalf of the applicant, a proper case is made out for their interference. That brings me to the question of what is meant by the words that "the court shall make such order as shall be just." Here there is no controversy between the parties, and the interests which are at stake are those of the public. Due consideration has to be paid to the interests of the applicant on the one hand, but the due considerations which are to be required on the other hand, are not those with regard to some other person with whom the applicant has a controversy as to disputed legal rights, but they are those which concern the public generally and the important body to whom the

applicant seeks to be restored. Therefore in those circumstances and with reference to the only class of cases which can come under this section, the expression "just" cannot be restricted to the narrower meaning it would have if the controversy were as to private rights between parties; and it must mean that which is right and fitting with regard to the public interests. With regard to the public interest there is no doubt what our answer ought to be. All that we know of the applicant in this case is that he was suspended for what must have been grave misconduct, because he was suspended for two years, and also that he has since that time become bankrupt and is at the present moment an undischarged bankrupt. When those facts are brought before us it seems to me it would be monstrous to say that any case has been made out which would make it just that we should give the assistance of the court to replace the applicant on the rolls. The result is that in a case of this kind where a solicitor has been suspended the same class of inquiry should be entered into, and that the court should require the same sort of security to guard themselves against making a mistake and allowing an improper person to get back into practice, as is required if he has failed for any reason which may involve no kind of imputation upon him to take out his certificate within the period mentioned in the statutes. It seems to me, therefore, that there cannot be any doubt that it is our duty to decline to accede to the application in the present case.

RIDLEY, J.—I entirely agree. The application was made under section 24 of the Solicitors Act, 1843, requiring the court to do that which is just in the shape of ordering that a certificate should be issued to the applicant. The first answer to the application was that that section has been in effect repealed by subsequent legislation. I cannot accede to that proposition. I think that the subsequent sections that have been referred to are simply in addition to the sections in question, and in point of fact they do preserve section 24 with the same force and effect as it always has had. The next answer was that the application ought to have been made under the substituted section—section 16 of the Solicitors Act, 1888, which has been substituted for section 25 of the Solicitors Act, 1843, and that in point of fact this solicitor had neglected for twelve months after the expiration of his certificate to apply for a fresh certificate, and that therefore he ought to have proceeded under section 16 and gone to the Master of the Rolls to obtain his certificate. I think he cannot be said to have "neglected" to take out his certificate. The applicant being under a sentence of suspension could not neglect to take out his certificate. I do not therefore accede to either of the arguments put forward for the law society, and I think it is open to the court to entertain the application under section 24, this not being a case in which there has been neglect which would send the applicant under section 16 of the Act of 1888 to the Master of the Rolls. I think it is a case in which the applicant may come to the court and ask for such an order as shall be just under section 24 of the Act of 1843. What is the effect of section 24? It deals with a different matter to section 25. It deals with the refusal of the registrar to do the duty imposed on him by section 23—namely, the duty of granting the certificate unless he shall see cause for believing that the party applying is not upon the roll of solicitors. It has been argued by the applicant that because section 24 deals with that matter, therefore the words "as shall be just" must have reference to the precise duty which is placed upon the registrar, and that if the registrar fails to grant a certificate for any other reason than that specified in section 23, it would be the duty of the court to grant a certificate because that would be just. I cannot accept that argument because section 24 is really not required in the Act at all, as section 23 places upon the registrar a plain and precise duty, and if he fail to perform it he could be compelled to do so by *mandamus*, or proceedings might be taken against him. It is apparent, therefore, that the Legislature were considering that there might be other circumstances in the mind of the registrar that might make it desirable that he should not perform merely as a duty the obligation put upon him by section 23, as, for instance, if there were anything in the nature of misconduct, or anything that might make it undesirable that a person entitled *primâ facie* to his certificate should obtain it without being brought before the court. It is in that way, as I think, that the words "as shall be just" are to be construed, and that view is in accordance with the practice. There has been a discretion in the court over the admission of solicitors and over the renewal of certificates. I do not find any case to show that any application has been made under that section; but there is a case of *Ex parte Grey*, 5 Dow. & L. 275, which is to some extent a confirmation of that view. That was an application not under section 24, which we are now considering, but under section 25, because the solicitor had in point of fact failed to renew his certificate. Not having suffered any sentence of suspension he was in a position to apply for a certificate, and he had neglected to do so. The court refused the application simply in the exercise of its discretion. It would be impossible for us to say that it would be a just order for us to make in these circumstances that this certificate should now be granted. If proper materials were furnished it might be right that this application might be granted, and that the certificate might be renewed, but we have not got these materials before us. In this case I think we ought to come to the conclusion that it would not be just to make the order asked for. The court has a discretion over all such matters, and we ought not to exercise it unless we are clearly of opinion that it would be just to do so, and in order to see that it would be just we ought to have materials to guide us to the conclusion that the applicant has been, and is, a fit and proper person to have the certificate granted to him. That has not been done in this case, and I agree that we ought not to make the order asked for.

Application refused.

Solicitors for the applicant, *E. C. Rawlings & Butt.*

Solicitor for the Incorporated Law Society, *S. P. Bucknill.*

Court of Appeal.

From Q. B. Div. (Lindley, M.R., and Romer, L.J.) — June 16, 20.

PRITCHETT AND YOUNG *v.* ENGLISH AND COLONIAL SYNDICATE (LIMITED). (*a.*)

Practice — Garnishee order, action upon—Judgment—R. S. C., 1883, *ord.* 42, *r.* 24; *ord.* 45, *rr.* 1, 2, 7; *Appendix K., Form* 40.

Though a garnishor who has not received payment from the garnishee, a limited company, is not thereby entitled to petition for a winding up, he can bring an action under order 14 *on the garnishee order, and obtain*

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

a judgment against the garnishee which may be made the foundation of winding-up proceedings.

In re Combined Weighing and Advertising Machine Co., 38 *W. R.* 67, 43 *Ch. D.* 99, *discussed.*

Appeal from Phillimore, J., at chambers.

The plaintiffs, who were judgment creditors of one Holdsworth for the sum of £3,459 9s. 4d., had obtained a garnishee order absolute in the usual form against the defendants, the English and Colonial Syndicate (Limited), for the sum of £99 6s. 7d., due by the defendants to Holdsworth. The garnishee order was not complied with, and it was found that the defendant syndicate had no property which could be reached by execution, but had property abroad out of which it could pay the amount, and which would become available if a winding-up order were made. The decision of the Court of Appeal in *In re Combined Weighing and Advertising Machine Co.*, 38 W. R. 67, 43 Ch. D. 99, settled that a winding-up order could not be made on the petition of a garnishor as such; but it was sought by this action to obtain, by suing on the garnishee order, a judgment upon which, if necessary, winding-up proceedings could be taken against the syndicate. The action was commenced by a specially-indorsed writ, and the plaintiffs then applied for judgment under order 14. The defendant syndicate applied by summons under ord. 25, r. 4, that the plaintiff's statement of claim might be struck out as disclosing no cause of action. The master refused to strike out the statement of claim, and gave the plaintiffs judgment; and on an appeal Phillimore, J., at chambers affirmed the master's decision, but gave leave to appeal. The defendant syndicate appealed accordingly.

Llewelyn Davies, for the appeal, referred to R. S. C., 1883, ord. 45, r. 2; *In re Combined Weighing and Advertising Machine Co.; Ex parte Chinery, In re Chinery*, 32 W. R. 469, 12 Q. B. D. 342; *Chatterton* v. *Watney*, 29 W. R. 573, 17 Ch. D. 259; R. S. C., 1883, ord. 42, r. 24; *Bailey* v. *Bailey*, 32 W. R. 856, 13 Q. B. D. 855; and *Westmoreland Green and Blue Slate Co.* v. *Feilden*, 39 W. R. 379, [1891] 3 Ch. 15. [LINDLEY, M.R., referred to R. S. C., ord. 45, r. 4. ROMER, L.J., referred to *Jones* v. *Farrell*, 1 De G. & J. 208.]

Montague Lush, for the plaintiffs, referred to *Godfrey* v. *George*, 44 W. R. 245, [1896] 1 Q. B. 48; *Kerr* v. *Kerr*, 46 W. R. 46, [1897] 2 Q. B. 439; *Hutchinson* v. *Gillespie*, 4 W. R. 302, 11 Ex. Ch. 798; and R. S. C., 1883, ord. 3, r. 6 (c).

Llewelyn Davies, in reply, cited *Walker* v. *Witter*, 1 Doug. 1; *Philpott* v. *Lehain*, 35 L. T. Rep. 855, 24 W. R. Dig. 134; *In re Boyd, Ex parte McDermott*, [1895] 1 Q. B. 611, 43 W. R. Dig. 13; and *Norton* v. *Gregory*, 73 L. T. Rep. 10.

Cur. adv. vult.

June 20.—LINDLEY, M.R.—The question raised by this appeal is not free from difficulty. It is whether an action can be supported by a garnishee order previously obtained against the defendant. It appears that Pritchett and Young obtained judgment in the ordinary way against Holdsworth for a large sum of money—£3.459 9s. 4d.—and that the English and Colonial Syndicate (Limited) owed Holdsworth a smaller sum—£99 6s. 7d.—and that Pritchett and Young have obtained, in the ordinary way and in the ordinary form, a garnishee order upon the syndicate. That order is in the common form in the words of Appendix (K), Form 40, "it is ordered that the said garnishees do forthwith pay the said judgment creditors £99 6s. 7d., the debt due from them to the said judgment debtor, and that in default thereof execution may issue for the same." There is no doubt whatever that that is an order upon them to pay to the plaintiffs the money due to the judgment debtor. It is quite true that before that order was made there was no debt owing by the syndicate to Pritchett and Young; the debt was owing by Holdsworth, and the order is in substance not an order against the syndicate to pay a debt due by it, but a handing over to the plaintiff of something due by the syndicate to Holdsworth.

In order 45 of the Rules of the Supreme Court, 1883, the order which deals with garnishee proceedings, there is a series of rules stating what the procedure for attaching a debt shall be (rule 1), and what shall be the consequence of attaching a debt (rule 2); and there is a complete code for enforcing by this method a judgment obtained by the garnishor against the creditor of the garnishee. The form given in the appendix shows that it is an order on the garnishee to pay a debt due by him, not to the garnishor, but to somebody else. Obedience to the order is to be a complete discharge to the garnishee as against the judgment debtor—that is to say, he is not to be liable to be attacked again in respect of the same debt.

In this case it is found that Pritchett and Young cannot get their £99 6s. 7d. out of the company by issuing execution in the ordinary way. The company have no assets in this country which can be taken, although they have property abroad which can be made available if the company is wound up; and the action, which is a very unusual one, is brought with the avowed object of getting a judgment against the company for the amount of the debt which has been attached, and availing themselves of that to obtain a winding-up order. It has already been decided that a winding-up order cannot be made upon the ordinary garnishee order itself, and this is an attempt to get a judgment on which it can be made.

We have looked into the cases on the subject, and the conclusion at which we have arrived is this. Ord. 42, r. 24, on which the plaintiffs rely, runs thus: "Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." The plaintiffs rely on that rule, and say that they want to enforce this garnishee order by means of an action, as if the order was a judgment. If this were *res nova*, which it is not, I should have thought that order 42 referred to enforcing orders by writ of execution, and to nothing else, and that rule 24 was put in to enable an order, as distinguished from a judgment, to be enforced by execution. I should have doubted whether it applies to the question before us. But it has been decided in *In re Boyd, Ex parte McDermott* and *Godfrey* v. *George* that the word "enforced" in rule 24 includes enforcing by action as well as enforcing by execution.

The rule has been construed in that way, and we cannot go behind those decisions. I do not, therefore, see how we can say that the present action will not lie. We cannot differ from the cases to which I have referred without construing the rule more narrowly than it has been construed previously. Those decisions and this decision will not be inconsistent with other cases which have been referred to. It was said that they were inconsistent with the decisions which show that an action will not lie on a balance order—*e.g.*, *Westmoreland Green and Blue Slate Co.* v. *Feilden*. But a balance order is merely an order for the collection of assets—*i.e.*, to pay a debt due to a company to its liquidator, and it may well be that an action will not lie upon that, but that the only way to enforce it is by execution in the ordinary way, and

that it is not such an order as is contemplated by ord. 42, r. 24. The decisions of the court that garnishee orders and balance orders are not final judgments, and therefore are not alone foundations for bankruptcy notices, are not inconsistent with our decision, for they turn upon the true construction of the Bankruptcy Act and the technical meaning of the words "final judgment." It is pointed out in *In re Combined Weighing and Advertising Machine Co.* that a garnishee order absolute is not a final judgment. The obvious conclusion is that this action will lie, and that we cannot order the statement of claim to be struck out, or say that the decision appealed from is wrong.

But although an action will lie, if a person who has obtained a garnishee order brings an action upon it without any necessity he will run the risk of having his action stayed as an abuse of the process of the court, and of being ordered to pay all the costs of the proceedings. It is obvious that if the amount to be paid can be obtained by execution, but instead of that he incurs the expense of an action, it is an abuse of the process of the court. That does not apply in this case, for the plaintiffs cannot obtain payment without an action, and that is their justification. The only further remark I will make is that, having regard to ord. 45, r. 7, it is plain on the language of the rule that if a plaintiff does obtain payment in obedience to a judgment, or under execution on it, the payment will discharge the garnishee as if the payment had been made without action, so that the syndicate will be protected from having to pay twice over.

ROMER, L.J.—I agree that this appeal shall be dismissed, for the reasons stated by the Master of the Rolls. In this ord. 42, r. 24, as interpreted by *Godfrey* v. *George* acts beneficially, and enables the court to remove some of the difficulty caused by the decision *In re Combined Weighing and Advertising Machine Co.* That decision is binding on us. But seeing that in garnishee proceedings the order absolute contains an order that the garnishee do pay direct to the garnishor, the judgment creditor, I am surprised that the court in the last-mentioned case did not see its way to hold that the judgment creditor there was entitled to petition to wind up the company.

Appeal dismissed.

Solicitors, *Sutton, Ommanney, & Rendall; Spyer & Sons.*

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — May 30, 31.

In re HALE.
LILLEY *v.* FOAD. (*a.*)

Mortgage — Receiver — Appointment by mortgagee of receiver—Extent of agency—Conveyancing Act, 1881, *s.* 24—*Management of business—Payment of mortgagor's debts—Statute of Limitations.*

A receiver appointed under the terms of a power in a mortgage deed which extends the powers conferred by the Conveyancing Act, 1881, *s.* 24, *to manage and carry on a business, is authorized to pay business debts of the mortgagor. This authority is not affected by the death of the mortgagor, and payment by the receiver of an instalment of a business debt contracted by the mortgagor operates as an acknowledgment of the whole debt by the executrix of the mortgagor, and prevents time running under the Statute of Limitations.*

Decision of Byrne, J., ante, *p.* 174, *affirmed.*

Whether a receiver having no powers except those conferred on him by section 24 *of the Conveyancing Act,* 1881, *could pay off an unsecured debt,* quære.

This was an appeal from a decision of Byrne, J. (reported *ante*, p. 174), which raised the question whether a receiver appointed by a mortgagee under a power in the mortgage deed becomes the agent of the mortgagor so that by paying an instalment of a debt due from the mortgagor he prevents the operation of the Statute of Limitations.

The facts are fully stated in the report of the case in the court below, but may be summarized as follows:

By an indenture of the 13th of December, 1886, a certain business was assigned by one Jennette von Swartwout to F. W. Hale, to be considered as belonging to him during the life of the said J. von Swartwout, and after her death to his wife, charged with an annual sum of £520, payable without any deduction during five years from the date thereof to J. von Swartwout, her executors and administrators (whether she should survive for that period or not), by equal weekly payments of £10 each.

Then by clause 9, "In case the said J. von Swartwout shall at any time become entitled to enter into possession of the business as aforesaid, the powers conferred by the Conveyancing Act, 1881, upon a mortgagee when the mortgage money has become due shall, so far as the same are applicable to the terms and conditions of these presents, become exercisable. And it shall be lawful for the said J. von Swartwout, either by herself or by her agents or attorney, in lieu of taking possession, or before or after taking possession of the business, to exercise the power of appointing a receiver conferred by the said Act. And by way of extension of the provisions of the said Act it is hereby also agreed that any receiver appointed under any power in that behalf shall be at liberty if so directed in writing by the said J. von Swartwout, her agents or attorney, to manage and carry on the business as he may think fit, and that any moneys he or the said J. von Swartwout, her agents or attorney, may pay or expend for that purpose, and whether before or subsequent to redemption by the said F. W. Hale or other the person entitled to the business as aforesaid, shall be considered as charged on the business with interest at the rate of 5 per cent. per annum." Hale, in carrying on the business, became indebted to the plaintiff to the extent of £1,000.

In October, 1888, it was arranged that this debt should be paid off by instalments of £25 each, and these instalments were paid by Hale down to his death on the 16th of June, 1891. The defendant Miss Foad was Hale's executrix under his will. At the date of Hale's death the annuity was in arrear to the extent of £1,000, and by a document under her hand dated the 29th of July, 1891, J. von Swartwout appointed F. Johnson "as receiver of the said business with full power to manage and carry on the same as he may think fit."

On the 6th of August, 1891, Johnson paid an instalment of the plaintiff's debt.

In October, 1891, a fresh receiver was appointed by the annuitant who declined to make any further payments. The plaintiff then took out an originating summons on behalf of himself and all other creditors of Hale for the administration of Hale's estate, and the following issues were tried before Byrne, J.: (1) Whether there was a debt due to the plaintiff or

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

not; (2) whether, if there was debt, it was barred by the Statute of Limitations. Byrne, J., held that the payment by Johnson on the 6th of August, 1891, prevented the operation of the statute.

The defendant appealed.

Astbury, Q.C., and *Montague Lush*, for the appeal.

Eve, Q.C., and *Younger*, for the plaintiff, were not called on.

LINDLEY, M.R.—This case has been well argued and the difficulties in it have been ably put forward. I will state at once that I think the case has some novelty in it and requires some care. The important question is whether the payments made by the receiver as agent for the mortgagor to the plaintiff, who is an undoubted creditor of the deceased, of monthly instalments of £25 on account of his debt, are sufficient to enable the plaintiff, whose claim would otherwise be barred by the Statute of Limitations, to prove for the balance of his debt against Hale's estate. It is important, and to my mind all important, to ascertain the extent of the receiver's authority. That authority was conferred by Hale when alive under the deed of the 13th of December, 1886. Hale owed the plaintiff in respect of business transactions £1,000, and there was an arrangement between the plaintiff and Hale to pay off this sum by instalments of £25 each. Hale did that as long as he lived, and on the 1st of June, 1891, he paid the instalment then due. Hale died on the 16th of June, 1891, and the defendant Miss Foad became his executrix. She was in this position. She could pay off the mortgage created by Hale if she had assets, but if not, she was bound by the stipulations in the mortgage deed and, whether she liked it or not, a receiver appointed by the mortgagee would become her agent to the extent of Hale's assets. That would be her true legal position. Hale's death did not operate as a revocation of the mortgagee's power to appoint a receiver, and the defendant could not help herself if a receiver was appointed. Now, what happened then? I turn to the power to appoint a receiver. [His lordship read the clause down to the words "conferred by the said Act."] Pausing there for a moment, I doubt whether it would be right to determine this question in favour of the plaintiff if no power had been given to the receiver except in the terms of the Conveyancing Act, 1881, because though a receiver appointed under that Act is the agent of the mortgagor the Act says what he is to do with the money he receives, and amongst the matters enumerated there is not any power to pay off a debt which does not affect the mortgaged property. I very much doubt whether a receiver under the Act could pay off an unsecured debt. He could keep down the interest on the mortgage debt and so on, but I should be in considerable difficulty in saying that under the Act the receiver had power to pay off an unsecured debt, if the deed contained nothing more than a power for the mortgagee to appoint a receiver under the Act. But the deed of December, 1886, does not stop there. [His lordship read the rest of the clause, and continued:] That is, the receiver has not only to receive, but to manage and carry on the business as he thinks fit. Now, the mortgagee having the power in her hands of appointing a receiver and manager did by the document of the 29th of July, 1891, appoint Johnson a receiver with full power to manage and carry on the business as he might think fit. I think Byrne, J., was perfectly warranted in calling attention to this extension of the statutory powers of the receiver, and this extension is all important. Johnson's position was this. Hale had died and Miss Foad was his executrix, but that did not affect the powers in the mortgage deed, for Miss Foad could not help herself. Then, Johnson having been thus appointed by the mortgagee, receiver and manager of the business, what does he do? He is informed of this debt and he goes on paying the instalments. Can it be said that he was exceeding his authority in so doing? I think not. What was he authorized to do? He was authorized to go on paying the debt if he thought right. It is true he was not authorized by the defendant, but he was by her testator, and that bound his executrix. That is the consequence of the powers contained in the mortgage deed. Now what is the legal effect of his acting on his authority as he did? When he did make the payment in respect of the instalment then due he knew that there was a balance still owing of the original debt, and he made the payment in respect of the original debt. Can it be said that he had not authority even to promise that the testator's assets should be liable in future for the instalments and that the balance of the debt should be paid out of those assets. I think not. I rather demur to the distinction which was drawn between promises and acts. In my opinion if an agent has authority to make payments on account of a debt, it may be inferred that he has authority to make a promise to pay the remainder of the debt, and if he makes a payment on account of the debt and nothing more is said or done, the payment is good *pro tanto*, and a promise to pay the whole may be inferred. The authority to promise, therefore, appears to me to exist, and it appears to me to have been pursued, and that is the key to the whole case. The extent of the receiver's authority is all important. Though I should feel some difficulty if the case turned on section 24 of the Conveyancing Act, 1881, I feel none on the authority which the receiver actually had. The decision of Byrne, J., was quite right, and this appeal must be dismissed, with costs.

JEUNE, P.—I agree with the judgment that has just been delivered, and I agree that the whole question in the case, and the only one, is what was the authority of Johnson. A promise need not be made by the debtor himself: it is enough if it is made by an agent or a person representing him. To take the common case of an executor, if he makes a promise of this kind by making part payment, either personally or by his agent, there is no doubt that he binds the estate to pay the remainder of the debt, because it is his duty to pay his testator's debts. It is similar in the case of a receiver. The case of *Chinnery* v. *Evans*, 13 W. R. 20, 11 H. L. Cas. 115, does appear to me to go so far as to show that a receiver acting within the scope of his authority and dealing with a matter within the mortgage can prevent the operation of the Statute of Limitations by part payment of interest on the mortgage debt. The reason is that he is acting within the scope of his authority. The question therefore comes back to this, Whether the receiver in the present case was acting within the scope of his authority? I agree with what the Master of the Rolls has said as to the importance of the terms of the power under which the receiver was appointed. I also agree that there is a difficulty in seeing how, having regard to the provisions of sub-section 8 of section 24 of the Conveyancing Act, 1881, and the mode in which money coming to the hands of a receiver is to be dealt with, a payment of this kind could be properly made by him. It is difficult I will only say to see how any receiver appointed under that Act could conduct a business and deal with the assets in the way in which the receiver has done here, because the sub-sections of section 24 seem to refer to the different duties of a person appointed to receive money, not of a person

appointed to carry on a business, while here there is a person who has been expressly empowered to carry on a business and whose duty it is to carry it on. If we get as far as that we find, in my opinion, that it was the duty of the receiver to do what this receiver has done. He had power to pay debts connected with the business, and it is not shown that this was not a debt connected with Hale's business. At any rate it was clearly one which Hale was paying off by instalments, and the receiver thought it was part of his duty to pay it off in the same way. There was good reason for its being paid in that way, and I am far from saying that it was not in the interest of Hale's business that the debt should be so paid because the payments by monthly instalments of £25 each prevented the creditor, from coming down on the debtor for the whole sum at once, which might have been disastrous. It was, in my opinion, in accordance with the duty of the receiver in managing the business to pay this debt as he did. In these circumstances it seems to me that Byrne, J., was perfectly right in finding, as he did, that this receiver in making these payments was acting properly—*i.e.*, within the scope of his authority. Thus the difficulty in the case vanishes. We cannot distinguish between a payment and a payment from which a promise is to be inferred, as it is a legal inference. Payment of part of a debt is an acknowledgment that it is part of a debt which has to be paid, and it seems to me to be quite impossible to draw any distinction between the payment as a payment and the payment as an act from which the legal inference of a promise to pay the whole debt follows, when once we have got the fact that the payment was within the duty of the receiver. I think, therefore, that the appeal fails.

ROMER, L.J.—I also think that, by virtue of the powers conferred by the deed under which the receiver was appointed, he had power on behalf of his principal, the mortgagor, to pay the instalment of £25 on the 6th of August, 1891, as also the two subsequent instalments which he seems to have also paid in the same way; and the legal result of that payment is the same as if it had been made by the executrix herself. He was, in my opinion, authorized to make these payments in such a way as to acknowledge that the balance of the debt was due from Hale's estate, and should be paid. Therefore the payments that he made were duly and properly made, and take the case out of the Statute of Limitations.

Appeal dismissed.

Solicitors, *Graham Gordon; J. B. & F. Purchase.*

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — May 3.

NORTH-EASTERN RAILWAY CO. (*Appellants*) *v.* OVERSEERS OF DALTON (*Respondents*). (*a.*)

Highway — Rate — Exemption — Liability to repair ratione tenuræ—*Order making highway a parish highway—Continuance of exemption—Highway Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 33—*Highway Act,* 1862 (25 *&* 26 *Vict. c.* 61). *s.* 35.

Where, by an order of justices under section 35 *of the Highway Act,* 1862, *a highway repairable* ratione tenuræ *is made a parish highway, and a sum is fixed to be paid to the highway board by the person previously liable to repair, "in full discharge of all claims thereafter in respect of the repair and maintenance of such highway," the exemption conferred upon such person by section* 33 *of the Highway Act,* 1835, *continues, and he is discharged not only from liability to repair* ratione tenuræ, *but also from liability to pay highway rates.*

Judgment of Wills *and* Kennedy, JJ. (46 *W. R.* 582, [1898] 2 *Q. B.* 66), *reversed.*

Appeal from the judgment of a Divisional Court (Wills and Kennedy, JJ.) upon a special case stated by quarter sessions (46 W. R. 582, [1898] 2 Q. B. 66).

The case was stated by the quarter sessions for the North Riding of the County of York upon the hearing of an appeal by the North-Eastern Railway Co. against a rate made for the relief of the poor in the parish of Dalton and for other purposes chargeable thereon on the 7th of June, 1897.

Prior to the making of an order by the quarter sessions for the North Riding at Michaelmas, 1880, constituting the hamlet of Islebeck a separate highway parish, and annexing such parish to the Birdforth highway district, that hamlet formed part of the township of Bagby in the said district, and was a place in which all the highways were repairable by the occupiers of land *ratione tenuræ*, and in which no highway rates were leviable by reason of the exemption contained in section 33 of the Highway Act, 1835. Islebeck continued to form part of the township of Bagby until June, 1886.

The appellant company was at all material times in occupation of lands in Islebeck, and was prior to the 11th of April, 1881, liable *ratione tenuræ* to repair part of a highway in Islebeck.

On the 11th of April, 1881, an order was made at petty sessions, notwithstanding the opposition of the appellant company, under section 35 of the Highway Act, 1862, whereby it was ordered that all the highways within Islebeck should become, and for ever thereafter be, parish highways, and be repaired and maintained by the Birdforth Highway Board, and whereby the sums to be paid by the respective occupiers of lands in Islebeck previously liable to repair the highways in full discharge of all claims thereafter in respect of the repair and maintenance of the highways were fixed. Such sums were duly paid in accordance with the order.

In June, 1886, the hamlet of Islebeck was detached from the township of Bagby, and amalgamated with the township of Dalton in the Birdforth highway district.

On the 7th of June, 1897, a rate for the relief of the poor in the parish of Dalton was made, in which the appellant company was rated and assessed in respect of its occupation of its lands in Islebeck. Such rate was levied (*inter alia*) in respect of expenses incurred, or to be incurred, by the Rural District Council of Thirsk (the successor of the Birdforth Highway Board) in respect of the repair and maintenance of the highways within the said rural district, including the portion of the parish of Dalton which was comprised in Islebeck.

The appellant company appealed against this rate to quarter sessions.

On behalf of the appellant company it was contended:

That the company, having been liable to maintain the highways in the hamlet of Islebeck *ratione tenuræ*, was exempted by section 33 of the Highway Act, 1835, from liability to rates levied in respect of the repair and maintenance of such highways, and had continued to be exempt ever since;

And that the company, having complied with the requirements of the order of quarter sessions of the 11th of April, 1881, was, by section 35 of the Highway

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Act, 1862, discharged of all claims thereafter in respect of the repairs and maintenance of any highways in Islebeck, and was, therefore, not liable to pay the rate in question.

On behalf of the respondents it was contended:

That the exemption from the payment of highway rates conferred by section 33 of the Highway Act, 1835, continued only so long as the liability of the company to repair a highway *ratione tenuræ* lasted, and that therefore the exemption determined on the 11th of April, 1881, when by virtue of the order of that date the highway became a parish highway;

And that the order of the 11th of April, 1881, only operated to discharge the appellant company from all claims from that date by the Birdforth Highway Board or its successors in respect of the repairs and maintenance of the highway then ordered to be made repairable by the parish, and in no way affected the liability of the appellant company, in respect of its occupation of property within the district of the Thirsk Rural District Council, to pay rates for expenses incurred by the council in respect of the repair and maintenance of highways within the rural district.

The court of quarter sessions held that the appellant company was not exempt from payment of any portion of the rate, and dismissed the appeal.

The question for the opinion of the court was whether the appellant company was exempt from payment of so much of the rate as was levied in respect of the repair and maintenance of the highways in the hamlet of Islebeck.

Section 33 of the Highway Act, 1835, is as follows: "When property, or the owner or occupier in respect thereof, has previous to the passing of this Act been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed."

Section 35 of the Highway Act, 1862, is as follows: "Where any person or corporation is liable, by reason of tenure of lands or otherwise, to repair any highway situate in a highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate . . . and the justices at . . . petty sessions . . . shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway."

The Divisional Court affirmed the decision of the quarter sessions.

The appellant company appealed.

A. T. Lawrence, Q.C., R. Cunningham Glen, and *A. A. Bethune,* for the appellants.

Macmorran, Q.C., and *H. Gawan Taylor,* for the respondents.

A. L. SMITH, L.J.—In this case a railway company appeal against a highway rate on the ground that they are by statute exempt from liability to such a rate. The railway company are the occupiers of land in a hamlet in the parish in question, and as such were formerly liable *ratione tenuræ* to repair a portion of a highway, and it is found in the case that the inhabitants of the parish were not liable to any highway rates in respect of the highways in the hamlet, because all such highways were repairable by the occupiers of lands *ratione tenuræ*. The railway company accordingly claim to be exempt by virtue of section 33 of the Highway Act, 1835. Section 27 of that Act gives power to levy a rate for the purposes of the Act on all property liable to be rated to the relief of the poor. The effect of that section read together with section 33 seems to me clearly to be that all occupiers of land are liable to such rate except in the case of property which was before the Act legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, all of which property is to be exempt from payment of the rate imposed by the Act. The rating authority contends that the railway company's exemption has ceased by virtue of section 35 of the Highway Act, 1862. I will first refer to section 62 of the Highway Act, 1835, which provides that any person liable to repair a highway *ratione tenuræ* may apply to have the highway made a parish highway, and the justices may make an order to that effect, and, if they do, they shall fix the proportion of the expenses of repairing the said highway to be annually paid by such person to the surveyor of the parish, or, instead of so doing, they may fix a certain sum to be paid by such person to the surveyor in full discharge of all claims thereafter in respect of the repairs of such highway. It seems to me clear that the meaning of that is that where a sum is so paid it is paid in full discharge of all liability for the repair of the highway. Then we come to section 35 of the Act of 1862, which says that, on the application of any person liable to repair a highway *ratione tenuræ*, justices may make an order that such highway shall thereafter be a highway to be repaired and maintained by the parish, and shall in such order fix a certain sum—which in my opinion means a capital sum—to be paid by such person to the highway board in full discharge of all claims thereafter in respect of the repair and maintenance of such highway. It is now argued that, though the railway company were before exempt from highway rates under section 33 of the Act of 1835, and have paid a capital sum under section 35 of the Act of 1862 in full discharge of their liability *ratione tenuræ*, they are yet liable to pay highway rates from which they were before exempt. I cannot so read the section. I do not think it has the effect of imposing upon the railway company a liability from which they were exempt. The question was considered in *Reg.* v. *Heath*, 14 W. R. 383, L. R. 1 Q. B. 218, when the Court of Queen's Bench took the same view which I am taking now.

The rating authority also take another point. They argue that by reason of the Local Government Act, 1894, there is now no such thing as a highway rate under the Highway Act, 1835, and that the exemption does not apply to the rate in the present case. It is true that alterations have been made in the rate, as regards the area over which it is imposed, the persons on whom it is imposed, and the machinery for levying it, but I think it is still a highway rate and is imposed by the Highway Act, 1835. I am therefore of opinion that the appeal must be allowed.

VAUGHAN WILLIAMS, L.J.—I entirely agree. Wills, J., began his judgment by dealing with the words at the end of section 35 of the Highway Act, 1862, "a certain sum to be paid by such person or corporation to the highway board of the district in full discharge of all claims thereafter in respect of the repair and maintenance of such highway," and he thought that those words meant a discharge only from liability to repair *ratione tenuræ*, and not a discharge from liability to pay rates as an inhabitant. He then went back to the words at the beginning

of the section, and construed them as meaning that a person liable to repair a highway *ratione tenuræ* might apply to justices for an order to make such highway a highway to be repaired and maintained by a rate to be levied on all the owners of property in the parish, including himself. If this were the true view, the sum to be paid ought not to be a sum representing the total amount of his liability, present and future, in respect of the highway *ratione tenuræ*, but simply the difference between the sum representing his past obligation to repair the highway and the sum representing his liability as a ratepayer. This view, however, seems to me to give the go-by to section 33 of the Highway Act, 1835, which expressly exempts persons in the position of this railway company from liability to highway rates. I think that the judgment of the Divisional Court fails to give effect to the exemption created by that section, and also disregards the authority of *Reg.* v. *Heath*.

ROMER, L.J.—I also agree. In my opinion, when section 35 of the Highway Act, 1862, is put in force, and a sum is fixed to be paid by the person previously liable to repair the highway *ratione tenuræ* in full discharge of all claims thereafter in respect of the repair of the highway, that sum ought to be fixed at such an amount as shall be equivalent to his liability to repair the highway taken over, and not upon the footing that he will become liable to pay highway rates from which he has been previously exempt. I do not think it was the intention of the Act that a person who had paid such sum should incur a fresh liability to highway rates. The case of *Heath* v. *Weaverham Overseers*, 42 W. R. 478, [1894] 2 Q. B. 108, seems to me to be distinguishable from this case.

Appeal allowed.

Solicitor for the appellants, *A. Kaye Butterworth.*

Solicitors for the respondents, *Robbins, Billing, & Co.*, for *Swarbreck & Rhodes*, Thirsk.

High Court of Justice.

Q. B. Div.
(Darling and Channell, JJ.) May 9.

WHITE (*Appellant*) *v.* MORLEY (*Respondent*). (*a.*)

Metropolis—Management—County council—Bye-law—Gaming—Betting—Repugnancy between bye-law and statute—Metropolitan Streets Act, 1867 (30 & 31 *Vict. c.* 134), *s.* 23—*Municipal Corporations Act*, 1882, *s.* 23.

A bye-law made by the London County Council prohibiting under a penalty any person from frequenting and using any street or other public place for the purpose of bookmaking, betting, or wagering, is a reasonable bye-law, and one that can properly be made under section 23 *of the Municipal Corporations Act*, 1882, *for the good rule and government of the district; and there is no inconsistency or repugnancy between the bye-law and the statutory provision contained in section* 23 *of the Metropolitan Streets Act*, 1867, *which says that "any three or more persons assembled together in any part of a street within the Metropolis for the purpose of betting shall be deemed to be obstructing the street," and shall be liable to a penalty.*

Case stated by Mr. Bros, Metropolitan police magistrate sitting at the Clerkenwell police court, raising a question as to the validity of a bye-law made by the London County Council in reference to betting in any public street.

A complaint was made by the respondent Morley, who was an inspector of the Metropolitan police, against the appellant for that he (the appellant) on the 2nd of December, 1898, at Palmer-place, near the Holloway-road, did unlawfully frequent and use the said place for the purpose of betting, contrary to the bye-laws of the London County Council.

The bye-law, which came into force on the 1st of October, 1898, was as follows: "No person shall frequent and use any street or other public place on behalf either of himself or of any other person for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager with any person, or paying or receiving or settling bets," under a penalty not exceeding £5.

The bye-law was made by the London County Council in pursuance of their powers under section 16 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), which gave to county councils the same power of making bye-laws in relation to their county as the council of a borough have, under section 23 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which section provided that: "The council may, from time to time, make such bye-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough, and may thereby appoint such fines, not exceeding in any case five pounds, as they deem necessary for the prevention and suppression of offences against the same."

At the hearing the following facts were proved: On the 2nd of December, 1898, the appellant was standing at about 1.45 p.m. on the footway of Palmer-place, which is a street and a public place. He stood there for about ten minutes, and during that time was approached successively by four persons, who handed to him slips of paper and money, and then walked away. They approached him singly, and there was never more than one person with him at any one time. On the 3rd of December a similar occurrence took place.

On behalf of the appellant it was contended that the bye-law was *ultra vires* and invalid, on the ground that the bye-law was repugnant to the statutory enactment already in force in the Metropolis—namely, section 23 of the Metropolitan Streets Act, 1867, relating to betting in the streets.

The magistrate found as a fact that the appellant was frequenting and using the said Palmer-place for the purpose of betting and receiving bets in the manner described on the 2nd and 3rd of December, 1898; and he found, and it was not in dispute, that the appellant was thereby guilty of a breach of the bye-law, assuming it to be valid; and he was further of opinion that the appellant's contention was wrong, and that the bye-law was a valid bye-law.

The question for the opinion of the court was whether the bye-law is a valid bye-law in the Metropolis.

Section 23 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), provides: "Any three or more persons assembled together in any part of a street within the Metropolis for the purpose of betting shall be deemed to be obstructing the street, and each of such persons shall be liable to a penalty not exceeding five pounds; and . . . a constable . . . may take into custody, without warrant, any person who may commit such offence in view of such constable."

Joseph Walton, Q.C. (*H. Avory* with him), for

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

the appellant.—The bye-law is bad upon two grounds—in the first place as being unreasonable, and in the second place as being repugnant to the statutory enactment in section 23 of the Metropolitan Streets Act, 1867. The bye-law is bad as being unreasonable. In *Johnson* v. *Mayor, &c., of Croydon*, 16 Q. B. D. 708, 34 W. R. Dig. 129, a bye-law prohibiting the sounding or playing upon any musical instrument in the streets on Sunday, was held to be unreasonable and *ultra vires*; and in *Strickland* v. *Hayes*, 44 W. R. 398, [1896] 1 Q. B. 290, a bye-law prohibiting generally singing and playing in the street, was held to be bad. These two cases are in our favour. The case against us is *Burnett* v. *Berry*, 44 W. R. 512, [1896] 1 Q. B. 641, where a bye-law prohibiting any person from frequenting and using a street or other public place for the purpose of bookmaking or betting, was held to be valid. These cases have all been considered in *Kruse* v. *Johnson*, 46 W. R. 630, [1898] 2 Q. B. 91, where it was held that the bye-law in question was valid, but there is nothing in that decision which conflicts with *Strickland* v. *Hayes*. This bye-law is also bad upon the second ground that it is inconsistent with and repugnant to section 23 of the Metropolitan Streets Act, 1867. The very same matter which is dealt with in the bye-law is dealt with in that statute. Section 23 deals with the very same subject-matter—namely, frequenting the streets for the purpose of betting, and says that three or more persons so frequenting the streets shall be guilty of the offence. The bye-law alters that statutory enactment and says that one person so frequenting the streets shall be guilty of the offence. Where the Legislature has dealt with a certain subject-matter in a certain way—as it has done here with street betting—then a bye-law which alters that and deals with the same subject matter in a different way is repugnant to the statute, and therefore unreasonable and void: *Bentham* v. *Hoyle*, 26 W. R. 314, 3 Q. B. D. 289. This also distinguishes the present case from *Kruse* v. *Johnson*.

Dickens, Q.C. (*Daldy* with him), for the respondent.—With regard to the first point, the case of *Burnett* v. *Berry* is conclusive, With regard to the second point, a bye-law is not necessarily repugnant to or inconsistent with a statute because it forbids that which the statute does not forbid. The mere fact that the bye-law forbids that which the Act does not forbid does not make the bye-law a bad bye-law, but if the bye-law forbids something which the Act specifically allows, then it would be bad. Section 23 of the Metropolitan Streets Act was aimed chiefly against obstruction in the streets; there was then no question of good rule and government, but a question of the obstruction of the streets only. The section said that three or more persons shall not assemble together in the streets for the purpose of betting; but it does not say that one person may frequent and use the street for that purpose. The bye-law, therefore, forbids a thing which is not dealt with by the statute at all, and which consequently the statute does not specifically allow. There is no inconsistency, therefore, between the provision in this bye-law and the provisions contained in section 23 of the Metropolitan Streets Act, 1867. There is therefore nothing in section 23 of the Act to make this a bad bye-law, and apart from that, the bye-law is in almost the same terms as the bye-law in *Burnett* v. *Berry*, which was held to be a valid bye-law, and one that could properly be made for the good rule and government of the place. The question of a bye-law being bad as being repugnant to the provisions of a statute is dealt with in the case of *Edmonds* v. *The Master, &c., of the Company of Watermen and Lightermen*, 24 L. J. M. C. 124.

Joseph Walton, Q.C., in reply.

Daldy referred to the case of *Jones* v. *Walters*, 62 J. P. 374, 46 W. R. Dig. 98.

DARLING, J.—I think in this case the appeal must be dismissed. The first question is whether the bye-law would be good if it were not for the Metropolitan Streets Act, 1867. I think, putting that Act out of the question, the bye-law would be a good bye-law for the good rule and government of this district. It is obviously a bye-law intended to prevent the use of the streets for something for which they are not intended. They are intended for use as highways for people to pass and repass along them; and this bye-law is aimed against persons who frequent and use the streets or any other public place for the purpose of betting. It is obvious that the persons who frequent and use streets and public places for making bets with people who choose to come and bet with them, prevent the natural use of the streets and public places as places of free passage; but I am also inclined to think that after what was said by Lord Russell, C.J., in *Kruse* v. *Johnson*, the bye-law would be good on quite a different ground—namely, that it would be good as preventing that being done in the streets which the Legislature has said shall not be done in places kept for the purpose, such as betting houses. I think the Chief Justice meant to say that it would be perfectly right in a local authority to prevent their streets being used for the same purpose for which the Legislature had said that houses should not be used—namely, for betting. Therefore I think, putting the Metroplitan Streets Act out of the question, that the bye-law is a good one; and I think so for this further reason, that since *Kruse* v. *Johnson* the court will not in any case of a bye-law made by a local authority—a popularly-elected body—look so strictly to see whether it is reasonable or unreasonable as they would be disposed to do in the case of a bye-law made by railway or other such companies. I think that since *Kruse* v. *Johnson* we must take it that the view of the court is that there is a larger discretion confided to elected bodies than was given to dock and railway companies and so on, and that the courts will not scrutinize so strictly the bye-laws of public bodies as they would the bye-laws made by trading corporations.

Now, with regard to the Metropolitan Streets Act, it is said that the bye-law is repugnant to that Act. If the bye-law and the Metropolitan Streets Act prohibited the same thing and provided different penalties, or if they prohibited the same thing, one with a condition and one without it, and the bye-law removed a condition, I should then say that the bye-law was repugnant to the Metropolitan Streets Act. The law on this point is laid down by Cockburn, C.J., in *Bentham* v. *Hoyle* thus: "Where the Legislature itself has taken the initiative and has superseded the necessity of making any bye-law by a statutory enactment applicable to the very case in respect of which the company have taken upon themselves to make a bye-law," then the bye-law would be repugnant to the statute. Applying that here, do the Metropolitan Streets Act and the bye-law deal with the same case? I do not think they do. Undoubtedly they both deal with betting, and with what in the statute is said to be an obstruction, and what in the bye-law may be an obstruction in the streets; but I do not think they both deal with the same thing. What is punished in the one is not forbidden in the other. The bye-law does not prohibit the same thing as the statute prohibits, and the statute does not punish the same thing as the bye-law punishes. The statute prohibits three persons from meeting together and making bets and punishes

them, but it does not say that one person may stand about in the street and make bets. The bye-law says that one person shall not stand about the street and make bets, but the statute has not said that he may. Further, the bye-law does not deal with a person doing that only once; the bye-law does not say that if any person makes a bet in the street with any other person he shall be liable for it; but it says that if any person shall frequent and use a street or public place, for the purpose of betting, then it shall be an offence against the bye-law. That is quite a different thing to what the statute deals with. The statute punishes three persons who once bet in the street; it does not punish two persons who once bet there, nor one person who once bets there. The bye-law does not wait for two or three people to come together, but it says that if any person frequents and uses the street—that is, does it more than once—for the purpose of betting, he shall be guilty of an offence and be liable to a penalty. There is, therefore, no inconsistency between the bye-law and the provisions of the statute, and the bye-law is not rendered invalid by any such inconsistency or repugnancy. The bye-law being in other respects a reasonable bye-law, there is nothing in the Act of 1867 to render it unreasonable or repugnant to that Act.

CHANNELL, J.—I am of the same opinion. Apart from the Metropolitan Streets Act, 1867, the case of *Burnett* v. *Berry* is expressly in point, and I think it is binding on us, even if we did not agree with it; but personally I do agree with it. I think, however, it would not be open to us now to question it. In point of fact it has already been followed in the case of *Jones* v. *Walters*. Consequently that must be taken to be settled, and it settles that this bye-law is within the powers under which it purports to be made, unless, of course, the Metropolitan Streets Act affects the question. It further precludes the question of its reasonableness; and since the decision of that case (*Burnett* v. *Berry*) the case of *Kruse* v. *Johnson* has been decided, and that case has thrown a good deal of new light on the extent of the doctrine about the reasonableness of bye-laws, and, so far as I understand that decision, the main point of it is this—that where a thing is of a character that it can be a nuisance and an annoyance, then it is almost always for the local authority which has the power to make the bye-laws to say whether it shall be considered to be a nuisance and an annoyance in their particular locality. The court will say if the bye-law is unreasonable, if they think the act forbidden could not be a nuisance; but if they think that it could be a nuisance, they will not as a rule interfere with the discretion of the local authority as to whether or not it should be forbidden in that particular locality. That is the main point in *Kruse* v. *Johnson*, and it seems to me, if anything were necessary to add to *Burnett* v. *Berry*, it would show that this bye-law would not be interfered with by the court on the ground of its being unreasonable.

Then it remains to consider the question about the Metropolitan Streets Act, 1867. I take it that that must arise under the doctrine of the law that bye-laws must be not only reasonable, but that they must not be repugnant to the general law. The power to make bye-laws is a power to make local laws which may be supplementary to the general law. It does not make the bye-law bad because it forbids something which does not happen to be forbidden by the general law. That is settled by several of the cases. That is not the meaning of repugnancy; but the local law may not alter the general law; it may not take away a qualification or condition which makes an act wrong under the general law, or it may not make unlawful an act which is expressly authorized by the general law. That would be repugnant. There must be some inconsistency in the bye-law other than that the local law goes on and forbids something which is not forbidden by the general law. My brother has pointed out the distinction between these two things, and I have not anything to add to that. Assuming that the only head of good government of the Metropolis under which this can come is the head of prohibiting the misuse of the streets, I still think that these two things, the bye-law and the Metropolitan Streets Act, are not repugnant to each other or inconsistent. The Metropolitan Streets Act makes the accidental assembling together of three persons for the purpose of doing something which goes beyond the ordinary use of the highway to be an obstruction of the highway and the matter of a fine. This bye-law makes a different thing altogether an offence. It makes the frequenting of the place unlawful, and a man would not frequent the place for the purpose of betting unless he could get persons to come there and bet with him. The result of his frequenting there would be to make people assemble there, and if the only thing were to prevent the misuse of the streets, it would result in that. The reason these things are not inconsistent or repugnant is that the gist of the offence in the two cases is entirely different. The gist of the offence under the Metropolitan Streets Act is the three people getting together, whether intentionally or not, and the gist of the offence under the bye-law is the frequenting and resorting and doing it habitually. They are two different things. One is forbidden by one law and one by the other, and there seems to be no inconsistency between them. If, therefore, the only head of good rule and government under which this comes is the head with reference to the preventing misuse of the streets, I still think they are not repugnant. I am also strongly inclined to think that in the expression of Lord Russell of Killowen, C.J., in *Burnett* v. *Berry*, the Lord Chief Justice meant to go beyond the mere misuse of the highway, and meant to say that it was within the power of the local authority to apply to the streets within their jurisdiction something that was already forbidden in a different way in different places. I think he meant to say that; and Wright, J., has said the same in *Jones* v. *Walters*; and if that be right, there is no inconsistency here. It seems to me on either ground it may be said there is no repugnancy. If the first point were not sufficient I should want further time to consider the latter point. I feel no doubt that the bye-law is a good one.

Appeal dismissed.

Solicitors for the appellant, *Lewis & Lewis*.

Solicitor for the respondent, *W. A. Blaxland*.

House of Lords.

From C. A. (England). March 14.

POWELL v. KEMPTON PARK RACECOURSE CO. (a.)

Gaming—Betting—Reserved enclosure on racecourse—"Using a place" for betting purposes—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 2, 3.

The keeping an enclosure at a racecourse, to which bookmakers and others resort, and in which betting takes

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

place, with the knowledge and without the interference of the owners of the racecourse, is not contrary to the provisions of the Betting Houses Act, 1853. *What is prohibited is the opening, keeping, or using of a place for a betting business.*

Hawke *v.* Dunn, 45 *W. R.* 359, [1897] 1 *Q. B.* 579, *overruled.*

Decision of the Court of Appeal, 46 *W. R.* 8, [1897] 2 *Q. B.* 242 (Lords Hobhouse *and* Davey *dissenting*), *affirmed.*

This was an appeal from an order of the full Court of Appeal (reported 46 W. R. 8, [1897] 2 Q. B. 242).

The material facts are as follows: At Kempton Park Racecourse there is a piece of ground (about one-quarter of an acre) known as the Reserved Enclosure, which is enclosed by iron rails. Persons are admitted to this enclosure on race-days, varying in number from 500 to 2,000, amongst whom there are always professional bookmakers from 100 to 200 in number. These bookmakers are admitted to this enclosure as members of the general public, and have no rights, interest, or control in or over the enclosure, nor have they any special rights or privileges therein. The bookmakers do not confine themselves to any fixed spot in the enclosure, nor do they use any desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same spot of the enclosure. In this enclosure these bookmakers carry on business in competition with each other, betting with those of the public who are within the enclosure and who may be desirous of betting with them, whether upon credit or by way of ready-money betting.

The appellant brought this action as a shareholder against the Kempton Park Racecourse Co., asking for an injunction to restrain them from permitting the enclosure to be illegally used within the meaning of the Betting Houses Act, 1853.

It was admitted that for a long time before the passing of the Betting Act of 1853 betting transactions of the same character had been carried on in enclosures at racecourses, and also that the respondents knew and permitted the use which was made of the enclosure.

Lord Russell of Killowen, C.J., before whom the case was tried, held that the case was not distinguishable from *Hawke* v. *Dunn*, 45 W. R. 359, [1897] 1 Q. B. 579, and granted an injunction, but the Court of Appeal (Rigby, L.J., dissenting) held that the enclosure was not a "place used" by the bookmakers for the purpose of betting with persons resorting thereto, and that the company did not permit the same to be so used within the meaning of section 3 of the Act.

The plaintiff appealed from this decision.

Asquith, Q.C., and *Cautley*, for the appellant.

Joseph Walton, Q.C., and *Stutfield* (*C. W. Mathews* with them) for respondents.

Earl of HALSBURY, L.C.—The statement of claim in this case sets forth that the plaintiff is a shareholder in a company incorporated to carry on the business of a racecourse company, and it asks that an injunction may issue to restrain the use of a part of the company's premises for what is alleged to be an illegal purpose.

If the purpose for which the part of the premises in question is to be used is illegal, the injunction ought to be granted; if not, the action ought to be dismissed.

Before dealing with the substance of the question which comes up on appeal from the Court of Appeal to your lordships, I think it right to say that in my view it is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the court before whom it comes must decide according to law, and the construction of the Act of Parliament is a pure question of law, and must be decided according to its legal construction, whatever may be the motives and wishes of the respective litigants. The form in which the question arises and the facts proved or admitted may affect the determination of the particular case and its consequent authority as governing other transactions, but the construction of the Act of Parliament must be the same upon whatever facts the question of its construction arises.

It has, indeed, been argued that the history of the legislation and of the facts which gave rise to the enactment may, in view of the preamble, affect the construction of the Act itself; but though I do not deny that such topics may usefully be employed to interpret the meaning of a statute, they do not, in my view, afford conclusive argument here. Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment; and in this case it appears to me that the question must be decided upon the words of the statute, and upon the facts which are not and never have been contested. Indeed, apart from the historical questions which, for the reasons I have given, I dismiss from my consideration for the present, it would be idle indeed for anyone to contest what I suppose is true of every race-meeting in the country, and not only applicable to this particular case.

In saying this, however, I think it is right to add that I do not see the least foundation for the suggestion that any fact or argument has been kept back or misrepresented. The argument has certainly been conducted with great ability and earnestness, as indeed was to be expected, considering who were the learned counsel who argued it.

Now, the words which it appears to me your lordships have to construe are these: (1) no house, office, room, or other place; (2) shall be opened, kept, or used; (3) for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same; or of (4) any person having the care or management, or in any manner conducting the business thereof; (5) betting with persons resorting thereto.

I will discuss presently the rest of the section, and in discussing this part of it I will postpone for the moment all the words except "owner" or "occupier" in order to make clear what, in my view, is the substantial sense of the enactment. I will, of course, deal with the other words in detail, and particularly with the words "person using the same"; but let us first see what is the substance of the enactment. It prohibits opening a house, &c., for the purpose of the owner or occupier betting with persons resorting to the house so opened. It does not prohibit betting. It does not affect to deal with the betting of people unconnected with the house, betting *inter se*; and it is obvious that unless some of the words which I have omitted can be held to enlarge the nature of the offence created by the words I have quoted, none of the facts proved shew the owner or occupier of the place in question to be betting or ready to bet with the persons resorting thereto. The owner or occupier has no interest in any bet, and is in no way concerned with any bet, and whatever may be the nature of the place, which to my mind is another question, the transactions described in the case are in no sense bets with the owner or occupier of the place in question. They are bets *inter se* by a great many people

who resort to the place, but have, as I have said, no relation at all to the owner or occupier thereof.

This appears to me so plain that I think, but for the words "or person using the same," no question would ever have arisen, and it is material to see what these words import. It will be observed that these words occur as an alternative to the owner of the place—I supply the words "of the place" by necessary construction—the "occupier" of the place, the "keeper of the place, or any person using the place": these are all put in one category. Then comes another enumeration of persons employed, and again language is exhausted to fix responsibility upon caretakers, managers, or other persons in any manner conducting the business thereof.

I think it is clear that what the statute is dealing with here is the case of persons who are in control and occupation of the place which is assumed to be the betting establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, and the business is that of a betting house or place to which people can resort for the purpose of betting, not with each other, but with the betting establishment.

It is the employment of the words "using the same" which to my mind has led to the difference of opinion. Those words, unless explained by the context, are necessarily ambiguous. In one sense every person who enters the enclosure uses it; but he does not use it in the character of owner, keeper, manager, or conductor of the business thereof. The betting man in his use of the place differs in this respect in no way from any other member of the public who enters it, and who neither does nor intends to bet. It is the personality of the betting man and not his being in any particular place which affords the opportunity of betting, and a man who walked along a public road shouting the odds in the way here described would be doing exactly the same thing.

It is nothing to the purpose that there are a great many of them who may be found in this enclosure; there is no business being conducted by a keeper, owner, &c., in the enclosure. Each betting man is himself conducting his own business of a betting man, and, as I have said, his betting is in no way connected with the place, except that he, as well as other people not betting men, are there.

It is here that I am unable to follow the reasoning of my noble and learned friends Lord Hobhouse and Lord Davey. They both, if they will forgive me for saying so, employ the word "use" in a double sense. My noble friend Lord Hobhouse admits the word "use" is ambiguous, and limits it by such words as "deliberate, designed, and repeated"; but to my mind these words miss the point. It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto.

My noble and learned friend Lord Davey gives as the prohibited purpose, "using," without any such qualification as I have been endeavouring to explain —using a house for the purpose of betting with persons who resort thereto. It is upon this point that I think the whole question turns, and I think here there is no such betting establishment at all as is aimed at by the Legislature, and no keeper, owner, &c., who bets with anyone. As I have said, I can understand no one of these bettors to be different from any other class of bettors. They do not in any sense own or keep the enclosure differently from the persons resorting thereto. In truth they are all persons resorting to this place, and the other class aimed at by the statute do not exist at all in these transactions. The man who takes the admission fee neither knows nor cares whether the man who pays for his admission bets or no.

I am not certain that I appreciate the distinction which I observe is sought to be drawn between what are called professional betting men and other men who bet. In respect of games which people play for amusement or pay, the distinction is intelligible enough; but all people who bet for money mean to win money, and whether it is for the sake of a living or for the sake of adding to money which the bettor already possesses seems to me an altogether illusory distinction.

The second part of the section is in strict accordance with what I have suggested as the meaning of the statute. It assumes a place or establishment for receiving money or some valuable thing being received by or on behalf of an owner, occupier, keeper, or person; here the statute uses the words "as aforesaid," "that is person using the same," for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise. Then every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law.

It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some other person who, if these designations do not apply, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place. In this view it is not an offence under this Act of Parliament to allow persons to assemble for the purpose of betting with each other; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual bettor, is conducting his own business, and doing it in a house used indeed, but only used, just as he might do it on the racecourse or on the high road. There is no betting establishment at all, and there is no keeper of one.

I do not think, therefore, that the important question is, What is a "place"? I think in this respect with Rigby, L.J., that any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the statute. But I think not only that this is the construction of the words to which, of course, we must apply the meaning which the Legislature has intended, if we can find it out, but I think it is reasonable and in accordance with good sense that the words should be so construed and so limited. Every game, sport, or exercise is included in the section, and I suppose there is hardly any uncertain event which is of great public interest on which bets are not frequently made.

Take a boat-race. Everyone who has a field, or garden, or house, or room and lets it for the day of the race may be perfectly certain that some of the people who go there, if they go in any considerable numbers, will bet, not indeed with the owner or occupier, &c., but with some one or more of the people who are there. Is each of such places a common gaming house, and subject to the provisions of the law recited in section 2, and a common nuisance under section 1? It seems to me that such a con-

struction would subject a great many perfectly innocent people to great inconvenience and danger when they neither had nor intended to have any connection with betting houses or anything analogous to betting houses.

I have used the phrase "innocent people," by which I mean people who neither bet nor wish to bet; but it is obvious that the Legislature has not prohibited betting at all, but prohibited keeping a house for betting. I do not again go through the list of words which follow "house," because I have already sufficiently explained the construction I place upon them all.

It is not very obscure why the Legislature has used so many words to express its meaning, and I have divided the words into five paragraphs to show what has been the cause of this multitude of alternatives. Suppose the thing intended to be prohibited is what in my construction of the section it is, and suppose the Legislature had not provided for all the alternatives, and the section had run thus, "No house shall be kept for the purpose of the owner betting with persons resorting thereto": the Legislature of course had to provide for the place not fulfilling the legal meaning of a house; so follow the words, "office, room, or other place." It had to provide for any evasion of the word "kept"; so we have the words "opened, kept, or used."

Then, in like manner, the person betting is to be got at, whatever form he assumes, betting on behalf of the betting establishment; so we then get "owner," "occupier," "keeper," "person using." Then another evasion occurred to the mind of the draftsman, and he proceeds to deal with any person employed by or acting on behalf of the classes previously described, or any person having the care or management of, or in any manner conducting, the business thereof; so that all through there must be a business conducted, and a place so connected with that business that the person owning it is betting with the persons resorting thereto.

I do not think it is important to go through all the cases which have been brought before the courts upon this subject, partly because so many of them have been decided on the special facts, which have not rendered it necessary to decide the exact question now before your lordships, and partly because I think A. L. Smith, L.J., has succeeded, in his luminous judgment, in showing that no less than eight very learned judges have construed the statute in the way that it appears to me it should be construed, and the case now comes before your lordships in a form that undoubtedly demands the decision in favour of one view or the other; but as the case of *Hawke* v. *Dunn* is said to have given rise to this litigation, I wish to examine the grounds of that decision.

I am unable to accept the reasoning in that case (*Hawke* v. *Dunn*), nor do I think it is consistent with the previous authorities or with itself.

In the first place, I find that reliance is placed upon the fact that the bookmakers who bet are professional bookmakers.

I know of no canon of construction which can introduce such words into an Act of Parliament, and certainly there are no such words here. I cannot doubt that if the prohibited thing is done, whatever that prohibited thing is, by a person who does it for the first time in his life, he is just as amenable to the law as though he had been for many years in the practice of it. Let a man open a house for such a purpose, and though he never in fact made a bet or received a deposit, though the proof might be difficult, yet the offence, if proved, would be consummated.

At the end of the judgment (in *Hawke* v. *Dunn*) I find these words: "The law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal, but what the Legislature has forbidden, and what it has pronounced to be illegal, is the use, by those who make a trade and business of betting, of any place for the purpose of betting with persons resorting thereto." I will not again refer to the fallacious employment of the word "use"; what I at present insist upon is the selecting of such persons indicated by the words as if the Act of Parliament had made any difference between different classes of persons, and as if professional bettors were in any different position from any other members of the public.

In another part of the judgment I find the learned judge saying: "In my opinion to limit the meaning of the words 'other place' to some other place *ejusdem generis* with a house or office, would have the effect of defeating, not of forwarding, the object of the Legislature, and I cannot imagine that, with the desire to suppress that kind of betting mentioned in the preamble, it was in contemplation to afford it a kind of sanctuary in a betting ring or in any other place not *ejusdem generis* with a house or office." The mischief recited in the preamble is the opening of places called betting houses or offices, and the receiving money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf. The learned judge makes his meaning clear when he begins by saying that "one of the practices deemed to be objectionable and injurious was that of what is known as ready-money betting—viz., that the person making the bet deposited with the bookmaker the money which he was disposed to adventure." This is again inserting by construction words which are not there; the words of the statute are "owners or occupiers of such houses or offices."

I certainly should have thought that if this case were to be argued upon the preamble alone there was not much room for doubt; with the actual enacting words, however, I have myself endeavoured to deal.

The commentary on *Doggett* v. *Catterns*, (1868) 13 W. R. 160, 17 C. B. N. S. 669, in Ex. Ch. 19 W. R. 390, 19 C. B. N. S. 765, seems to suggest that a different thing is aimed at by section 4 than that which is included in section 2. I entirely agree with what Blackburn, J., said on that case, but his question is, I think, applicable to the case now under discussion. I cannot suppose that the very same thing was not intended to be aimed at by all the sections; and the reasoning of the learned judge seems to assume that a different class of transactions was aimed at, so that the decision of *Doggett* v. *Catterns* might be reconciled with the view that he himself entertains, upon the ground that the question did not arise upon section 1 but upon section 4. I am unable to concur with any such view. The offence, whatever it is, is created by sections 1 and 2. The other sections in the Act apply as corollaries from the commission of the offence, and I think it would be impossible to reconcile *Doggett* v. *Catterns* with the view of the learned judge, by supposing that section 4 is not ancillary to and from but a new remedy in respect of the same class of transactions which are made the subject of penal enactments by sections 1 and 2.

The analogy which the learned judge suggests between the statutes 42 Geo. 3, c. 119, 4 Geo. 4, c. 60, s. 60, and the statute now under construction, is, I think, erroneous, and a careful consideration of those statutes would lead to an opposite conclusion. The words of the Act Geo. 3, c. 119, so far as they are relevant to the matter in hand, prohibited any person from keeping any "office or place" for lotteries, and so

Act which the learned judge does not seem to have noticed—namely, 59 Geo. 3, c. 65, actually recites that doubts had arisen in respect of the use of these words. The section in that Act is as follows: "And whereas doubts have arisen whether, under and by former Acts passed from time to time for granting to His Majesty a sum of money to be raised by lotteries, and the Acts commonly called 'Little Goe Acts' of the twenty-seventh year of his present Majesty, intituled 'An Act to render more effectual the laws now in being for suppressing unlawful lotteries,' and of the forty-second year of His present Majesty, intituled 'An Act to suppress certain games and lotteries not authorized by law,' the word 'place' mentioned in the said Acts respectively was meant to describe any place used for the purpose of drawing the illegal lottery called 'Little Goe' or for the purpose of insurance in the lottery of 'Little Goe' or in anywise relating thereto, be the same an enclosed building or not; it is therefore hereby declared and enacted, that the word 'place,' when and where the same is mentioned and used in this and the said several above-recited Acts relating to the drawing of the said illegal lottery called 'Little Goe,' or the assembling of persons for any of the illegal purposes mentioned therein, or for the purpose of 'Little Goe' or lottery insurance, shall be taken to extend to and mean any place in or out of an enclosed building or premises, whether upon land or water, where such illegal practices, or anything relating thereto, shall be carried on or attempted to be carried on."

So that, notwithstanding the width of the words, the Legislature found it necessary to explain, enact, and declare the meaning of the word "place." These form part of a collection of statutes establishing a monopoly by the Government for raising money by lotteries, and prohibiting every kind of lottery and every "place" for establishing any kind of lottery in words which are intended to be exhaustive. To apply such an analogy to such an Act as your lordships are now considering, wherein it is admitted that neither betting nor professional betting—if there be a difference—is prohibited at all, seems to me to be erroneous.

If I have passed over the arguments relied upon by some of your lordships in respect of the history of the legislation and the argument derived from the mischief which the preamble expressly recites to be the mischief against which the Act is directed, it is not that I differ from or undervalue the cogency of those arguments. I only desire to emphasise the proposition that I should come to the same conclusion as that to which I have arrived upon the language of the statute itself if those arguments were not available to aid its construction.

For these reasons I think the appeal should be dismissed with costs, and I move your lordships accordingly.

I ought to add that my much lamented and distinguished friend Lord Herschell, who saw my judgment, concurred in the views which I have expressed. And I have a letter from my noble and learned friend the Lord Chancellor of Ireland saying that he also agrees with the judgment I have proposed to your lordships.

Lord WATSON.—I am of the same opinion, and for substantially the same reasons which have already been expressed by my noble and learned friend the Lord Chancellor.

Lord HOBHOUSE.—In stating to the House the conclusions to which I have been drawn in this difficult case, I will endeavour as far as possible to avoid repetition of matters which have been frequently stated, though some repetition is necessary to make my remarks intelligible. I think that, often as disputes have arisen under the Betting Act of 1853, none has arisen exactly in the present form. In other cases there has either been a criminal charge or an action to recover money as the foundation of them. In the present case, a member of the company which owns the racecourse seeks to prevent the company from using its property in a way which in his view is forbidden by statute. Those sections, therefore, which are specially aimed at occupiers, managers, or persons filling other special characters, are not now directly called into action. They must be carefully considered as throwing light on the principal section which contains the prohibition to which they all refer and on which they all rest. But the part of the Act relied on for the injunction is the first and principal section, which declares in impersonal terms that no place shall be used for the purpose therein described.

The section is somewhat involved, and I am disposed to think that its involutions have caused some inaccuracy of language, or even of thought, in some passages of the many judgments cited to us. I will first pick out and arrange the material words applicable to the present discussion. After the preamble, section 1 enacts: "(*a*) No house, office, room, or other place (*b*) shall be opened, kept, or used (*c*) for the purpose of the owner . . . (*d*) or any person using the same . . . (*e*) betting with persons resorting thereto." Taking the words of widest meaning, I read this as a declaration that no place shall be used for the purpose of the owner or (of) any person using the same (for) betting with persons resorting thereto. There is no question here about the owner using the place for betting with anybody. I have only inserted him into my skeleton sentence for the purpose of showing how I read into it the prepositions "of" and "for" in heads (*c*), (*d*), and (*e*)—a reading which makes the grammar rather clearer, and, I think, will hardly be disputed. If, then, the company's reserved enclosure is a placed used for the purpose of any person using it for betting with persons who resort to it, it is the thing prohibited; it is declared to be a common nuisance and contrary to law.

The precise nature and use of this enclosure is to be learned from the company's defence and from particulars of description put in by them. I will state what seem to me the material points. It is about a quarter of an acre in extent. It is uncovered, except that on the side furthest from the racecourse is the grand stand—namely, tiers of seats with a roof over them. All people are admitted to the racecourse on payment of 1s. or 2s. 6d., according to the occasion. All people are admitted to the enclosure on such further payment as will make up £1. The number of persons admitted on race-days varies from 500 to 2,000. Among them are professional bookmakers, varying from 100 to 200, having no special right there, and admitted only as other people are. Of the general public the greater number go there for the purpose of backing horses with bookmakers. A certain number do not bet at all. The bookmaker is accompanied by a clerk, who assists him in his transactions. He does not confine himself to any fixed spot, nor does he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same part of the enclosure. Some minor points are mentioned, and various modes of betting explained; but I do not think that much more light is thrown on the nature of the place than by the main incidents which I have mentioned.

We have it, then, that in this small space of a quarter of an acre there collect habitually on race-days a number of persons whose calling is to make

bets with anybody who comes to them; that they may number 200, each with his clerk, making 400 persons out of, at most, 2,000, whose business is betting with the public; that they never fall short of 100, making, with clerks, 200 such persons; that the greater number of the other persons using the enclosure, who may be 500 or may be 2,000 in the course of the day, go there for the purpose of doing business with these bookmakers; and that, though they walk about, each of the bookmakers is usually to be found in the same part of the enclosure. Your lordships are the judges of fact in this case. What inference can you draw, except that the enclosure is known to persons desirous of making bets as a place where they can at once find those who will gratify their desire; and that the business is regular and methodical, carried on in a defined area, which is small compared with the numbers who use it for betting, and in which each professional betting-man can be at once found by anybody who wants him within a few yards of the spot on which he is accustomed to stand?

Applying the expressions of the statute to the facts, and taking the words in their ordinary and reasonable sense, it seems to me impossible to deny that the enclosure is a "place kept" (by the company) and "used" (by them) "for the purpose of persons" (bookmakers) "using the same for the purpose of betting with persons resorting thereto" (*i.e.*, with that larger number of the public who go for the sake of betting with them), or, conversely, that it is kept and used by the company for the purpose of that greater number of the public using it for betting with the bookmakers who resort to it. The words appear to me to describe the case of this enclosure so readily and fitly that it is incumbent on the company, who deny that the use is illegal, to adduce very strong reasons for holding that the words are used in some sense much more restricted than the sense which they are calculated to bear according to the ordinary use of language. That they undertake to do by an examination of the rest of the statute.

It is said that some limitation must be placed on the generality of the words, for otherwise, seeing that betting, like every other human action, must be in some place or other, which for the moment would be used for that purpose, it would result that all betting would be prohibited. That is a thing which the Legislature has never attempted. In the year 1845 it was enacted that a bet should not be the basis of a contract as it used formerly to be; but it remains a perfectly legal act. That argument is repeated many times in various forms of language, and to show precisely what it is I cannot do better than read a passage from the weighty judgment of the present Master of the Rolls: "No person can bet except in some place or other, and whenever he bets in any place he uses that place for betting. To construe 'other place' or 'place' in its ordinary sense of any and every place where persons can or do bet, would involve an absolute prohibition of betting, and would have rendered it quite unnecessary to specify 'betting houses, rooms, or offices.' But the Legislature clearly did not intend to prohibit, and has not prohibited, all betting, nor even all betting by persons who deposit their stakes. Some limitation must therefore be put on the expression 'other place' or 'place.'"

Now, speaking with great deference to so clear an intellect, I cannot help thinking that the argument would not have been put in this way if it had not been for the involved structure of section 1, or if the sentence had been kept, as it were, displayed before the eyes of the commentator. The ordinary sense of "place" is not to mean any and every place where persons can bet. The ordinary sense is a portion of space, and as applied to the earth we live on, a portion of that earth. But the moment the idea of betting is introduced, other words of section 1 come into play. The Legislature has not left us to deal with "place" *in vacuo* or in the abstract. It has joined other words, and so, as I think, carefully described and confined the meaning of "place." If the practice complained of is that of the owner, occupier, manager, or persons in like position, the meaning is confined within a very narrow compass. In the case before us we have a wider range given by the word "persons." Still there is a qualification of the word "place," and it is one which seems to my understanding to be reasonable, intelligible, and definite enough to ascertain and to apply to the facts of each case. To fall within section 1 the place must be one used for the purpose of anyone using the same for betting with persons resorting thereto. That is true of only a very limited number of places. We have not to construe the word "place," but the compound term "place-used-for-the-purpose." I agree that we must consider the meaning of the word "used" and the meaning of the word "purpose," but if we find that when those words are interpreted in senses germane to the subject-matter, and in accordance with common usage they give a reasonable limitation of the word "place," why should we quit the safe ground of the statutory words and go about seeking for limitations of our own, which must be conjectural?

The most common limitation imposed on the generality of the word "place" by those who think it needs more limitation than is supplied by the words immediately connected with it is, that it must be akin *ejusdem generis* with its companions, "house, office, room." If the genus selected is wide enough in range, I agree; but that does not go far to solve the problem. That it must mean something other than a house, office, or room the words compel us to admit, and I think nobody denies it. To find out what it means that is not a house, office, or room, and is yet in the view of the law-makers of the same nature, the statute itself is our guide; not in sidelong, indirect lights thrown by other sections addressed to other parts of the subject, but in the express words of this section, which are directly addressed to the very root of the subject. If another place is definite enough in area for identification, if it enables its users to carry on their business as a house, office, or room would do, and if the use of it produces the same results to betting people as a house, office, or room would do, it is of the same genus or nature as a house, office, or room, and it is struck at by the Act. And I think that is the kind of place which is designated by the expression indissolably linked with it, "place-used-for-the-purpose"; and that the other limitations which have been suggested to exclude such places as this enclosure are not warranted by the terms of section 1, and are not called for by any fear of unreasonable consequences. With these remarks on the insufficiency, as I think it, of the criticisms on the word "place" separated from the context from which the statute never separates it, I pass on to examine the words of qualification used in the statute.

The place must be used for a purpose before it can fall within the prohibition. The word "used" is almost as wide in range as the word "place." It may be applied to most human actions. But to use a thing for a purpose is an expression with a much more limited range, and the nature of the purpose will confine it within narrower limits still. If I walk along Whitehall I may be said to use Whitehall, but if I blow my nose there, and thereupon anyone were to say that I was using Whitehall for the purpose of blowing my nose that would be a misuse of language to which either casual hearers or students of

language would object. The phrase "use for a purpose" necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand. Again, if a snarling dog approaches me, and I take up one of the stones on the road to fling at him, it is not incorrect, though the user be momentary, to say that I have used the stone for the purpose of flinging it at a dog. But it would be very incorrect to say that the stones on the road are kept or used for the purpose of persons using them for flinging at dogs. The expressions, I think, necessarily, or at least very strongly, import an habitual or repeated use of the thing for the purpose.

If, then, we read the statute as striking at places the use of which for the purpose of betting is deliberate, designed, and repeated, either on the part of the owner or person having the control, or on the part of other persons using the same, we shall, as I conceive, give to its words their plain and ordinary meaning, and we shall not give to it any extravagant latitude such as has been suggested.

I do not propose to take up the time of the House by a minute examination of cases which have been examined often and minutely by others. I think that very little, if any, authority can be produced against the reading which I have tried to expound, and that many judicial opinions may be cited which favour it. But I should like to illustrate it by reference to cases which seem to me to mark neatly the boundaries between legal and illegal use of a place for betting. There are two cases, in each of which the bar or tap-room of a public-house was used for betting. In each case betting took place in the bar. In *Whitehurst* v. *Fincher*, 17 Cox C. C. 70, 38 W. R. Dig. 82, the defendant was the betting man. He went to the bar on three consecutive days and made some bets. He was not a bookmaker. It was held that the room was not used for the purpose. In fact, the defendant came in, and being there made bets, but there was no designed or systematic use of that place. In *Hornsby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20, the defendant was the occupier, whose room was used by a bookmaker systematically for his business, and the defendant was convicted. The judges who decided the former case were Mathew, J., and Fry, L.J., and those who decided the latter were Mathew, J., and Mr. Justice, now Lord Justice A. L. Smith. And with *Hornsby* v. *Raggett* agree *Reg.* v. *Preedy*, 17 Cox. C. C. 3, decided by Hawkins, J., where the place was the bar of a public-house, to which the defendant resorted on several days for making bets. In none of these cases did the court allow the objection that the betting men had no right to use the place; or that it was used at the same time by other persons for its legitimate purpose of a tap- or bar-room; or that no particular part of the room was allotted for betting. The decisions turned on the essential question whether or no the evidence showed that the room was used for the purpose of a person using the same for betting with persons resorting thereto. And for ascertaining this purpose the leading consideration was whether the use of the room was casual or systematic.

For the same purpose I compare the cases of *Reg.* v. *Cook*, 32 W. R. 796, 13 Q. B. D. 377, and *Snow* v. *Hill*, 33 W. R. 475, 14 Q. B. D. 588, on the one hand, with *Hawke* v. *Dunn* on the other hand. In the first of those three cases the place was a bicycle-ground, [illegible] acres in extent. There were 20,000 spectators. Though no betting was allowed, some actually took place. The manager of the ground was convicted by the magistrates, but the conviction was quashed by the court, consisting of Hawkins, J., and Smith, L.J. The facts showed, said Hawkins, J., that betting was not the business of the place. So in *Snow* v. *Hill* the place was an enclosed field, five acres in extent, used for dog-races. The defendant, who was convicted by the magistrates, moved about this field making bets. Lord Coleridge and Smith, L.J., were the judges. They quashed the conviction. It appears from the judgment which the latter learned judge delivered in the present suit, that the precise ground of the decision was that the defendant walked about and did not use any definite spot; not, as had been supposed, that he was not shown to have been a professional bookmaker. But in that case there was no other spot capable of definition except the whole field, and it was not shown that the field was crowded with betting men, or could reasonably be said to be used for the purpose of betting, or for any purpose other than its ostensible one of dog-racing. In both these cases the question really tried was whether a defined place was used for the purpose forbidden by the statute. In *Hawke* v. *Dunn* the same question was tried. The defendant was a bookmaker, the place was an enclosure, within a racecourse, called "Tattersall's Ring." On the day in question about 1,000 persons were admitted to the enclosure, including the defendant and fourteen other bookmakers, with their clerks. That is a much smaller proportion of bookmakers than exist in the present case; but as regards the size of the place and the habitual use of it, that case strongly resembled the present one. The magistrates refused to convict the defendant of using the enclosure for the forbidden purpose, but on appeal a conviction was obtained. Hawkins, J., delivered the opinion of the court of five judges, who were unanimous. He laid it down that the user forbidden is the user by those who make a trade or business of betting. And what the judges found is that the facts proved—namely, the definite area, the large number of betting men resorting to it for betting, the habitual use of it, and the calling of the defendant—combined to show that the enclosure was a place used for the forbidden purpose.

Here let me make a remark on a point which has entered into the discussion of the six cases I have quoted—namely, whether or no the persons betting were professional bookmakers. It was pointed out more than once at the bar, and has been again pointed out by the Lord Chancellor, that the statute does not single out bookmakers as objects to strike at. That is quite true, and yet it remains that the character of the persons who commonly use the place is a relevant and important fact. The crucial question being whether the particular place in dispute is a "place-used-for-the-purpose," surely the fact that it is habitually used by persons who make betting the business of their lives is an important ingredient of evidence for ascertaining the purpose. I have not mentioned it with any other object, and I think it is with the same object that other judges have dwelt upon it.

I think that the six cases which I have mentioned are all well decided, though of course I am aware that the suit before your lordships is intended to be and is in effect a rehearing of *Hawke* v. *Dunn*. Different judges used different terms in expressing their opinions; but in each of these six cases the real controversy has been whether there is a reasonably defined area designedly and repeatedly used for the purpose of betting with persons resorting thereto. If so, that is a forbidden place within section 1, and the question who is liable to penalties depends on other sections of the Act.

Of course there will be difficult cases in which it is doubtful whether they fall on one side or the other of the dividing line between legality and illegality, whatever line may be drawn. In deciding whether a place is used for a purpose, the size of the place, its more or less marked division from other places, the

proportions between those who come for the purpose in question and those who come for other purposes, the regularity or frequency of the use, all such things must enter into the consideration, and may cause much difficulty. For myself, I cannot feel substantial difficulty in the six decisions I have quoted. And yet I know there is difficulty, such difficulty as to produce dissent from *Hawke* v. *Dunn* in the Court of Appeal, and among most of your lordships. How far that difficulty will affect other decisions I hardly know, but unless it is rested on some grounds peculiar to enclosures on racecourses it will shake many other decisions. I think that some of the other decided cases are on the face of them open to question. In *Eastwood* v. *Miller*, 22 W. R. 799, L. R. 9 Q. B. 440, I should have doubted whether the ground could properly be said to be a place used for the purpose of any person using the same for betting with persons resorting thereto, seeing that the only place was a large field used for other purposes by largely preponderating numbers of persons. In *Haigh* v. *Town Council of Sheffield*, 23 W. R. 547, L. R. 10 Q. B. 102, the same doubts occur. But in the case of *Hawke* v. *Dunn*, as in the present case, the statutory expressions are fitted exactly to the facts, and we can hardly say that there is difficulty, if these expressions are to receive their obvious and ordinary sense, and are not to be cut down on account of expressions in other sections, or because it is that such places as enclosures on racecourses are wholly beyond the scope of the enactment.

The latter of these suggestions is founded mainly on the preamble, which recites as the motive for the new law that a kind of gaming has "of late" sprung up. It goes on to mention specifically the opening of places called betting houses or offices, and the receiving of money in advance for bets, which I believe is called ready-money betting. "For the suppression thereof" it is enacted; and then commences section 1. There is nothing to explain what period of time is comprised in the vague words "of late," nor whether the latter phenomena are the opening of betting houses and offices simply, or, as the grammar would indicate, that opening combined with ready-money betting; nor why ready-money betting, which requires possession and payment of cash by the offerer of the bet, is more demoralizing than ordinary betting, in which he may go to any extent beyond his means on the chance of winning and never having to put down any money at all. Looking at the preamble alone, I say for myself that it does not give me any idea of the precise mischief which the Legislature is resolving to suppress, except that it has something to do with betting, and that I have to look at the enacting part to find out what it is. That is not the sort of preamble which can be used with any confidence to control expressions in the enacting part, even were they less clear than those of section 1. At any rate, that section 1 is more precise than the preamble, and does go beyond it in several particulars, is allowed by everybody who has commented on it; and I need not dwell more upon that point.

But it is stated that the practice of betting in racecourse enclosures prevailed long before the year 1853, and that in some cases it is traceable as far back as the beginning of this century. Some very pertinent remarks on this statement were made in the Court of Appeal by Rigby, L.J., which I will not repeat (they begin at p. 291, [1897] 2 Q. B.) but will beg to adopt, as showing that statements of this kind, though unquestionably made in perfect good faith, must be received with great caution. They relate to matters of history beyond the personal knowledge of the parties who make them; they have not been subjected to close investigation; and in order to have any important bearing on this discussion the facts stated must not only be a full account of the whole case, but must have been present to the minds of the framers of this statute. The ground is a very unsafe one to build upon.

But let us see exactly what the argument is. It is, I understand, that if the Legislature had intended to prohibit such well-known practices, it would have used more express words pointed to that end. The argument was very well and forcibly put, and I confess that for some time I came under its influence. But after all its force depends on the extent to which it is thought that the terms of section 1 require judicial limitation narrower than the limitation which they themselves import when read in their ordinary sense. By repeated study of those terms I have persuaded myself, and have been at pains to show, that this ordinary sense of the terms leads to a reasonable and clear comprehension of the mischief at which the Legislature has struck. To any mind which has arrived at that conclusion the force of the argument founded on notorious existing practice is turned in the opposite direction. Why, if racecourse enclosures were not struck at, should the Legislature have chosen terms which fit this enclosure, and, therefore, *ex hypothesi* the older enclosures with close exactitude, and yet make no exception in their favour? Suppose it were shown that systematic betting went on in public-houses long before 1853. It would be very surprising if it did not, and probably it could be shown if anybody were interested enough in the matter to make inquiry. Public-houses are not mentioned in the Act any more than racecourse enclosures. Their bar-rooms are subject to precisely the same inquiries as regards defined area, user, and purpose as are racecourse enclosures. It has been found in several cases that the terms of section 1 aptly describes parts of bar-rooms frequented by ordinary customers, but also frequented by betting men. It is difficult to think that those decisions should be overturned if reasons were assigned for believing that the practices condemned by them were too old to fall within the very vague terms "of late sprung up," and that the Legislature could not have intended to prohibit practices then long known.

It is true that many years have elapsed before applying the Betting Act to places of the kind now in question. If the meaning of the descriptive terms were so ambiguous as to hold the mind in *equilibrio* between two rival constructions, one might resort to this consideration for aid. But I cannot admit it to import an ambiguity into terms which I find substantially clear. It is of no great weight. In this country we are in the habit of leaving many kinds of prosecutions to be set agoing by private persons, and the result is an irregular application of the law. Whether private persons shall invoke a law to suppress practices which they dislike depends on many circumstances affecting their minds; perhaps the most powerful incitement would be an extension of the practices themselves, and of the feelings roused against them.

This irregularity is most marked when the law has placed in the category of crime practices which large numbers of persons think to be vicious, and large numbers again think to be harmless, and carry on without any loss of self-respect or of the respect of their neighbours; and such I take to be the case with betting. I could mention other statutes—*e.g.*, those relating to the observance of Sunday, and those relating to lotteries, which have been applied in unexpected ways after a long time. But I will avoid these speculations. It is sufficient to say that if this statute is invoked it must be rightly construed

whether its long sleep has been due to lack of interest or of courage, or to ignorance, or to any other cause.

There are, it is true, expressions and provisions in the statute on which arguments may be built for restriction of the terms of section 1. I will refer to a sentence or two in the judgment of the present Master of the Rolls, because, by collecting those passages of the statute together, he presents a condensed and forcible statement of the argument founded on them. (See [1897] 2 Q. B., at pp. 261-2.) He first refers to the preamble which I have dealt with at length. The place aimed at by the Legislature, he says, is a place where the business of betting is carried on (sections 1, 3, 4). Well, that is the main object of this enclosure. It is a place used as a betting house or office, which can be forcibly entered under the warrant of a magistrate (sections 11, 12). This enclosure is used by the great majority of persons who use it at all, both in form and substance, just as a betting house or office is used, and it can be forcibly entered by the officers of the law. It is a place which can be advertised as a betting place (section 7); so can this enclosure, though in fact it is not. It is a place which can be reasonably regarded as a common nuisance (section 1); so can this enclosure. If the practice objected to were an orgie, offensive to the moral sense, nobody would think that it was not a nuisance, or that there was any absurdity or practical difficulty in treating it as a nuisance, and the Legislature has chosen to place the specified mischief on the footing of a nuisance.

So far I see no difficulty in applying the provisions of the statute to the enclosure. But then stress is said on this: that it must be a place which it is not absurd to treat as a gaming house within 8 & 9 Vict. c. 109, ss. 2, 11, 12. That provision, I admit, causes difficulty; and it is the only one of the subordinate provisions which does. It would be somewhat astonishing if persons entering the enclosure for curiosity only, or amusement, found themselves arrested for being in a gaming house. I cannot find, however, that this consideration has prevented the courts from holding places under like conditions to be within section 1. It would be absurd, in some respects, to treat the spots occupied by a desk, an umbrella, or a box as gaming houses; but that did not prevent decisions that they were within section 1, and I have not heard any objection taken to those decisions. It would be very hard if a man going to enjoy a pot of beer in Preedy's bar had been arrested for being in a gaming house, yet Preedy's case and the other public-house cases involved such a consequence as much as *Hawke* v. *Dunn*, or as this case. I do not know that they are to be overruled, and I certainly do not think that they ought to be.

In the recent case of *Liddell* v. *Lofthouse*, 44 W. R. 149, [1896] 1 Q. B. 295, all the consequences apprehended in this case might have followed. The place was a billsticker's hoarding, supported at two points by stays of timber, and quite open in front. This formed between the supports a convenient protected bay for a betting man, who posted himself there for three consecutive days to bet with all comers. He was convicted by Lindley and Kay, L JJ., of using the place for the forbidden purpose. Yet not only was the place unenclosed, but in front it was undefined by any boundary, and any innocent passer-by who stopped for a while to look on might, according to the argument now under examination, be arrested for being in a gaming house. Lindley, L.J., says: "The place is sufficiently defined for all purposes. As to its being partly undefined, I think there are many places, which though in some sense undefined, can yet be described with sufficient clearness for the purpose of identification." I entirely agree; but I add that in all such places there may be, and in many there are sure to be, persons not engaged in the betting. I do not remember that this decision was objected to in the argument here, and in the Court of Appeal it was referred to by several judges with apparent approval.

I think this difficulty shrinks in magnitude under examination. It really arises from carelessness in importing the provisions of another statute into a new range of subjects; and that the words "other place" bring in a larger range is not denied by anybody; the only dispute is, how much larger. Then the draftsman does not observe that some of the subordinate provisions of the imported statute may not be applicable to everything which falls within the larger range. The arrest of persons not actually engaged in the betting is a thing most unlikely to happen; and it does not appear ever to have happened in fact. I cannot think it right to cut down clear words of enactment in the leading section because one of the subordinate provisions may involve a remote possibility of this kind. It is hardly legitimate to allow so small a part of the Act to influence its essential scope so largely.

To sum up briefly what I fear has been a tedious argument, I find a place definitely demarcated, of small size compared with its occupants, regularly frequented by large numbers of professional bookmakers carrying on their business of betting in the most methodical manner with persons who come there for that purpose. A "certain number," it is said, do not bet at all; but the greater number of the public go for the purpose of betting with the bookmakers. I agree that the Act is directed not against betting, but against bookmakers and those who make a business of betting: *Liddell* v. *Lofthouse*. But I say that the mode of warfare adopted against such persons is to strike at places where betting is concentrated into a focus, so that persons wishing to bet may know exactly where to find those who will indulge them. Wisely or unwisely, the Legislature has decided that such practices are vicious, "tending to the injury and demoralization of improvident persons." Wisely or unwisely, the Legislature has thought it possible and desirable to repress these vicious practices by branding them as crimes. It has declared that places used for such practices are common nuisances and contrary to law. If we are to rely on admitted facts, this enclosure is a concentrated focus of betting as regular as the races themselves, and it is thronged by betting men, professional and other, with only a moderate sprinkling of men not engaged in betting. If there is any meaning in words, that is a place kept and used for the purpose of persons using the same betting with persons resorting thereto. Those are the guiding terms of the Act, and I do not think that their meaning can rightly be cut down by anything in the vague preamble or in the subordinate provisions.

In my judgment, therefore, the decision in *Hawke* v. *Dunn* is right, and so is the decision which the Lord Chief Justice delivered in this case in deference to *Hawke* v. *Dunn*. Knowing that the majority of your lordships are of a different opinion, I make no motion. But having myself arrived from a state of great doubt to a clear conclusion, I have thought it right to state the reasons why I differ from so great a weight of authority.

Lord MACNAGHTEN.—I concur in the motion proposed by the Lord Chancellor.

Lord MORRIS.—I also agree.

Lord SHAND.—I also am of the same opinion, and

in addition I only desire to express my view that, if the language of the words of enactment in the statute were open to the observation that they are ambiguous, and so are open to two different views or constructions, which I do not think they are, yet I am strongly of opinion that the terms of the preamble are so clear as to the object and intended scope of the statute that the judgment, even in that view, must be given in favour of the respondents.

Lord DAVEY.—This case is chiefly remarkable for the great divergence of judicial opinion on the question involved in it. On the one hand we have the opinions of Hawkins, Cave, Wills, Wright, and Kennedy, JJ., in *Hawke* v. *Dunn*, and those of Rigby, L.J., in the present case, in favour of the appellant's view; while, on the other hand, Lord Esher, the present Master of the Rolls, and Lopes, L.J. (now Lord Ludlow), and Smith and Chitty, L.JJ., support the respondents' contention, and it is tolerably clear that the opinion of the Lord Chief Justice was in the same direction. If we turn to the older decisions it is admitted that *Eastwood* v. *Miller* and (I think) *Haigh* v. *Town Council of Sheffield* and *Liddell* v. *Lofthouse* cannot stand with the decision of the Court of Appeal. We have also the valuable opinion of Erle, C.J., and Keating, J., on the construction of the Act in *Doggett* v. *Catterns*, and it is somewhat difficult to make out the exact grounds on which their decision was overruled in the Exchequer Chamber. For reasons which will presently appear I think that the distinction sought to be made in *Bows* v. *Fenwick*, 22 W. R. 804, L. R. 9 C. P. 339. and *Gallaway* v. *Maries*, 30 W. R. 151, 8 Q. B. D. 275, that the betting man or bookmaker (as he is called) in one case stood on a stool under an umbrella and in the other case on a box, is too thin to be a ground for decision.

In this divergence of judicial opinion I find it the better and safer course to examine the words of the Act itself and endeavour to form my own opinion on the construction of the Act as applied to the admitted facts of the present case, as if the matter were *res integra*, and there were no previous decision upon it.

Turning, therefore, to the Act, the first thing to be noted is the preamble, to which great and, as I think, undue importance has been attached by some of the learned judges in the Court of Appeal. Your lordships must forgive me if I read the words of it: "Whereas a kind of gaming has of late sprung up leading to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf on their promises to pay money on events of horse-races, and the like contingencies, for the suppression thereof" (*i.e.*, of the kind of gaming described). "Be it enacted," &c.

It has been said that inasmuch as betting transactions of the same character as those which take place in this enclosure have been carried on in similar enclosures throughout the country from the beginning of the century, it is inconceivable that these practices should have been unknown to the Legislature when it passed the Act of 1853, and if it had been intended to suppress them, direct or unmistakeable words would have been found in the Act. Your lordships have before you in the appellant's case (the accuracy of which was admitted by the learned counsel for the respondents in the course of the argument) a more detailed statement of the facts on this point than was unfortunately before the Court of Appeal. That statement is to the effect that although enclosed spaces had been in existence at race-meetings prior to the passing of the Act, for the purpose of betting, yet prior to that time the betting was for the most part credit betting, and ready-money betting only occasionally took place, and to a small extent. I think, therefore, that the argument I have referred to is founded on an exaggeration of the facts as now disclosed; but, further, I am of opinion that the argument itself is illegitimate if it is sought thereby to cut down the language of the enactment according to its plain and natural meaning, or to restrict the enactment to the particular matter set forth in the preamble. "Undoubtedly"—I quote from Chitty, L.J.'s, judgment words with which I cordially agree—"it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms." But the preamble is a key to the statute, and affords a clue to the scope of the statute when the words construed by themselves without the aid of the preamble are fairly capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature. It may well be in this and in other cases that the Legislature, taking the recited facts as the occasion of the enactment, has deliberately used larger words to prevent the same kind of mischief in other forms. In the present case I am bound to express my opinion, with unfeigned respect for those who think otherwise, that there is not any such ambiguity in the present Act as entitles a court to cut down or restrict the words of the enactment by the recital in the preamble.

I have said thus much about the preamble because I dissent from many of the arguments which have been used, and the question is one of general interest. But in truth it is not essential to my opinion in this case, because I am prepared to accept the construction put upon the word "place" by the learned counsel for the respondents.

To turn now to the enactments themselves, and reading only what is material to explain my construction, section 1 provides that no house, office, room, or other place shall be opened, kept, or used for the purpose of any person using the same or conducting the business thereof betting with persons resorting thereto, or for the purpose of receiving deposits in the manner which has been shortly described as ready-money betting. Section 3 enacts that any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of them, or any person conducting the business of any house, &c., used for the purposes aforesaid, shall be liable to penalties. The present case falls within section 3, and the important words are "opened, kept, or used." I think that the word "used" must mean something different from "opened" or "kept," and be intended to enlarge the scope of the enactment; and the person who uses is clearly different in kind from the occupier who permits the user. I cannot find any sufficient reason for not attaching its ordinary meaning to the word "used," which is not a difficult word to construe. Indeed, I have had some difficulty in understanding in what other sense the word is said to be employed, or grasping the meaning sought to be attached to it.

It will be seen that the prohibited purposes are twofold: (1) using a house, &c., for the purpose of betting with persons resorting thereto, and (2) receiving deposits on bets. I have already said that for the purposes of this case I accept Mr. Walton's contention that the word "place" should be construed as *ejusdem generis* with house, room, or office. I will

ke it to mean any enclosed space capable of being ed and in fact used by persons carrying on the siness of betting with others as their office or place business for the time being. The questions there- e are: Was this enclosure a place capable of being used; was it, in fact, used for the purposes entioned in the first section of the Act, and did the spondents wilfully permit it to be so used?

The enclosure in the present case is a piece of ound of not more than a quarter of an acre in tent, fenced off and enclosed by iron railings. We ve not, therefore, to consider any questions such as ose raised in *Doggett* v. *Catterns* whether a tree in yde Park could be a place within the meaning of e Act, or those suggested in the course of the gument, whether a racecourse could be a place. It an enclosed, segregated space of comparatively oderate dimensions, and it was scarcely denied that is capable of being a "place" within any construc- n of that word.

The number of persons admitted to this enclosure ries from 500 to 2,000, and among such persons ere are always a certain number, varying from 100 200, who are professional bookmakers "carrying their business" (I use the language of the amended rticulars) in the manner described. Of the other embers of the public frequenting the enclosure e greater number go there for the purpose of backing" horses with the bookmakers, but a certain mber do not bet at all. They go there, I suppose, m curiosity or in company with their friends, perhaps even (though the situation does not seem ry eligible for obtaining a quiet view) to see the ce. The bookmaker in the enclosure is accompanied his clerk or partner with the necessary book for cording his transactions. He does not confine him- lf to any fixed spot in the enclosure, nor does he use y such apparatus as a desk, stool, or umbrella, ough any particular bookmaker is usually to be nd in or near the same part of the enclosure. The ended particulars then describe the mode of betting opted by the bookmakers. To put it shortly, the actice is for the members of the public who bet with m to back a particular horse against the "field," hilst the bookmaker backs the "field" against the rticular horse selected. A bookmaker anxious to ck the field against a particular horse calls out the ds which he will give or take in respect of those rses, and this practice of calling out the odds largely adopted by every bookmaker betting in the closure for the purpose of attracting the attention backers. Some bookmakers carry on a ready- ney business—that is, usually require the backer to posit his stake when the bet is made. Others do greater part of their business on credit—that is, hout requiring a deposit. But, as might be ex- ted, a deposit is required when a bet is made with erson unknown to them.

On this statement of facts I cannot bring myself to ubt that the reserved enclosure is a place in the ure of a room which is in fact used by professional ting men as their place of business for the time ng, or, if you will, temporary office, for both the poses mentioned in the first section of the Act— nely, for the purpose of betting with persons resort- thereto, and for the purpose of money being eived by them in consideration of a promise to pay ney on the contingency of a horse-race. In my nion the provisions of the Act are infringed if a son carries on his business in the manner prohibited the Act in some known room or place to which ple who come to bet with him can resort knowing t they will find him there. There is nothing what- r in the Act which requires that the occupation or r of the place for the prohibited purposes shall be exclusive, or that the person using the place shall have a right of occupation of any defined portion of it. And I regard it as altogether immaterial that the bookmakers do not stand on a stool or box, or use a gaudy umbrella for the purpose of rendering themselves more conspicuous or attracting the attention of their customers. Those are accessories which may afford useful evidence when the nature of the business is in doubt, but are not essential to the carrying on of the business. Then it is said that the bookmakers pay the same fee for admission as the other members of the public, and have no more right there than others who have paid the same fee. I am unable to see the relevance of this. The question is, not how they get there, but what they are permitted to do when they have got there? In short, it seems to me, on the admitted facts of this case, that this enclosure is a species of betting-room or exchange to which professional betting men go for the purpose of pursuing their calling, and which their customers resort to knowing they will find them there and be able to deal with them. I adopt the judgment of the present Master of the Rolls in the Stockton case (*Liddell* v. *Lofthouse*), which seems to me a more difficult one than the one before your lordships.

It is not in controversy that the respondents knowingly permit the enclosure to be used by betting men in the manner described, and, inasmuch as it does not appear that any other part of the land under their control is used for the same purpose, I should have little difficulty in inferring, if it were necessary, that the reserved enclosure is appropriated by them for that purpose. I have a strong suspicion that they would not permit the betting men to carry on their business on the grand stand or any other part of their adjoining land or buildings. But it is not so found in the present case, and I have no right to assume it, nor is it necessary for the purpose of this case. It is sufficient to say that the bookmakers are licensed or permitted by the respondents to use this particular place for the purposes of their business.

Some of the learned judges have thought it inconceivable that the Legislature can have intended to prohibit the use of an enclosure like the one in question for the purposes detailed in the amended particulars. I have a greater difficulty in understanding why, under the provisions of an Act directed to the suppression of a particular kind of gaming, a person should be allowed to transfer his business for the day or more to an enclosure in Kempton Park and carry it on there in precisely the same manner which he could not do in his own office in London or elsewhere. I do not think that any serious difficulty is created by the enclosure being liable to be treated as a common gaming house, with the consequences thereof. Persons who resort to this enclosure must know what they are about. And it is admitted that the majority of people who go there do so for the purpose of betting.

For these reasons I agree with Rigby, L.J., and my noble and learned friend Lord Hobhouse that the judgment of the Court of Appeal should be reversed. But as the majority of your lordships are of a different opinion, the appeal will, of course, be dismissed with costs.

LORD JAMES OF HEREFORD.—I desire to say that it appears to me that this action was duly brought in the court below.

The leading counsel for the appellant, in the commencement of his argument, very properly called your lordships' attention to the fact that the action was in one sense a friendly action—a fact of which the courts below had also been informed. It appears that by a decision in the case of *Hawke* v. *Dunn*

the proceedings permitted by the defendants at Kempton Park would be regarded as illegal. From that decision there could be no appeal. Shareholders in the defendants' company were therefore interested in obtaining the decision of the Court of Appeal and of this House upon the matters involved. To effect his object the plaintiff, one of the shareholders in the defendants' company, brought this action in a form which would secure a judgment upon the legality or illegality of the defendants' proceedings. It seems clear that the action was brought in good faith for the purpose of obtaining an authoritative and final judgment. Probably the plaintiff will regard with satisfaction his want of success in the action. But the judgment, whatever it may be, will and must be acted upon. This, therefore, is not a case where the judgment of a judicial tribunal is sought for the purpose of determining a right for mere abstract purposes.

It also seems quite clear that there is no ground for saying that any collusion has existed between the plaintiff and defendants or their legal advisers. The statements made by Mr. Asquith and the late Sir Frank Lockwood are conclusive upon that point. In the course of his reply at the bar of the House Mr. Asquith stated that he had acted as leading counsel for the plaintiff in the case of *Hawke* v. *Dunn*, and had argued successfully in that case that facts similar to those existing in the present suit constituted illegality. Not the slightest trace can be found throughout the whole of these proceedings of any want of good faith or zeal on the part of plaintiff or his advisers in the conduct of the suit.

It was stated by the leading counsel for the appellants that a somewhat too broad admission was alleged to have been made in the tenth "particular," wherein it was stated that at the time of the passing of the Betting Houses Act, 1853, betting was carried on and had been carried on since the commencement of the century in certain enclosures in precisely the same manner as now existing. In my judgment this allegation is immaterial, and cannot in any degree affect the decision that should be arrived at on this appeal. But even if it were material the alleged inaccuracy has now been plainly corrected by the statements made in the tenth paragraph of the appellant's case. Such statements, admittedly correct, are now accepted without reference to the allegations in the tenth "particular." The decision of your lordships will, therefore, proceed upon the statement of fact that some ready-money betting had existed on racecourses prior to 1853, but in less degree than that which has occurred since.

Inasmuch, therefore, as it seems that this action has not been brought to try any abstract question, that the judgment of this House is sought for the purpose of being enforced and acted upon, and that the action —which has been conducted in perfect good faith—is in no sense collusive, I can see no ground for the suggestion that there is any impediment in the way of the due determination of this appeal.

I do not refer in detail to the facts of the case, which have been already stated, but I regard them as establishing that within an enclosure at Kempton Park certain "bookmakers" are in the habit of betting, that such persons make betting their trade or business, and that the fact of such betting taking place within the enclosure is known to the defendants, and the betting not being interfered with must be taken to be sanctioned by them.

The action is based on the allegation that the respondents have infringed the provisions of the Betting Houses Act, 1853, by opening and keeping open the enclosure for the purpose of being used by professional "bookmakers" for betting with persons resorting thereto. In order to determine the question submitted for the decision of your lordships' House, it is necessary carefully to consider both the history and the provisions of the Betting Houses Act of 1853.

In relation to the origin of the Act, I concur in the statement made by Hawkins, J., in the case of *Reg.* v. *Cook*. It appears that shortly before the passing of the Act of 1853 a system of ready-money betting had sprung up in the Metropolis and the larger provincial towns. Houses, offices and rooms were opened for the sole purpose of carrying on this betting business. Public-houses also were utilized for effecting the same object. In these places lists giving the names of horses entered for different races were exposed to view. Against the names of the horses on these lists figures were placed showing the odds the betting man or bookmaker carrying on the betting business was willing to lay against each horse. These betting places were open to the public in the same way that a shop is kept open. Anyone wishing to back a horse would have to deposit the sum of money he desired to risk with the person in attendance, receiving a card recording the transaction. Such a mode of betting of course represents what is termed ready-money betting. These list houses became so numerous, and the betting carried on in them became so extensive, that the Government of the period determined to deal rigidly with the evils resulting therefrom, and to suppress by rendering illegal the list houses. With this object, as declared by Sir Alexander Cockburn, the then Attorney-General, the Act of 1853 was passed. The object of that Act can be discovered from its contents. It is intituled "An Act for the Suppression of Betting Houses," and the preamble recites "that a source of betting has of late sprung up tending to the demoralization and injury of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies. For the suppression be it enacted," &c.

It will be seen that, so far as the preamble discloses the intention of the Legislature, the evil intended to be dealt with is not the act of betting either by depositing money or on credit, which was and is legal. The evil recited is the carrying on of a betting business under certain conditions in a house or office, and for suppression of these houses and offices the provisions of the Act were framed.

Doubtless the contents of a preamble of an Act of Parliament cannot for any purpose control the actual clear provision of the statute; but if the wording of the statute gives rise to doubts as to its proper construction, the preamble can be and ought to be referred to in order to arrive at the proper construction to be put upon the enacting portion of the statute.

Upon this subject I fully accept the *dictum* of Lord Tenterden in *Halton* v. *Cove*, 1 B. & Ad. 538, 558, who thus summarizes the matter: "It is very true, as argued for the plaintiff, that the enacting words of an Act of Parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it. Yet on a sound construction of every Act of Parliament I take it the words of the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act, and the preamble affords a good clue to discover what the object was."

With the intention apparently of dealing and dealing only with the evils recited in the preamble, the Legislature proceeded in the first section of the Act

to enact: "No house, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto, and every house, office, or room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." And by section 2: "Every house, room, office, or other place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house."

The provisions of this second clause are very important when construing and applying the first. In order to bring the first clause into operation something must exist that can at least constructively be regarded as a common gaming house. As the betting at Kempton Park was not carried on in a house, room, or office, it becomes necessary to determine what effect is to be given to the words "other place," and how far they can be held to apply to the enclosure wherein the alleged illegal betting took place.

Speaking in general terms, whilst the place mentioned in the Act must be to some extent *ejusdem generis* with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word "place."

There must be a defined area so marked out that it can be found and recognized as "the place" where the business is carried on and wherein the bettor can be found. Thus, if a person betted on Salisbury Plain, there would be no "place" within the Act. The whole of Epsom Downs or any other racecourse where betting takes place would not constitute a place; but directly a definite localization of the business of betting is effected, be it under a tent or even movable umbrella, it may be well held that a "place" exists for the purposes of a conviction under the Act. If this view be correct, I think that the enclosure existing at Kempton Park might, physically speaking, under certain conditions constitute "a place" within the meaning of the first and second sections of the Act of 1853. It is a defined space limited by metes and bounds, and of such an area that a person therein carrying on the business of betting can be found. I also think, as I have previously stated, that it is established that within this enclosure betting took place, that the bets were made by men whose business is that of a bookmaker or betting man, and that such betting took place with the cognizance, and therefore it must be held with the sanction, of the defendants. But the main question involved in this case has still to be solved—namely, Was the enclosure opened, kept, or used for the purpose of the owner, occupier, or any person using the same, or of any person conducting the business thereof, betting with persons resorting thereto? In my opinion this question must be answered in the negative. For I think that the certain conditions I have just referred to do not exist, and that in consequence of the absence of those conditions this enclosure cannot be held to be "a place" wherein an offence has been committed.

In this case the only alleged "place" where the business of betting is said to be carried on is the particular enclosure referred to. But it must be remembered that the whole of Kempton Park racecourse is enclosed; within that enclosure there are certain stands and other enclosures. Unfortunately it is known to all that as a general rule wherever racing takes place betting upon the races exists also. Some portion of those who witness horse-races invariably bet. It may be taken, therefore, that of the spectators who enter the Kempton Park racecourse a certain number intend to bet on the races and do so. Those who back horses are for the most part members of the general public; those with whom the horses are backed—that is, those who lay the odds against the different horses, are known as "bookmakers," and no doubt attend at all race-meetings with the primary object of carrying on their business of betting.

It is probable that throughout the whole of the enclosed racecourse betting on the different races takes place in greater or less degree. Certainly there is nothing to prevent such betting everywhere within such enclosed course. But by a sort of gravitation, resulting apparently from convenience, the majority of those who bet at Kempton Park congregate within a special enclosure—the one in question—for the purpose of betting. The spot appears to attract the "bookmakers" in consequence of its being central and adjacent to different stands, and within sight of the winning post and of the board on which the names of the horses about to start and their jockeys are made public. But I do not find that the defendants have opened, kept, or used this enclosure for the purposes of betting more than any other portion of the racecourse. Any member of the public can enter it for the purpose of seeing the race. No facilities for betting are provided by the defendants, and the fact that bets are made therein results from the personal action of the persons entering it. I certainly can find no direct evidence that the enclosure was opened, kept, or used for the purpose mentioned in section 1 of the Act—that is, for conducting the business of betting. Doubtless it is proved that betting as alleged, systematically took place within the enclosure to the knowledge of the defendants. Is that evidence sufficient to establish an infringement of the Act? In my opinion it is not. As was often remarked during the argument of the case at the bar, betting is not illegal in itself, and the statute never intended to make it so. It is only the opening, keeping, or using of a place for the carrying on of a betting business that is illegal. This is shown by the consequences created by section 2 of the Act. The place wherein illegality exists is declared to be a common gaming house, and the right to arrest and search all persons found therein follows. A man who bets or allows betting in his private house, or the man who, associating with his fellows in a club, even a sporting club, and there bets upon races, is guilty of no illegal act. In such cases the ingredient of dedication or appropriation of the place to the purposes of a betting business is absent. And as I think that in this case such ingredient is equally absent, it appears to me that this enclosure has not, by the proceedings which occur within it, been constituted a place within the meaning of section 1 of the Act of 1853.

In thus dealing with the case, I have treated the whole enclosure as being the alleged "place." There is another view that may be presented—namely, that each peripatetic bookmaker using the enclosure occupies "a place"—that is, the ground upon which his two feet rest, and that having permission so to stand upon any particular spot he may from time to time select, there is a shifting appropriation of each of such spots for the purpose of carrying on his business. But in such case, what can be said to constitute the "place" requisite to constitute the offence? There is nothing in any way resembling a house, office, or room. No defined area exists; nothing to indicate where the bookmaker can be

found is to be seen; and, as was admitted by Mr. Asquith during his argument at the bar, every piece of earth on which a betting man's feet rest, say, on Salisbury Plain, cannot constitute a place *ejusdem generis* with house, office, or room. I think the statement of the same learned counsel that "a place must be a place where a man according to the ordinary usages would be found" is correct.

I do not purpose referring to the cases which were quoted at the bar in detail, but I would say that I think it must be taken that the judgment of the Court of Appeal in the present case overrules the decisions in *Eastwood* v. *Miller*, *Haigh* v. *Town Council of Sheffield*, and *Hawke* v. *Dunn*. Whilst with several cases, such as *Shaw* v. *Morley*, 16 W. R. 763, L. R. 3 Ex. 137, and *Bows* v. *Fenwick*, in which convictions took place, no conflict arises. On the other hand, the judgment appealed from seems to be supported by the Scottish case of *Hemetty* v. *Hart*, 13 Ct. of Sess. Cas., 4th series, 9, and *Snow* v. *Hill*.

For these reasons I am of opinion that the judgment of the Court of Appeal should be affirmed, and the appeal therefore dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Le Brasseur & Oakley*.

Solicitors for the respondents, *Peachey & Son*, for *Arthur Cheese*.

Court of Appeal.

From Prob. Div. & Adm. Div. (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — June 7.

"THE FULHAM." (a.)

Ship—Salvage—Detention of salved property by receiver of wreck—"Salvage due under this Act"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 544, 546, 552.

By section 552 *of the Merchant Shipping Act*, 1894, "*Where salvage is due to any person under this Act*," *the receiver shall, if the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel, or cargo, or apparel.*

Held, that the words "salvage due under this Act" were not confined to cases where there was a claim for life salvage under sections 544 *and* 545 *of the Act, or where the claim was for salvage services rendered to a wreck or vessel stranded or in distress on or near the coasts of the United Kingdom under section* 546, *but extended to all cases where salvage was recoverable under any of the provisions of the Act.*

Judgment of Barnes, J. (ante, *p.* 62, [1898] *P.* 206), *affirmed.*

Appeal from the judgment of Barnes, J., reported *ante*, p. 62, [1898] P. 206.

The action was brought by the owners of the British steamship *Fulham* against the defendant, who was the receiver of wreck and collector of customs at the port of Plymouth, to recover £60 damages for the detention of *The Fulham* at Plymouth.

The facts were shortly these: *The Fulham* while on a voyage from Sulina to Dunkirk ran short of fuel, and when in the English Channel, about twenty miles from Plymouth, she was taken in tow by the steam tug *Flying Buzzard* and brought into Plymouth. A claim for salvage services was made, and at the request of the master of the tug the defendant, acting under section 552 of the Merchant Shipping Act, 1894, detained *The Fulham* at Plymouth for two days, when she was released upon security being given to the satisfaction of the defendant. On the same day a writ was issued on behalf of the owners, master, and crew of the tug in the Admiralty Division claiming salvage remuneration, and a salvage award was made in their favour.

Barnes, J., held that the defendant had jurisdiction under section 552 to detain the ship, and gave judgment for him.

The plaintiffs appealed.

Robson, Q.C., and *J. A. Hamilton*, for the plaintiffs.—The defendant had no jurisdiction to detain the ship under section 552 of the Merchant Shipping Act, 1894. That section only applies to cases where "salvage is due to any person under this Act." Salvage "due under this Act" refers to cases of life salvage under sections 544, 545, and to cases where salvage is payable under section 546 where salvage services are rendered to a vessel wrecked, stranded, or in distress on or near the coasts of the United Kingdom. The salvage here was not "due under this Act," as there was no life salvage, and *The Fulham* was not in distress "on or near" the coast.

Sir R. B. Finlay, S.G., and *H. Sutton*, for the defendant.—Section 552 is not limited to cases in which salvage is payable under sections 544, 545, or 546. It applies to all cases where salvage services are due or claimed under any provision of the Act, whether the provision relates to procedure or otherwise. Those cases cover every claim for salvage services: see sections 544-550, 565, 571. If the section were limited as contended for by the plaintiffs, the inquiry upon which the receiver of wreck would have to embark would be an impossible one, and his duties in this respect would be rendered impossible.

They referred to *Hartfort* v. *Jones*, 1 Ld. Raym. 393.

J. A. Hamilton replied.*

Cur. adv. vult.

June 7.—A. L. SMITH, L.J., read the following judgment: This is an action brought in the Admiralty Division of the High Court of Justice by the owners of the steamship *Fulham*, which is a British ship, against the receiver of wreck and collector of customs at the port of Plymouth, to recover damages for his having detained the plaintiffs' ship. Two causes of action are set up, the first being that the defendant had been guilty of what is called in the pleadings a gross dereliction of duty in detaining as he did the plaintiffs' ship, and the second that the defendant had no jurisdiction at all to detain the plaintiffs' ship. The first cause of action is traversed by the defendant, and the second the defendant justifies under section 552 of the Merchant Shipping Act of 1894. What is the true construction of this section is the paramount question in this case, though others have been debated. As to the first cause of action, my brother Barnes has found in favour of the defendant, and the plaintiffs do not appeal as to this. As regards the justification pleaded under section 552 of the Act of 1894, the learned judge has also found in favour of the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* The arguments as to whether any life salvage services were rendered so as to bring the case within section 544, and whether *The Fulham* was in distress "on or near the coasts of the United Kingdom" within section 546 are omitted, as in the judgment of the court, it became unnecessary to deal with them.

defendant, and it is against this that the plaintiffs appeal.

The question is peculiarly short in itself, and is, What is the true rendering of the words in section 552 of the Merchant Shipping Act, 1894, "where salvage is due to any person under this Act"? It is said on behalf of the plaintiffs that the words are limited to cases which come within either section 544 or section 546 of the Act, and it is only in such cases that the receiver of wreck has jurisdiction to detain a ship alleged to be liable to a salvage claim under section 552 of the Act. It was argued that section 544 does not apply to the present case because there was no salvage recoverable for salving life, and that section 546, which relates to salvage of property, does not apply because the steamship *Fulham* was not in distress at any place "on or near the coasts of the United Kingdom," though she was in the port of Plymouth when the claim was made by the salvors for salvage services rendered to her. I desire to say that I protest against being taken through the Merchant Shipping Acts of 1846, 1854, 1861, and 1862, in order to put a construction upon the few words I have to construe in the great consolidating Act of 1894, with its 748 sections and 22 schedules, in the last of which no less than 48 prior Acts have been wholly or in part repealed. If this is to be the means by which a consolidating statute such as that of 1894 is to be construed, it would be far better that the Legislature should not attempt to codify the law at all, for suitors and the court would then be spared the trouble of having also to interpret an additional Act. In the Act of 1894 new groups of sections, with new headings, are inserted. Old sections are placed in new contexts, different phraseology is at times used, and, for myself, I decline to embark upon an inquiry as to why or wherefore the Act of 1894 differs from the prior Acts, in themselves differing with each other, and I apply myself to what the Legislature has enacted to be the law when it passed the Merchant Shipping Act of 1894.

The facts are these: The plaintiff's ship, *The Fulham*, was in distress some twenty miles off Plymouth, being short of coal. The owners of the tug *Flying Buzzard*, being apprised of this fact, sent out their tug from Plymouth to her assistance, and the tug brought *The Fulham* safely into Plymouth, which is in the defendant's district. My brother Barnes, assisted by the Elder Brethren, in a salvage suit brought by the owners of the tug against the owners of the steamship *Fulham*, found that there had been a risk, when the tug took *The Fulham* in tow, of the steamship going ashore and being lost, and that there was some risk to life, and he awarded the sum of £900 for the salvage services rendered. The learned judge, in his judgment now under appeal, said the risk to life would form an element in considering the claim, though it was "substantially a claim for salving property."

With these facts I come to section 552. That the present is a case "arising out of a salvage service and a dispute relating thereto" is clear, and it is in relation to a dispute about this service that the receiver of wreck at Plymouth detained *The Fulham*, which detention is now complained of. The Act of 1894 is conveniently divided, as many Acts are, into differents parts, each part containing groups and sections with their respective headings and sub-headings. I turn to Part 9 of the Act, section 510, which is headed "Wreck and Salvage," for this is a part of the Act I have to consider. I pass over those sections in this Part 9 which do not relate to this case, and are under sub-headings—"Vessels in Distress," "Dealing with Wreck," "Unclaimed Wreck," "Removal of Wrecks," "Offences in respect of Wreck," "Marine Store Dealers," and "Marking of Anchors"—until I come to sections 544, 545, and 546, under the sub-heading "Salvage." Section 544 relates to salvage for saving life. Section 545 I will leave out; it is not material. Section 546 relates to salvage of cargo or wreck; that is, salvage of property where the vessel is wrecked, stranded, or in distress on or near the coasts of the United Kingdom. No duty is imposed upon the receiver of wreck by these sections. They deal with the salvage which may be recovered for salvage services rendered, whether to life or property. Next comes the sub-heading "Procedure in Salvage," with its group of sections. This is an important group as regards the present case. Sections 547, 548, 549, 550, and 551 all deal with the procedure which is to take place when disputes arise as to the salvage to be paid for salvage services rendered. It is perfectly clear that the salvage services about which these disputes may arise are in no way limited to salvage services on or near the coasts of the United Kingdom, for those sections embrace disputes as to salvage, wherever the services may have been rendered. These disputes may be settled either summarily or by the High Court, and all disputes not summarily adjudicated upon, according to the provisions of the Act, are to be determined by the High Court. I now come in this group of sections under "Procedure in Salvage" to section 551, which deals with the valuation of property by a receiver of wreck when a dispute as to salvage arises, and the *res* salved is in the district of the receiver, no matter where the salvage services may have been rendered. This section enacts that "where any dispute as to salvage"—which clearly means as to any salvage, no matter where the salvage services have been rendered—"arises, the receiver of the district where the property is in respect of which the salvage claim is made, may, on the application of either party, appoint a valuer to value that property, and shall give copies of the valuation to both parties. That the receiver of wreck at Plymouth had jurisdiction under this section of the Act to appoint a valuer at the instance of the salvors, even against the will of the shipowner, which valuer would go on board to value the property salved, is to me clear, and I did not hear the contrary contended for at the bar on behalf of the plaintiffs. Whether the dispute arises as to life salvage or as to salvage of property, no matter where the services have been rendered, this jurisdiction is conferred upon the receiver, and it is not confined to the case of a vessel in distress on or near the coasts of the United Kingdom; and as regards this jurisdiction there is no limit, excepting that the property saved must be in the district of the receiver.

But it is said that the next section in this group—namely, section 552, only confers upon the receiver of wreck a limited jurisdiction, and that he has no jurisdiction to detain a vessel in the case of a claim being made for salvage rendered to the ship which is then within his jurisdiction until payment of the claim or process be issued for the arrest and detention of the vessel by some competent court, as is provided for by this section, unless it be a claim for life salvage under section 544, or the vessel was in distress on or near the coasts, under section 546. This argument is based solely upon the words in section 552, "where salvage is due to any person under this Act." I do not agree with this contention, and for these reasons. First of all, what is the meaning of the words "salvage due under this Act"? I do not deny that they may mean money which is due and then payable for salvage services. But is this their real meaning in this section? Where can be found in either section 544 or 546, or indeed in any section of the Act, provision that money is due and

then payable for salvage services rendered? It cannot be found. No salvage is due and then payable under either of the two sections, or any other section in the Act. It is clear to me that the true reading of the words "salvage due under this Act" is not that the money should be actually due; and surely this section 552 is not to be deleted from the statute, which, if the meaning contended for is to be attached to the words, would be the case. In my judgment the word "due" in this section means recoverable under the Act. I think this is supported by the words in sub-section 3 of section 552, "if the claim for salvage exceeds £200;" and at the beginning of the section the words are "under this Act," and not "under sections 544 and 546," or even "under the previous provisions of this Act." One finds in the Act how moneys payable for salvage services, whether to life or property, may be recovered under the Act, and see as to this, especially, section 565. I fail to see why a claim under section 565 is not a claim for salvage under section 552. In my judgment, therefore, section 552 is not limited to sections 544 and 546, as contended for by the learned counsel for the appellants. I am fully aware that the side-notes of a section form no part of the Act, but, having considered the Act, I cannot put in terser language what I hold to be the meaning of the section than what I find in its side-note. I find in its side-note, "Detention of property liable to salvage by a receiver." I believe this to be an accurate rendering of the section. In my opinion the receiver of a wreck had jurisdiction to detain the plaintiffs' ship as he did, and that my brother Barnes was right in the conclusion he arrived at as to the true construction of this section. What the Solicitor-General said about the Legislature placing the receiver of wreck in the shoes of the salvor, who was entitled to a lien upon the property salved, struck me as well worthy of consideration, but I do not need this to bring me to the conclusion I have arrived at; and I may add that I cannot see any sense in what the appellants contend for—namely, that although the receiver of wreck may detain a ship in the case of a dispute about salvage services, no matter where rendered, if the ship was in distress on or near the coast, yet he has no jurisdiction if the same dispute arises and the ship was not in distress on or near the coast and yet is within his district.

As regards the subsidiary points—namely, whether life salvage had in fact been rendered, and the meaning of "on or near the coast," so much debated at the bar, I say nothing. In the view I take of this case these questions do not arise, and if I said anything about them it would be purely *obiter*. For the reasons above stated, in my judgment this appeal should be dismissed with costs.

VAUGHAN WILLIAMS, L.J., read the following judgment: I agree. Despite the arguments based on the words "due under this Act" in section 552, I cannot get out of the words of the section. I thought it my duty to examine the words carefully because the construction we have arrived at leads to a somewhat strong result; that is to say, that there may in fact be an arrest on mesne process by the receiver on a mere claim of salvage in a case in which the receiver may have no personal knowledge of the circumstances. I am not sure that the receiver has any discretion if a claim is made, as the word used is "shall." The power or jurisdiction in such circumstances seems certainly new under this Act.

ROMER, L.J., agreed.

Appeal dismissed.

Solicitors for the plaintiffs, *Holman, Birdwood, & Co.*

Solicitor for the defendant, *Solicitor to the Board of Trade.*

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 6.

WALSHAW v. MAYOR, &c., OF BRIGHOUSE (a.)

Local government—Offences—Unsound meat—Condemnation by justice—Compensation to owner—Arbitration—Award—Jurisdiction of arbitrator—Costs and expenses—"Full compensation"—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), ss. 116, 117, 308.

Meat was seized by an inspector of the local authority as unsound, and condemned by a justice under sections 116 *and* 117 *of the Public Health Act,* 1875. *The owner of the meat was thereupon summoned for an offence under section* 117, *but the magistrates dismissed the summons upon an objection to its form, without inquiring into the merits. The owner of the meat claimed compensation, to be settled by arbitration, under section* 308 *for damage sustained by him by reason of the exercise by the local authority of the powers of the Act; and the arbitrator found that the meat was, at the time of its condemnation, sound and fit for the food of man, and he included in the damage sustained by the owner of the meat the loss of the carcase and the expenses of and incident to the seizure and in defending himself before the magistrates. In an action on the award the judge refused to admit evidence that the meat was unsound at the time it was condemned, and gave judgment for the amount claimed.*

Held, that the question of the soundness of the meat at the time of its condemnation was a question of fact for the arbitrator to determine, and his finding could not be reviewed in the action.

Held, also, that the "full compensation" to which the owner of the meat was entitled would include the value of the meat and the expenses incurred by him in connection with the seizure and in defending himself before the magistrates.

Appeal from the judgment of Day, J., at the trial of the action without a jury.

The action was brought upon an award. It appeared that an inspector of nuisances for the borough of Brighouse seized under section 116 of the Public Health Act, 1875, a carcase of meat belonging to the plaintiff as unfit for human food, his opinion as to its unsoundness having been confirmed by the medical officer of health for the borough, and the carcase was on the same day taken before a justice of the peace, who condemned it and ordered it to be destroyed. The defendants thereupon took out a summons against the plaintiff under section 117 of the Act, but the magistrates, without hearing any evidence or going into the merits, dismissed the summons upon a technical objection as to its form, making no order as to costs. No further summons was taken out against the plaintiff. The plaintiff then claimed compensation under section 308 of the Act for the damage sustained by him by reason of the exercise by the defendants of the powers of the Act, and he appointed an arbitrator under sections 179, 180 for the purpose of having compensation assessed, and gave notice thereof to the defendants. The defendants did not within the prescribed time appoint an arbitrator, and the arbitrator appointed by the plaintiff proceeded with the arbitration, the defendants attending the proceedings, and in spite of their protest the arbitrator heard evidence as to the soundness of the carcase. The defendants then called evidence with the view of showing that the carcase was unsound. The arbitrator found as facts that the carcase was not diseased or unsound or unwholesome or unfit for

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the food of man when it was condemned and ordered to be destroyed, but was then sound, wholesome, and fit for the food of man; and that the plaintiff, by reason of the exercise of the powers of the Act, had sustained damage as follows: (*a*) The loss of the carcase, £7 10s.; (*b*) expenses of and incident to the seizure and of and incident to defending himself in the magisterial proceedings, £37 1s.; (*c*) loss in his business as a butcher which immediately and necessarily flowed from the seizure, condemnation, and magisterial proceedings, £52. He also directed the defendants to pay the costs of the reference and of the award.

The plaintiff brought an action upon the award to recover the above amounts, when the defendants tendered evidence to show that the carcase was at the time of the seizure and condemnation unsound. Day, J., refused to admit the evidence upon the ground that this matter was concluded by the finding of the arbitrator, and gave judgment for the plaintiff for the amount claimed.

The defendants appealed.

By section 308 of the Public Health Act, 1875: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by the Act. . . ."

Macmorran, Q.C., and *T. R. D. Wright*, for the defendants.—The arbitrator has only jurisdiction under section 308 to decide as to the fact of damage and the amount of compensation. He has no jurisdiction to find that the carcase was sound, as that is equivalent to finding that the plaintiff was not in default. That is a question of liability for the court and not for the arbitrator to determine. This is distinctly stated by Lord Fitzgerald in *Brierley Hill Local Board* v. *Pearsall*, 33 W. R. 56, at p. 58, 9 App. Cas. 595, at p. 603, and it also appears from Lord Selborne's opinion. The award was, therefore, bad on the face of it, at any rate so far as regards that finding, and Day, J., was wrong in refusing to admit evidence that the carcase was unsound and holding that the finding of the arbitrator concluded the matter. It is open to the defendants in an action on the award to shew that the damage was not occasioned by the exercise of the powers of the Act, and that the damage arose in relation to some matter as to which the plaintiff was himself in default, and in order to show that, they are entitled to give evidence that the carcase was unsound. [They also referred to *In re Davies and Rhondda Urban District Council*, Law Times, the 20th of May, 1899, p. 62.] Further, the question whether the plaintiff was in default was concluded by the order of the justice condemning the carcase as unfit for human food and directing it to be destoyed. The plaintiff might have appealed from that order to quarter sessions under section 269 of the Act, and not having done so the order of the justice was conclusive upon the matter, and the finding of the arbitrator cannot override it. As regards the items of damage, the condemnation of the carcase was the act of the justice and not the act of the defendants. Therefore the loss of the carcase was caused, not by the exercise by the defendants of the powers of the Act, but by the order of the justice. The first item therefore—namely, the value of the carcase, cannot be recovered. Nor can the expenses of the plaintiff in defending himself before the magistrates be recovered.' The magistrates might have made an order giving the plaintiff costs upon the summons. They did not do so, and so this item of loss was occasioned by the magistrates making no order as to costs and not by the exercise of the powers of the Act. Section 253 allows anyone, with the consent of the Attorney-General, to take out a summons under the Act. *In re Bater and Mayor, &c., of Birkenhead*, 41 W. R. 513, [1893] 2 Q. B. 77, was a different case, because there the question was as to the costs incurred by the owner of the meat in resisting its condemnation. Those costs were clearly caused by the seizure of the meat and its being taken before a justice for condemnation.

Scott Fox, Q.C., *W. J. Waugh*, *W. Madden*, and *G. P. Walker*, for the plaintiff, were not called upon.

A. L. SMITH, L.J.—In my opinion this appeal must be dismissed. The question arises thus: The inspector of nuisances for the district inspected the carcase belonging to the plaintiff, and the medical officer of health also inspected it, and both came to the conclusion that the carcase was unfit for human food, and thereupon it was seized and a justice condemned it and ordered it to be destroyed. A summons was issued against the plaintiff, and the summons was dismissed, not upon the merits, but upon a technical objection, and it is admitted that that objection was a good one. No other summons against the plaintiff was taken out. The plaintiff then made a claim against the defendants for compensation upon the ground that he had been damaged by the exercise by the defendants of the powers of the Act—namely, in seizing and procuring the condemnation of the meat. The plaintiff appointed an arbitrator under the Act for the purpose of having the compensation assessed, but the defendants did not appoint one. The single arbitrator then proceeded with the reference, and evidence was heard at considerable length, and the defendants called a body of evidence to show that the carcase was unsound. In the result the arbitrator made his award, and the plaintiff now brings an action on it. It seems to me that the arbitrator was right in the form in which he made his award, because he did not find that the defendants were liable, but he found specific facts upon which the court are to say whether the defendants are liable.

I come now to section 308, upon which the point arises. Under it the arbitrator has to settle a "dispute as to the fact of damage or amount of compensation." We are not without authority as to the meaning of those words. In *Brierley Hill Local Board* v. *Pearsall* Lord Selborne and Lord Fitzgerald deal with them. Lord Selborne said that "if the arbitrator goes into the inquiry, as he ought, as a question of fact, and if he deals with the facts as he finds them, but deals with them in a wrong view of those facts according to law, then, no doubt, his award will not be final." There is nothing in that which shows that in an action on the award the court must not take the facts found by the arbitrator as binding between the parties. Lord Fitzgerald said: "In establishing his case under that section (section 308) the plaintiff had to sustain four propositions—viz., first, that he had sustained damage; secondly, that such damage had been occasioned by reason of the exercise by the local authority of the powers of the Act; thirdly, that such damage arose in relation to some matter as to which he was not himself in default; and fourthly, the amount of compensation to which he was properly entitled. Any dispute as to propositions 1 and 4 is to be settled by arbitration. The fact of damage comes first in the section, and is the foundation of all the rest. In the execution of his duties it is difficult to see how the arbitrator can avoid inquiring whether the acts

complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding, and would be inoperative." In my opinion the words of the section, taken in conjunction with that decision, show that every question of fact is in the province of the arbitrator, and his decision is binding upon the parties, and only questions of law can be raised in an action on the award. The arbitrator has found that the carcase was sound. It is said that he ought not to have gone into that question, because by doing so he has found by inference that the plaintiff was not in default. The arbitrator however, could not have ascertained the fact of damage without finding whether the carcase was sound, though, no doubt, it followed that if the carcase were sound the plaintiff was not in default. It is further said that the seizure of the carcase by the inspector and its condemnation by the justice as unsound was conclusive to show that the plaintiff was in default, but in my opinion that is not conclusive, and it was open to the arbitrator to find that the carcase was sound.

There remains the question as to the items of damage claimed. The first item objected to is £7 10*s.* for the loss of the carcase. It is said that the loss was caused by the act of the justice who condemned it and ordered it to be destroyed, and not by the act of the defendants. I cannot agree. The proceedings which led to the condemnation were originated by the defendants, and they are responsible. It is then said that the costs of the proceedings before the justices cannot be recovered. By section 308 of the Public Health Act, 1875, the plaintiff is to be paid "full compensation" for any damage sustained by reason of the exercise of any of the powers of the Act in relation to any matter as to which he is not in default. In the present case the plaintiff has got £37 1*s.* less in his pocket owing to the exercise by the defendants of the powers of the Act. In *In re Bater and Mayor, &c., of Birkenhead* the owner of the meat was held entitled to be repaid the costs which he had incurred in resisting the condemnation of the meat. Lord Esher, M.R., in speaking of section 308, said: "The words used are very wide, and it seems to me that they must include any pecuniary loss which a man suffers when he is not himself in default. In ordinary language there certainly is damage sustained by a man when, in order to defend his property, he has to call witnesses to prove that he was not in the wrong. It is damage to his pocket because he has to pay the expenses of the witnesses whom he has called. An endeavour is made to avoid this conclusion by giving these expenses a legal name and calling them costs; but they are not the less expenses which a man has had to pay, and for the payment of which he is in the words of the Act entitled to 'full compensation.'" That case seems to me to cover this point. For these reasons the appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. I only wish to make one observation. It cannot be denied that it was the duty of the arbitrator to deal with the fact of damage and the amount of compensation. It seems to me that it was impossible for him to deal with these questions without deciding whether the meat was sound or not. That was a fact for him to decide, and it is impossible for any court to say that it was not within his jurisdiction to decide it.

VAUGHAN WILLIAMS, L.J.—I entirely agree. In my opinion the arbitrator was acting within his jurisdiction in finding as a fact that the carcase was sound, and that finding cannot be disputed now. I wish to make an observation with reference to an argument advanced on behalf of the defendants—namely, that there had been a judicial order by a justice condemning the meat as unsound, and that, as it had thus been judicially determined that the plaintiff was in default, the arbitrator had no jurisdiction to go into that question and to override that judicial determination. In my opinion the order of the justice, in this case, condemning the meat was not a judicial order at all. I do not say that an order of condemnation under section 117 may not in some cases be a judicial order so as to be conclusive between the parties unless set aside and not to be gainsaid in subsequent proceedings. But I say that upon the facts here the order of condemnation was not a judicial order at all.

As regards the question whether the £37 1*s.* is recoverable, section 308 gives "full compensation" where a person has sustained any damage by reason of the exercise of any of the powers of the Act, and the case of *In re Bater and Mayor, &c., of Birkenhead* shows that these expenses are recoverable. It is further said that the loss of the £37 1*s.* was caused by the justices before whom the summons came making no order as to costs, and that therefore the loss was not caused by the exercise of the powers of the Act. I do not think so. If a competent court had made an order dealing with these costs, the parties could not go behind that. But here the justices made no order dealing with these costs.

Appeal dismissed.

Solicitors for the plaintiff, *Walker & Rowe*, for *F. Walker*, Halifax.

Solicitors for the defendants, *Williamson, Hill, & Co.*, for *Storey & Willans*, Halifax.

High Court of Justice.

Chan. Div. }
Stirling, J. } June 7, 15.

LONDON AND MIDLAND BANK (LIMITED) v. MITCHELL. (*a.*)

*Mortgage—Personal property—Statutes of Limitations—Equitable mortgagee of shares in a limited company—Foreclosure—Statute-barred debt—*21 *Jac.* 1, *c.* 16, *s.* 3—3 *&* 4 *Will.* 4, *c.* 27, *s.* 34—37 *&* 38 *Vict. c.* 57.

One of two brothers (who had carried on business in partnership, and were entitled to shares in a limited company, the certificates of which were deposited with a bank to secure any overdraft on a current account) died in 1891, *and the account was then closed, leaving a balance due to the bank. In* 1898, *no interest having in the meantime been paid and no acknowledgment of the debt given, the bank sued the surviving brother and the executor of the deceased brother to enforce their security; and, while the former defendant did not resist the claim, the latter objected that the debt was barred by analogy by the Statutes of Limitations.*

Held, that the bank were entitled to the relief claimed, because there was no provision in any Statute of Limitations affecting the right of a mortgagee of personal property to enforce his security, and the mere fact that the personal claim could not be enforced did not deprive a mortgagee of his right to proceed against the property.

Originating summons.

Two brothers, Alfred and Edward Wordsworth, had carried on business in partnership and had

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

kept an account, first with a banking company now amalgamated with the plaintiff company, and subsequently with the plaintiff company. To secure the balance of their banking account Messrs. Wordsworth deposited with the plaintiffs' predecessors the following documents—(1) five certificates under the seal of Joseph Rodgers & Co. (Limited), showing that one Joseph Welstrop was the owner of the shares in question; (2) a certificate by the secretary of Joseph Rodgers & Co. of a transfer of those shares by the executors of Joseph Welstrop to Alfred and Edward Wordsworth; (3) a transfer of those shares, with the name of the transferee in blank signed by Alfred and Edward Wordsworth. The plaintiff company claimed to be entitled to the benefit of the security thus created and sought to enforce their lien or equitable charge in the following circumstances.

On the 3rd of April, 1891, Edward Wordsworth died, and the defendant William Mitchell was his legal personal representative. His brother, Alfred Wordsworth, was still living. At the date of the death of Edward Wordsworth a considerable balance was due to the plaintiffs on the banking account which was then closed. The balance still remained due, no interest having been paid on it, and no acknowledgment of the debt having been given by Mitchell. On the 28th of September, 1898, more than six years after the death of Edward Wordsworth, the plaintiffs issued this originating summons against Mitchell and Alfred Wordsworth. The latter made no objection to the relief claimed; the former raised the objection that the Statutes of Limitations were a defence to the action.

Upjohn, Q.C., and *Martelli*, for the plaintiffs.—The plaintiffs claim a declaration that the charge still existed, and ask for an account of the amount due and for a sale of the shares. As to the defence that the debt was to be considered as statute-barred, the plaintiffs contend that even if by analogy the doctrine was to be admitted in the case of an equitable mortgage, the time of limitation would only run from the date of refusal to pay off the debt, as, in the actions of detinue and trover, from the dates of the wrongful detention and conversion respectively. But to admit the analogy at all would be revolutionary as against the equitable mortgagees, who cannot enforce their security without bringing an action on the debt. The debt in this case is not extinguished by the statute 21 Jac. 1, c. 16, and no collateral right or remedy is affected thereby: *Courtenay* v. *Williams*, 3 Hare 539, per Wigram, V.C., at p. 551. The right of the mortgagees is a *jus in rem*, and this is not an action to recover a debt, but an action *in rem* to enforce the charge against the property charged; in one case the holders of an imperfect security were allowed to come in even in competition with the holders of a perfect security: *In re Strand Music Hall Co.*, 14 W. R. 6, 3 De G. J. & S. 147. No Statute of Limitations applies here, not even by analogy: *Mellersh* v. *Brown*, 38 W. R. 732, 45 Ch. D. 225, where Kay, J., refused to apply the analogy to a case of personal estate.

Jenkins, Q.C., and *T. Douglas*, for the defendant Mitchell, the legal personal representative of the deceased partner.—The plaintiffs were not entitled to a foreclosure decree by reason of their *laches* and delay and the fraud of their manager, who had known that the surviving partner had purchased all the assets of the business, and had indemnified himself against all liabilities in respect of it. The remedy at law for the debt, which was a simple contract debt, was gone, and therefore the remedy to recover the thing which secured the debt was gone in equity. This was personal property, the right to recover which began in 1891, and now, by analogy, the debt was barred by the Statutes of Limitations: *Cholmondely* v. *Clinton*, 2 Jac. & W. 1, at pp. 81, 152; *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511; *Hovenden* v. *Lord Annesly*, 2 Sch. & Lef. 607. [Shelford on Real Property Statutes (9th ed.), p. 149; and Robbins on the Law of Mortgages, p. 1059, was also referred to.] This was not in the class of cases of a reversionary interest: *In re Lowe's Settlement*, 30 Beav. 95, 10 W. R. Ch. Dig. 74; *In re Hancock, Hancock* v. *Berrey*, 36 W. R. 710, 57 L. J. Ch. 793; *In re Lake's Trusts*, 63 L. T. Rep. 416, 39 W. R. Dig. 112. The plaintiffs were not entitled, being statute-barred, to sue in equity for a transfer of the shares.

Henry v. *Smith*, 2 Dr. & War. 381, 4 Ir. Eq. Rep. 502; *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345; and *Brocklehurst* v. *Jessop*, 7 Sim. 438, were also referred to.

Cur. adv. vult.

STIRLING, J., after stating the facts of the case, continued: The deposit of the documents which have been mentioned has constituted the plaintiffs equitable mortgagees of the shares. If authority for this is required I may refer to what was said by Lord Selborne in delivering the judgment of the Court of Appeal in *France* v. *Clark*, 32 W. R. 466, 26 Ch. D. 257, as to the position of the defendant Clark. [His lordship read from the report at p. 262.] It was admitted on behalf of the defendant Mitchell that no statute expressly applied, but it was contended that inasmuch as the personal remedy for the debt was barred by the statute 21 Jac. 1, c. 16, s. 3, the remedy against the property which constitutes the security for the debt would not be enforced by a court of equity, acting in obedience or by any analogy to the statute. It is now well established that an action for foreclosure is not an action for recovery of a debt, but for recovery of the mortgaged property: *Heath* v. *Pugh*, 29 W. R. 904, 30 *Ibid.* 553, 6 Q. B. D. 345, 7 App. Cas. 235; *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539. Before the statute 3 & 4 Will. 4, c. 27, it was held that a mortgagee of land could not get relief by way of foreclosure after a period of twenty years. This period was not fixed because the personal remedy was then barred, for the statute of James did not apply to specialty debts, and as regards simple contract debts barred them in six years; but it was chosen because section 1 of that statute (a section now repealed) provided that no person having a right of entry into land should thereunto enter but within twenty years after the title accrued. If the mortgage was not by deed, or if the deed contained no covenant for payment, then, although after six years the personal remedy was barred, the remedy against the land continued. This was recognized in the recent case of *Barnes* v. *Glenton*, *ante*, p. 435, [1899] 1 Q. B. 885, before the Court of Appeal. [His lordship read the headnote of the case and the judgment of Romer, L.J., at p. 890.] In addition to the cases there cited I may refer to *In re Conlan's Estate*, 29 L. R. Ir. 199, where Monroe, J., says: "The mere fact that the personal claim cannot be enforced does not deprive the creditors of the remedy against the land." The time, therefore, at which a bar to an action for foreclosure arises under or by analogy to the statute is not that at which the personal remedy ceases, but that at which the remedy against the property which is the subject of the charge is taken away. Now, the statute 21 Jac. 1, c. 16, s. 3, does apply to certain actions for the recovery of personal estate—viz., detinue and trover. It does not appear to me that

the analogy founded on these assists the defendants in the present case, for in neither form of action does time begin to run until a defendant has done something wrongful as between him and the plaintiff—as, for example, has refused to comply with a lawful demand or has wrongfully converted the property in his possession to his own use: see *Miller* v. *Dell*, 39 W. R. 342, [1891] 1 Q. B. 468. Nothing of the kind has happened here. Another way of looking at the case is this: The deposit of the shares constituted in equity an assignment of these shares to the plaintiffs to the extent of the debt, just as much as if a formal deed had been executed assigning them to the plaintiffs, subject to a proviso for redemption. The plaintiffs have, therefore, acquired in equity an interest in these shares and in the nature of property. Though the debt is barred, in the sense that a personal action can no longer be brought to recover it, the debt is not gone; nor is the right of property destroyed, for there is no provision in any Statute of Limitations with reference to personal property similar to that contained in 3 & 4 Will. 4, c. 27, s. 34, whereby the title to land is extinguished after the lapse of a certain period. If, then, the property of the plaintiffs still exists, I fail to see what there is to deprive the plaintiffs of the rights attached to such property. On this ground Kay, J., proceeded in *In re Hancock*. That case no doubt relates to a reversionary interest in personalty, and it was contended that the decision might have been different if it had related to an interest in possession. If the fund was in the hands of a person who could successfully plead the statute against both mortgagor and mortgagee, no doubt the result would be different; but if the holder of the fund either could not plead the statute (as, for example, by being an express trustee) or did not choose so to do, it seems to me that the reasoning of the learned judge would still apply. How could a mortgagor interfere to prevent the holder of the fund from handing over the property to his mortgagee? In my judgment the contention of the defendant Mitchell is not well founded, and the plaintiffs are entitled to relief by way of foreclosure or sale.

His lordship made the usual foreclosure decree in respect of the shares mentioned in the summons, the bank to add the costs of the summons to their security.

Solicitors, *Morton, Cutler, & Co.*, for *Carter, Atkinson, & Bentley*, Pontefract; *Emmet & Co.*, for *Foster, Raper, & Routledge*, Pontefract.

Chan. Div. } June 16.
Byrne, J. }

JOHNSTONE v. CROMPTON & CO. (*a.*)

Mines and minerals—Reservation from grant—Red rock and coal, neither of immediate commercial value—Injunction.

The defendants were the lessees of certain lands under a lease dated the 30th of September, 1860, *granted by the predecessor in title of the plaintiff, the lease containing the reservation, "except nevertheless and always reserved out of this demise all mines and minerals within or under the said land."*

The defendants, in boring for water, had bored through a stratum of red rock and a layer of coal from six to eight inches in thickness, and the plaintiff moved for an injunction to restrain their so doing, on the ground that, although it was admitted that the red rock and coal could not be worked for profit at the present time, these substances were mines and minerals within the reservation.

Held, that the plaintiff was entitled to the injunction on the principle laid down in Hext *v.* Gill, 20 *W. R.* 957, *L. R.* 7 *Ch. App.* 699, *and explained in* Earl of Jersey *v.* Guardians of the Poor of Neath Poor Law Union, 37 *W. R.* 388, 22 *Q. B. D.* 555, *that the substances in question were such as had "a use and a value of their own independent of and separable from the rest of the soil."*

Motion to restrain the defendants from making or permitting to be made in or under the lands demised by or comprised in an indenture of lease dated the 30th of September, 1860, any excavations or underground borings or from removing any mines or minerals in or under the said lands or from interfering with the use and enjoyment by the plaintiffs of the said mines or minerals.

By an indenture of lease dated the 30th of September, 1860, and made between Thomas, Earl of Wilton (the predecessor in title of the plaintiff Sir Frederic Johnstone) of the one part, and Thomas Mucklord (through whom the defendants claimed) of the other part, three closes, fields, or parcels of land situate in the township of Ainsworth, forming part of the Heaton estates, together with the printworks, dyehouse, bleachworks, messuages, dwelling-house, erections, and buildings thereon, and the reservoirs of water situate thereon, and the use and enjoyment of all water usually flowing on to the lands thereby demised from the adjoining lands of the said earl, with their appurtenances, "except nevertheless and always reserved out of this demise all mines and minerals within or under the said land, with liberty for the said earl and his assigns, and other the person and persons for the time being entitled to the reversion immediately expectant on the determination of the term hereby created, and their agents and workmen, at all times to drain, get, and dispose of the said mines and minerals at his and their free will and pleasure, nevertheless not breaking open nor doing any damage to the surface of the land hereby demised or the buildings thereon, and making reasonable compensation to the said lessee, his executors, administrators, and assigns, or his or their tenants, for all damage thereby occasioned," were demised by the said earl to the said Thomas Mucklord for the term of ninety-nine years from the 29th of September, 1860, without impeachment of waste at the yearly rent of £150, and subject to the covenants by the lessee and conditions therein contained.

By an indenture of lease dated the 17th of March, 1896, and made between the then Earl of Wilton of the one part and Thomas Fletcher of the other part, all those mines of coal and cannel known by the names of the "Trencherbone" and the "Cannel" mines lying under parts of the Heaton estate, together with full liberty to work, win, and get the said mines, were demised to the said Thomas Fletcher for the term of twenty-one years from the 23rd of March, 1896, subject to the payment of the dead rent and royalties there mentioned.

The mines demised by the lease of the 17th of March, 1896, comprised mines known as the "Trencherbone" and "Cannel" mines lying under the lands demised by the lease of the 30th of September, 1860.

The lease of the 30th of September, 1860, was assigned to the defendants, Crompton & Co., in or about the year 1897. The lease of the 17th of March, 1896, was assigned to the plaintiff company, Thomas Fletcher & Sons (Limited), on the 16th of May, 1898.

It appeared from the evidence that the defendants

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

had recently commenced to excavate and sink a borehole about eighteen in diameter and through the mines and minerals reserved by the lease of 1860, and that they intended to sink the said borehole to a depth of about 400 ft., so as to insure their piercing the rock known as "Cannel" rock lying immediately above the cannel mines and obtaining water therefrom.

It appeared that in order to reach the cannel rock the borehole must pass through the following strata—namely, surface clay, red rock, red metal, fireclay, coal, Trencherbone coal, and that the defendants had already bored through the red rock and a stratum of coal from six to eight inches in thickness.

It also appeared that the cannel rock contained large quantities of water, which, when reached by the borehole, would, through pressure, rise to the surface, and in so doing would flood all the strata above it which were pervious to water including the Trencherbone coal and Trencherbone rock, and that the consequence of such flooding would inevitably be that when the rock above the cannel rock was worked, the workings would become flooded and that the flooding would extend through the connections made or to be made with those workings, and that irreparable injury would be done, not only to the mines and minerals under the lands demised by the lease of the 30th of September, 1860, but to the adjoining mines.

The main question was whether, having regard to the reservation in the lease of 1860 the boring through the strata of red rock and coal of from six to eight inches in thickness was a boring through, and therefore a trespass upon, the reserved minerals.

It was conceded that the red rock and coal in question could not be commercially worked to a profit at the present time.

Farwell, Q.C., and *Cann*, for the plaintiffs.—The principle laid down by *Hext* v. *Gill*, 20 W. R. 957, L. R. 7 Ch. App. 699, applies in deciding what comes within the term "minerals," the test being whether the substances have a use and value of their own independent of, and separable from, the rest of the soil: *Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union*, 37 W. R. 388, 22 Q. B. D. 555.

Macswinney and *H. P. Lowe*, for the defendants.—The accuracy of the definition in *Hext* v. *Gill* has been doubted by the House of Lords in *Lord Provost of Glasgow* v. *Farie*, 37 W. R. 627, 13 App. Cas. 657, and the reservation here only applies to minerals that can be worked at a profit.

BYRNE, J.—In this case the plaintiffs seek for an injunction to restrain the defendants from boring beneath the surface of certain property which is demised to them, the object of the boring being to obtain water. On the evidence as it at present stands water cannot be obtained without boring to such a depth as to penetrate the cannel coal, which lies at a very considerable depth from the surface. The defendants are lessees under a lease dated the 30th of September, 1860, whereby certain lands are demised. [His lordship read the lease as above set out, and proceeded:] Now, it is in evidence that there is danger should the cannel coal be penetrated, or should a seam called the "Trencherbone coal" be penetrated, and water be subsequently obtained, that there will be very considerable flooding of other property belonging to the plaintiffs, which would be the consequence of the operations which have been commenced. I have before me a plan showing the nature of the material through which the boring has gone, and will have to go, should it be continued. There is first of all the surface clay, then next to that comes red rock and red metal, then coal six to eight inches, then bands of coal, then metal, and below that again, red rock porous, then thin coal, and then the Trencherbone coal; then below that again there is red rock and metal, and then thin bands of coal; and ultimately, at a very considerable depth, you get to cannel coal. At present the defendants have only bored to the six-to-eight inch coal—that is, the highest near the surface. They have bored through the red rock.

The question which has been argued before me is whether, having regard to the reservation in the lease, the boring through the red rock and the coal is boring through, and, therefore, a trespass upon, the reserved mines and minerals or the reserved minerals really. It is conceded that this red rock and the coal in question cannot be commercially worked to a profit at the present time.

It is said, on the other hand, by the defendants, that the true meaning of the reservation is only to reserve such minerals as can be worked for a commercial profit. I think I am truly expressing the terms in which the contention is put, but it does not much matter whether that is the precise way of referring to it, because I will refer to the authorities to show the exact point. It is also said that assuming the red rock and the coal in question can be construed to come within the term minerals in the reservation, nevertheless there is such a context as would render it necessary to put such a construction on that reservation as would show that in this particular document it referred only to such minerals as can be got at a profit. That is founded on the expression, "with liberty at all times to drain, get, and dispose of the said mines and minerals at his and their free will and pleasure, nevertheless not breaking open nor doing any damage," and so on, in the words I have already read.

I had better deal with that point first. I do not think, on a fair construction of this reservation, if without that power the clause in question includes such substances as are said to be minerals in the present case, that the use of the subsequent words giving power to drain, get, and dispose of would limit the use of the word "minerals" in the way suggested. Therefore it occurs to me that the true question is whether a reservation of mines and minerals means only substances properly coming within those words which can be commercially worked to a profit. Now, the first case to which I propose to refer is and has been for many years regarded as a leading case on this branch of the law; I mean *Hext* v. *Gill*. Without going into the circumstances of that case I refer at once to a passage in the judgment where Mellish, L.J., says (p. 712): "But the result of the authorities, without going through them, appears to be this: that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." Then the learned judge proceeds to consider whether it ought to have a more limited meaning in the case then before him.

Then in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie* a question arose as to the meaning within the Waterworks Clauses Act, 1847, of a reservation of the "whole coal and other minerals in the land," and there was some discussion as to the true meaning of *Hext* v. *Gill* in the course of that case. Lord Halsbury, C., says (p. 669): "I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by James, L.J., in the case of *Hext* v. *Gill*, which I shall have occasion hereafter to refer to; and, although the lord justice held himself bound by authority so that

he yielded to the technical sense which had been attributed to these words, I still think (to use his language) that a grant of 'mines and minerals' is a question of fact 'what those words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when they were used in the instrument"; and later on the Lord Chancellor refers to the language of Mellish, L.J., in *Hext* v. *Gill*. He refers to the summing-up of the authorities, and then he says: "I cannot myself assent to such a definition. In the first place, it introduces as one element the circumstance that the substance can be got at a profit. It is obvious to see that if that is an essential part of the definition the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next." Then Lord Macnaghten says (13 App. Cas. 689): "In some of the reported cases it seems to be laid down, or assumed, that to be a mineral a thing must be of commercial value, or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit." Lord Herschell says (13 App. Cas. 685): "I think the reservation must be taken to extend to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit and have a value independent of the surface of the land."

The words in that case were "mines and minerals," so that it is really a definition of the words "mines of coal," &c., "or other minerals."

Now, the observations of the learned lords in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie* were fully consideredin the case of *Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union*. I will venture to take from the judgment of Bowen, L.J., his view of what was meant by the summing up of Mellish, L.J., of the authorities in *Hext* v. *Gill*, and he deals with that matter in reference to the criticism of Lord Halsbury, C., to which I have already referred in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie*. The passage I refer to is at 22 Q. B. D., at p. 562, where the lord justice says: "I would only say with regard to Lord Halsbury's criticisms on *Hext* v. *Gill*, I cannot help thinking either that he has not been perfectly reported, or else the Lord Chancellor had not in his mind at the moment the exact canon of construction of Mellish, L.J., because Mellish, L.J., does not say, nor, I think, mean, that the test was whether the minerals could be worked at a market profit at the time, but whether they had a value of their own independent of and separable from the rest of the soil. Reading the passage from the judgment of Mellish, L.J., to which I have referred, together with what Bowen, L.J., said in the passage I last read, it does not appear to me there is anything inconsistent in the law as laid down in *Hext* v. *Gill*, falling deservedly under the criticism, which was applied to it. The case of *Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union* is a clear decision, if it were wanted, that *Hext* v. *Gill* is a binding authority, not only on me, but on the Court of Appeal; so also is the case of *Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union*.

Now the question is, What is the true meaning of the rule as laid down in *Hext* v. *Gill*? It cannot be that the test is whether the minerals can be worked at a market profit at the time. This is expressly shown by Bowen, L.J., not to be the meaning of the words of Mellish, L.J. Does it, then, mean that the test is whether they are minerals in any other sense than this; are they substances otherwise falling under the definition of minerals which have "a use and a value of their own independent of and separable from the rest of the soil?" I understand the true rule to be this: You inquire what the substances are; and then you ask, Are those "minerals" in the sense that they belong to a class of substances, or form a class or kind of substance of which it can be said that the substance is a valuable article either for the purposes of sale or other purposes? Applying that test to a simple substance like coal, I ask myself, Is coal a mineral? Speaking generally, undoubtedly, apart from this particular test of commercial value, one must say that coal is one of the most familiar examples of what is meant by minerals, not merely in a general sense, but in a grant of this description. It is one of the first things which is so regarded in a coal district. Am I to inquire whether the coal, as it now exists beneath the soil, can be got so as to be sold at a profit? I think not. I think it belongs to a class of substance, or is an illustration of a substance which has "a use and a value of their own independent of and separable from the rest of the soil." I think that is the fair result of the authorities; and that in this case, it being shown upon the evidence that red rock is useful for building purposes, as to the red rock and as to the coal which has been referred to, although neither of these substances can be worked to a commercial profit at the present time, yet nevertheless they fall within the reservation; and that what the defendants have done and are threatening to do constitutes really a trespass on the property of the plaintiffs in the action. The result, therefore, is that the plaintiffs are entitled to an injunction restraining the defendants from trespassing on the mines and minerals mentioned in the lease.

Solicitors, *W. F. Foster; Woodcock, Ryland, & Parker*.

Chan. Div.
Wright, J. } **May 31.**

In re JUBILEE SITES SYNDICATE (LIMITED). (*a*.)

Company—Winding up—Supervision order—Private examination under section 115 *of the Companies Act*, 1862—"*Due regard to interests of creditors or contributories*"—*Public examination—Petition by the official receiver—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 115—*Companies* (*Winding-up*) *Act*, 1890 (53 *&* 54 *Vict.* 63), *ss.* 8, 14.

The powers which section 14 *of the Companies* (*Winding-up*) *Act*, 1890, *gives the court to order a company to be wound up compulsorily on the application of the official receiver includes every case where the powers of the voluntary liquidator are proved, in the opinion of the court, to be insufficient for the purposes of the winding up in so far as the interests of the creditors or contributories are concerned. An order, however, ought not to be made as a matter of course, but a strong case ought to be made out to justify the interference of the court under that section.*

This was a petition presented by the official receiver under section 14 of the Companies (Winding-up) Act, 1890, praying that the company, which was being wound up under the supervision of the court, might be ordered to be wound up compulsorily.

The company was formed in April, 1897, and went

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

into voluntary liquidation on the 2nd of November of that year, the liquidation being ordered to be carried on under the supervision of the court.

On the 10th of November Mr. H. C. Wilson, who had been appointed voluntary liquidator, still continued to act. A Mr. H. Spain was, however, afterwards appointed as joint liquidator with him.

The syndicate had been promoted by the Dumbarton Development Syndicate (Limited), a company registered in Scotland, but it was alleged that this company was but another name for an individual—a Mr. Beall—and serious charges of misfeasances were made against him.

The official receiver now petitioned under section 14 of the Companies (Winding-up) Act, 1890, that the company might be wound up compulsorily on the ground that it was necessary that Beall, who had already been privately examined under section 115 of the Companies Act, 1862, should be publicly examined under section 8 of the Act of 1890, in order that a fuller disclosure of the facts relating to the company might be obtained.

Mr. Spain, one of the liquidators, supported the petition. Mr. Wilson, the other liquidator, opposed.

Stewart Smith, for the official receiver.—It is necessary in this case that there should be a public examination under section 8 of the Companies (Winding-up) Act, 1890, in order that the facts may be fully disclosed. This can only be done under a compulsory order. The court should therefore exercise its powers under section 14 of that Act and order this company to be wound up compulsorily.

Norman Craig, for Wilson.—The liquidators are not failing in their duties, and the court should only move when such is the case.

Stewart Smith, in reply.—The powers of the court are much greater in a compulsory than in a voluntary winding up or one under supervision "So that where a *primâ facie* case of malpractice has been made out a creditor may be 'prejudiced by a voluntary winding up,' and, if so, a compulsory order will be made": Buckley on Companies Act (7th ed.), 362.

WRIGHT, J.—This is a case of great importance. It is very desirable that a person in the position of the official receiver should in a proper case be able to interfere with effect for such a purpose as is here suggested. There are two questions for my decision—namely, What is the real meaning of section 14 of the Companies (Winding-up) Act, 1890? and, Has a sufficient case been shown to justify an order being made under the section when its meaning has been ascertained? I have had a great doubt as to what the section means, but I think a reasonably wide construction ought to be given to it, and that, without straining its language at all, the section includes every case where the powers of the voluntary liquidator are proved, in the opinion of the court, to be insufficient for the purposes of winding up in so far as the interests of creditors or contributories are concerned. If, in short, the official receiver, after a compulsory winding-up order, would possess any power which the voluntary liquidator cannot exercise, and which is shown to be necessary in order that there may be an efficient winding up in the interests of the creditors or contributories, then section 14 applies. That is the principal factor in the case. If that is the proper construction of the section, are the facts of the present case sufficient to bring it within the section? I think they are. There is a strong *primâ facie* case that there are persons who ought to be made to restore, if they have got it, the property of the company. When I find, as I do, that a zealous voluntary liquidator, acting under the advice of counsel of great experience, arrives at the conclusion that he cannot satisfactorily take proceedings for misfeasance without some examination going beyond that which may be obtained under section 115 of the Companies Act, 1862—or, in other words, that a public examination under section 8 of the Act of 1890 is absolutely necessary—then I think that a winding-up order under section 14 of that Act should be made. I may add that I do not think an order should be made as a matter of course under section 14. As here, a very strong case must be made out to justify the interference of the court under that section.

Solicitors for the official receiver, *Munns & Longden*.

Solicitor for the voluntary liquidator, *E. H. Hoare*.

Q. B. Div.
(Darling and Channell, JJ.) } May 17.

KINSON POTTERY (LIMITED) (*Appellants*) v. MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF POOLE (*Respondents*). (*a*.)

Local government—Public health—Nuisance—Liability of owner—Want of structural convenience—Sewer—Right to drain into—Obligation to provide—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 21, 94.

The slop and scullery water of twelve houses owned by the appellants, but occupied separately by their tenants, flowed into a drain constructed for the purpose of carrying away the surface water from the street upon which the houses abutted. The slop and scullery water flowed thence into an open ditch, where a nuisance arose. No cesspool or other means of dealing with the drainage was provided upon the premises themselves, nor was there an available sewer constructed for the purpose of carrying away sewage. The appellants were summoned by the local authority under sections 94 *and* 95 *of the Public Health Act*, 1875, *for non-compliance with a notice to abate the nuisance, and an order was made upon them by the justices before whom the summons was heard.*

Held (Channell, J., dubitante), *that the appellants were the proper persons to be proceeded against, since the nuisance arose from the "want of a structural convenience" within the meaning of the first proviso of section* 94.

Held, also, that, though the surface water drain was a "sewer" within the meaning of section 4 *of the Act, the appellants had no right, by virtue of section* 21, *to turn into it matter which it was not intended to receive, and that the obligation of the local authority under section* 15 *to provide sewers in their district was discretionary.*

Case stated by justices for the borough of Poole.

A complaint was preferred by the respondents, as urban sanitary authority of the borough of Poole, against the appellants, charging them that, being the owners of twelve houses in Ringwood-road, Longfleet, within the respondents' district, they did unlawfully permit the premises to be in such a state as to be injurious to health, and did unlawfully make default in complying with the requisitions contained in a notice served upon them by the respondents, requiring them to abate the nuisance, contrary to section 95 of the Public Health Act, 1875.

The appellants were the owners of the twelve houses mentioned in the complaint. The houses were situated in a part of the respondents' district which bore a rural character and abutted upon a highway known as Ringwood-road. In 1892 a plan was

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

deposited with the respondents by W. H. C. Curtis, on behalf of William Carter, the then owner of the houses. The plan provided for the draining of the houses into cesspools at the back. In 1896 the business of William Carter was incorporated under the Companies Acts under the name of the appellant company, and the houses became the property of the appellant company.

In erecting the houses the plans were departed from in that the cesspools at the back were not constructed.

Prior to 1892 the respondents, as highway authority, had laid down at the side of the highway upon which the appellants' houses abutted a drain for a distance of 123 yards or thereabouts for the purpose only of receiving the surface water from the highway. By means of the drain the surface water was conveyed to, and emptied into, an open ditch by the side of another highway about 49 yards distant from the appellants' houses.

The slop and scullery water from the appellants' houses was, without the permission of the respondents, turned into the surface water drain and, entering the open ditch, became offensive. The respondents, by a formal notice served on the appellants, required them to abate the nuisance by constructing cesspools to receive the slop and scullery water from their houses. This notice not having been complied with, the present proceedings were instituted.

A system of drainage was carried out by the respondents in parts of their district, but the nearest point to which a main sewer had been brought by the respondents was half a mile distant. Beyond this no sewer had been constructed by the respondents into which the slop and scullery water from the appellants' houses could have been drained.

The justices made the order asked for by the respondents.

Section 94 of the Public Health Act, 1874, is as follows: "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises or continues, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided—first, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner; secondly, that where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner or occupier of the premises the local authority may themselves abate the same without further order."

Section 15 of the same Act provides as follows: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Section 21 provides that "the owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention to do so," and upon certain other conditions.

Macaskie, for the appellants.—The liability for this nuisance rests not upon the appellants, but upon the respondents. The surface water drain whence the nuisance arose is not a drain, but a sewer within the meaning of the Public Health Act, 1875, because the drainage of more than one house flows into it (*Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233); and this is so notwithstanding that the drainage of the houses was, in the first instance, wrongfully turned into the drain (*Geen* v. *Vestry of St. Mary, Newington*, 46 W. R. 624, [1898] 2 Q. B. 1), and notwithstanding that the drain was only intended to be a surface water drain, *Whettcroft* v. *The Local Board of Matlock*, 52 L. T. Rep. 356, 33 W. R. Dig. 128. The drain is, therefore, the property of the respondents, and the appellants had, by virtue of section 21 of the same Act, a right to drain into it. It was the duty of the respondents, under section 15, to make proper sewers for the drainage of the houses in their district, and it was their failure to comply with this duty that caused the nuisance. They cannot proceed against the appellants for a nuisance caused by their own failure to provide proper sewers: *Reg.* v. *Tynemouth Rural District Council*, 44 W. R. 646, [1896] 2 Q. B. 219, 451; *Kirkheaton District Local Board* v. *Ainley*, [1892] 2 Q. B. 274, 40 W. R. Dig. 219; and *Fordham* v. *Parsons*, [1894] 2 Q. B. 780. The appellants are not the proper persons to be proceeded against. They are not the persons by whose act, default, or sufferance the nuisance arose. The occupiers are the proper persons to be proceeded against.

Clavell Salter, for the respondents.—It is immaterial whether the appellants are the persons by whose act, default, or sufferance the nuisance arose, because the nuisance arose from the want of a structural convenience—namely, the absence of cesspools, within the first proviso of section 94, and therefore the proceedings were rightly taken against the appellants, who are the owners. Further, the appellants are, at any rate, persons by whose act, default, or sufferance the nuisance "continues." Assuming that the drain is a sewer, the appellants had no right to drain into it because, under section 21, it is a condition precedent that notice of an intention to drain into a sewer should be given. No such notice was given in the present case. The appellants could not have a right under section 21 to turn house drainage into such a sewer as this was, because it emptied into a natural watercourse, and the local authority is expressly forbidden, by section 17, to drain into natural watercourses without first dealing with the effluent.

Macaskie replied.

DARLING, J.—I think that the magistrates were right in making the order. The appellants were the proper persons to be summoned in respect of the nuisance which had arisen, because I think the nuisance arose from the want of a structural convenience within the first proviso of section 94. If the cesspools indicated in the plan had been constructed, the slop and scullery water would not have flowed into the respondents' surface water drain and thence into the ditch, and so caused the nuisance.

Now, it is said that the appellants are not liable for the nuisance, because the drain into which the slop and scullery water, after it left the appellants' premises, found its way was a sewer; that, as it was a sewer, the appellants had a right, under section 21 of the Public Health Act, 1875, to turn into it anything they chose; and that then it was for the respondents to deal with it and not themselves.

I cannot think that the Legislature intended that. It is true that this drain may, for certain purposes, be a sewer—for instance, for the purpose of vesting in the local authority. But it does not follow from that that owners or occupiers of houses are entitled to turn anything they chose into what is technically a sewer. If that were so, chemical manufacturers would have the right to turn offensive chemical

substances into mere country drains, and there would be thrown upon the shoulders of the local authority the burden of altering their sewers at the mere caprice of owners or occupiers. There must be a proper user of the sewer.

There being an improper user in this case, the contention that under section 21 notice of an intention to use the sewer was necessary is immaterial.

It was further contended that it was the duty of the respondents to provide sewers for their district and that individual owners or occupiers could not be called on by the respondents to abate a nuisance which arose in consequence of their failure to provide sufficient sewers. But, in my opinion, the local authority have a discretion as to what sewers are necessary. I think the appeal should therefore be dismissed.

CHANNELL, J.—I am of the same opinion. The only question on which I have any doubt is as to whether the appellants are the proper persons to be be proceeded against. Three points were raised. It is said in the first place that this surface water drain is a sewer vested in the local authority, and that, that being so, the appellants have a right, under section 21, to turn the drainage of their houses into it. The contention is ridiculous. It is true that a pipe made to carry surface water may, in certain circumstances and for certain purposes, become a sewer, and I think that this pipe, though not intended to receive sewage, is yet within the definition of a sewer. But though the pipe is a sewer, that does not give the plaintiffs the right to use it for the purpose for which they did use it. The right given by section 21 is, in the first place, only on condition of notice being given to the local authority; and I think that it was intended that only sewage should be drained into drains constructed for the purpose of carrying sewage, and that only water should be drained into drains constructed for the purpose of carrying water. There must be a proper user of the sewers constructed by or vested in the local authority. Further it is said that the nuisance arose from the default of the local authority to provide a proper sewer for this part of their district in accordance with section 15. No doubt the local authority have a duty to provide sewers, but that does not mean that they are bound to provide sewers for the use of every house in their district. There may be a case where in a rural district a few cottages are isolated. Can it be said that the local authority must construct sewers, at great expense, to receive the drainage of these cottages? It is a question of degree, and the local authority have a discretion in the matter; so that it does not follow that because these houses are within the respondents' district that they are bound to provide sewers for them, and there is nothing to show that an obligation exists to provide sewers in this portion of their district. The proper course for the appellants to have taken would have been to require that an inspector should be sent to inquire into the requirements of the district.

With regard to the third and main point—whether the appellants are the proper persons to be summoned—I have, as I have said, some doubt. I am not clear what is meant by a want of a structural convenience, and I should like to further consider it, but it is not of importance here, because, in any case, the tenants could be proceeded against and the appellants could be compelled to make the necessary alterations in that way.

Appeal dismissed.

Solicitor for the appellants, *J. E. King*, for *J. H. Tattersall*, Bournemouth.

Solicitors for the respondents, *Prior, Church, & Adams*, for *H. S. Dickinson*, Poole.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) — June 21.

GOOCH *v.* CLUTTERBUCK AND ANOTHER.
DAVIS (*Third Party*). (*a.*)

Landlord and tenant—Lease—Assignment—Indemnity against breaches of covenant—Covenant to repair—Premises out of repair at date of assignment—Liability of assignee.

A lease, which contained a covenant by the lessee and his assigns to keep the houses comprised therein in repair, became vested in the defendants as the executors of the assignee of the lease. The houses were out of repair, and the defendants agreed to sell them to a purchaser for the residue of the term. On the same day the plaintiff, who was entitled to the reversion on the determination of the lease, served notice upon the defendants that the houses were out of repair, giving particulars of the breaches of covenant complained of. The defendants subsequently executed, as trustees, an assignment of the lease of the houses to the purchaser, who knew of their condition and of the service of the notice, and the purchaser covenanted that he would thenceforth pay the rent reserved by the lease, and observe and perform the lessees' covenants therein contained, and from the payment and performance thereof respectively would keep indemnified the defendants and the estate and effects of their testator. The houses not having been put into repair, the plaintiff brought an action against the defendants to recover damages for breaches of the covenant to repair specified in the notice, and the defendants served a third-party notice on the purchaser claiming indemnity from him under his covenant to indemnify.

Held, that the defendants were entitled to an indemnity from the assignee against their liability for the breaches of the covenant to repair.

Appeal from the judgment of Channell, J., at the trial without a jury of an action to recover damages for breach of covenant to repair.

By a lease dated the 4th of August, 1807, the plaintiff's predecessor in title demised to one Critchley a piece of land for the term of 100 years from the 25th of March, 1807, at the yearly rent of £3 15s. The lease contained a covenant by Critchley, his executors, administrators, and assigns, to erect within one year certain houses on the land, and during the continuance of the lease as often as need be to repair and keep in repair the same. The houses were built in pursuance of the covenant. The plaintiff was the owner of the reversion expectant upon the determination of the above term, and by divers mesne assignments the premises became vested for the residue of the term in one John Malin, who entered into possession, and died on the 26th of July, 1897, and thereupon the premises became vested for the residue of the term in the defendants as the executors of Malin.

On the 1st of October, 1897, the plaintiff served notice upon the defendants under section 14, sub-section 1, of the Conveyancing Act, 1881, that the premises were out of repair, and gave particulars of the breaches of covenant complained of. Upon the same day the defendants agreed to sell to Patrick Davis the premises for the residue of the term, and upon a requisition as to title the notice of the 1st of October was disclosed to Davis.

On the 20th of December, 1897, the defendants, as trustees, by deed assigned the premises to Davis, who knew of their condition and of the breach of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

covenant, for the residue of the term of one hundred years at the yearly rent of £3 15s. by the lease reserved and subject to the lessee's covenants therein contained. The assignment contained the following clause: "And the purchaser doth hereby covenant with the vendors that he will henceforth pay the rent by the said lease reserved, and observe and perform the lessee's covenants therein contained, and from the payment and performance thereof respectively will keep indemnified the vendors and the estate and effects of the said John Malin, deceased."

On the 31st of January, 1898, the houses not having been put into repair, the plaintiff brought an action against the defendants as executors of John Malin, and also in their personal capacity, to recover damages for breaches of the covenant to repair specified in the notice of the 1st of October, 1897, committed during the possession of Malin and of the defendants. The defendants served a third-party notice on Davis claiming indemnity from him under the above covenant in the assignment.

Channell, J., found that there had been a breach of the covenant to repair, and gave judgment for the plaintiff, subject to a reference as to damages, and he held that as the breach of the covenant to repair was a continuing breach, the defendants were entitled to an indemnity from Davis.

Davis appealed.

O. Leigh Clare, for Davis.—The covenant of indemnity relates to future breaches and not to past breaches of covenant by the assignors. The assignors were bound to perform the covenants during the continuance of their term up to the date of the assignment. If the judgment is right, the assignee would be liable to indemnify the assignors against arrears of rent which accrued due during the continuance of their interest, or against claims founded upon a breach of covenant to paint every seven years committed by the assignors. That would not be a reasonable construction of the covenant. The common form of covenant is given in Key & Elphinstone's Precedents in Conveyancing (6th ed.), p. 427.

He referred to *Hawkins* v. *Sherman*, 3 C. & P. 459; *Smith* v. *Peat*, 9 Exch. 161, 2 W. R. Dig. 154; *Moule* v. *Garrett*, 18 W. R. 697, L. R. 5 Ex. 132.

A. T. Lawrence, Q.C., and *T. Douglas* (*S. Joyce Thomas* with them), for the defendants.—The assignee knew that the premises were old and out of repair, and that the plaintiff had served notice on the defendants under section 14 of the Conveyancing Act, 1881, that a breach of covenant had been committed. The assignee knew that the plaintiff was threatening an action on the covenant to repair or to recover possession, and he took over the premises together with the defendants' liability to repair. In these circumstances the assignment was executed and the covenant of indemnity was inserted. The covenant would be of no use unless it covered breaches of covenant committed by the assignors during their term. The plaintiff cannot sue them for breaches of covenant committed after the assignment. The construction placed on the covenant by Channell, J., was right.

O. Leigh Clare replied.

A. L. SMITH, L.J.—In this case Channell, J., felt some doubt in the construction which he placed upon the covenant to indemnify. Nor am I perfectly clear about it. I think upon the whole that Channell, J., has come to a right conclusion. The action was brought against a mesne assignee to recover damages for breach of a covenant to repair. On the 1st of October, 1897, a notice setting forth a list of dilapidations was served on the defendants, and on the same day the defendants agreed to assign the premises to Davis; and on the 20th of December the assignment was executed. The question turns entirely upon the true construction of the covenant of indemnity in the assignment. The circumstances in which the assignment was executed have been stated to us, and we have been told that the houses are old houses and the executors were selling these old houses to Davis. In my opinion the meaning of the covenant in the assignment is, so far as regards the covenant in the lease to repair, that Davis will indemnify the defendants against all actions and claims in respect of their liability on the covenant. Upon the whole, therefore, I am of opinion that the judgment of the learned judge was right.

RIGBY, L.J.—I am of the same opinion. I do not think it in anyway a clear point, but upon the whole I agree with the construction placed upon the covenant by Channell, J. We have here houses as to which each of the parties knew their condition and the terms of the lease. The assignee, who has been brought in as third party, knew that the covenant to repair contained in the lease had not been performed by the assignors. In those circumstances he covenanted that he would observe and perform the lessee's covenants contained in the lease—that is, that he would put the houses in proper repair, and if he had done so no action would have been brought by the reversioner against the assignors. The covenant in the assignment goes on to say that "from the payment and performance thereof respectively" the assignee "will keep indemnified the vendors and the estate and effects of the said John Malin, deceased." The meaning of that clause seems to me to be this: I, the assignee, know that you, the assignors, have not performed your covenant to repair, and I will indemnify you against your liability to perform it. To my mind that is not at all an unreasonable construction, because it may be assumed that the assignee gave less for the houses than he would otherwise have given. The covenant of indemnity is somewhat curiously worded. What is the meaning of keeping indemnified from the performance of the covenant? It seems to me that it means that the covenantor will keep the covenantee indemnified against all actions, proceedings, expenses, claims, and demands whatsoever on account of the obligation which the latter has undertaken. This obligation was undertaken by the defendants and has not been performed. The plaintiff brought an action against them claiming damages in consequence thereof. The defendants had no defence to that action. In my opinion upon the true construction of the covenant the assignors are entitled to an indemnity. The difficulty has arisen by taking a common form of covenant and importing some clumsy words into it.

VAUGHAN WILLIAMS, L.J.—I agree. I think that according to the reasonable construction of the covenant the assignee undertook to satisfy the claim which the landlord had against the assignors under the covenant to repair. I am brought to that conclusion partly by the particular words in the covenant, keep indemnified "from performance," instead of non-performance, which are the ordinary words. I am also led to this conclusion by the fact that, to a large extent, this indemnity covenant deals with a state of things with which the assignors could not themselves interfere. Having assigned the lease, the assignors could not enter upon the premises and perform the covenant to repair.

Appeal dismissed.

Solicitors for the defendants, *Ward, Bowie, & Co.*, for *Lane, Clutterbuck, & Tomlinson*, Birmingham.

Solicitors for Davis, *Goldberg, Barratt, & Newall* for *A. J. O'Connor*, Birmingham.

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 14.

BRANKELOW STEAMSHIP CO. (LIMITED) AND OTHERS v. CANTON INSURANCE OFFICE (LIMITED). (a.).

Insurance, marine—Lump chartered freight—Cesser clause—Charterers' liability to cease on cargo being loaded—Lien for bill of lading freight—Absence of lien for chartered freight—Loss of goods by perils of the sea—Bill of lading freight payable less than chartered freight.

By a charter-party a ship was chartered for a voyage at the lump freight of £3,000 payable on delivery of the cargo. The master was to sign bills of lading at any rate of freight the charterers might require, but not under chartered rates, or difference to be settled in cash on signing bills of lading; the charterers' liability to cease on shipment of the cargo provided it was worth the freight, dead freight, and demurrage on arrival at the port of discharge, but the vessel to have a lien thereon for the recovery of all freight, dead freight, and demurrage. The charterers loaded a full cargo under bills of lading which made the goods comprised in each bill of lading deliverable to the consignee thereof on payment of the bill of lading freight. The shipowners effected a policy against perils of the sea on the chartered freight. During the voyage part of the cargo was lost by a peril of the sea, and on the ship's arrival at the port of discharge the bills of lading freights payable to the shipowners upon that part of the cargo which arrived was less by £645 than the chartered freight, though the cargo which arrived was worth the chartered freight. In an action by the shipowners upon the policy to recover the £645 as being a loss of chartered freight by a peril of the sea,

Held, that the loss was not caused by a peril of the sea, but by the master not having signed bills of lading giving the shipowners a lien upon the goods comprised in each bill of lading for the whole chartered freight.

Appeal from the judgment of Bruce, J., in favour of the defendants.

The action was brought upon a policy of marine insurance on chartered freight. By a charter-party dated the 17th of September, 1896, the plaintiffs chartered their steamship *Ramleh* to Messrs. Williams & Co., as charterers, for a voyage from the River Plate to Liverpool at the lump freight of £3,000 payable on delivery of the cargo at Liverpool in cash.

Clause 18 of the charter-party was as follows: "Bills of lading.—The master to apply at the offices of the charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided said cargo is worth the said freight, dead freight, and demurrage on arrival at the port of discharge), but the vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever."

The charterers loaded a full and complete cargo under bills of lading signed by the master, the goods comprised in each bill of lading being deliverable to the consignee thereof on payment of the bill of lading freight, and a lien being given on the goods for the bill of lading freight. The total of the bills of lading freights exceeded the chartered freight.

On the 11th of November, 1896, the plaintiffs effected with the defendants a policy of insurance against perils of the sea "on £3,000 freight, chartered or as if chartered, so valued, on board or not on board." During the voyage the vessel went aground and part of the cargo was jettisoned or damaged by a peril of the sea, and upon arrival of the vessel at Liverpool the bills of lading freights payable upon that portion of the cargo which arrived amounted to £2,355, and the plaintiffs received this sum from the consignees. The cargo which arrived was worth the chartered freight, dead freight, and demurrage.

The plaintiffs brought this action on the policy to recover £645, the difference between the £3,000 chartered freight and the £2,355 received for the bills of lading freights, as being a loss of freight by a peril of the sea insured against.

Bruce, J., held that the loss of the chartered freight was not caused by a peril of the sea, but by reason of the master having signed bills of lading making the cargo deliverable to the respective consignees on payment of the bill of lading freight, and not giving a lien on the goods comprised in each bill of lading for the chartered freight, and he accordingly gave judgment for the defendants.

The plaintiffs appealed.

Joseph Walton, Q.C., and *Pickford, Q.C.* (*Horridge* with them), for the plaintiffs.—The bills of lading freights at the time of shipment exceeded the £3,000 chartered freight, and as the goods that arrived were worth the £3,000 chartered freight, the cesser clause applied, and the charterers' liability to pay the chartered freight ceased on the goods being shipped. The shipowners had, therefore, to look to the bills of lading freights for payment of the chartered freight. The bills of lading freights, in consequence of a loss by a peril of the sea, fell short of the chartered freight by £645, and that is a loss which the shipowners can recover under the policy. The plaintiffs were, therefore, entitled to recover.

They referred to *Gardner* v. *Trechmann*, 15 Q. B. D. 154, 33 W. R. Dig. 190; and *Inman Steamship Co.* v. *Bischoff*, 31 W. R. 141, 7 App. Cas. 670.

Carver, Q.C., and *J. A. Hamilton*, for the defendants.—The charter-party gave a lien on the goods shipped for the whole chartered freight. Each parcel of the cargo might have been put under a lien for the whole £3,000. Each bill of lading only gave a lien for the bill of lading freight. There would have been no loss of the chartered freight if each bill of lading had given a lien for the £3,000 chartered freight, as the cargo that arrived at Liverpool was worth more than £3,000. Therefore the shipowners lost their chartered freight by their own act and not by a peril of the sea. The cesser of liability is equivalent to the lien given, and the shipowner gets the lien in consideration of relieving the charterer from liability: *Hansen* v. *Harrold Brothers*, [1894] 1 Q. B. 612. The defendants knew of the charter-party and of the lien given by it to the shipowners, and they insured the chartered freight on that footing. They never insured the bill of lading freight. The defendants, therefore, were not liable.

Pickford, Q.C., in reply.—The shipowners took a lien on each parcel of goods shipped for the bill of lading freight relating to that parcel, and those freights exceeded in all £3,000. Therefore they had a lien for the whole £3,000 on the bill of lading freights, and a loss of freight occurred by a peril of the sea.

Cur. adv. vult.

June 14.—A. L. SMITH, L.J., read the following judgment: By a charter-party dated the 17th of September, 1896, the plaintiffs, the Brankelow Steamship Co. (Limited), let their steamship *Ramleh* on hire to Messrs. Williams & Co., the charterers, for a voyage from the River Plate to Liverpool at the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

lump freight of £3,000, payable on the delivery of the cargo in cash. Upon the 11th of November, 1896, the plaintiffs caused a policy of marine insurance to be effected with the defendants, the Canton Insurance Office (Limited), to cover the lump chartered freight upon the voyage in question against perils of the sea, the freight insured being thus described in the policy: "On £3,000 freight, chartered or as if chartered, so valued, on board or not on board." I leave out the other plaintiffs upon the record—viz., the charterers of the ship, for I agree with Mr. Carver that the defendants undertook no liability as to them under the policy. It was the shipowners' lump chartered freight and nothing else which they covered by the policy against perils of the sea. The charterers loaded a full cargo under this charter, and in due course the ship arrived at Liverpool with the cargo on board, excepting a portion represented by bills of lading freights amounting to the sum of £645, which cargo by reason of a sea peril had been jettisoned, or lost upon the voyage, and it is these bills of lading freights amounting to £645 which the plaintiffs seek to recover from the defendants under their policy covering lump-chartered freight. Now, if there were no other facts in this case but those above mentioned, there cannot be a doubt that there would have been no loss of lump chartered freight by a peril of the sea, for it has been often held that upon a charter at lump chartered freight the whole amount is payable by the charterer to the shipowner upon the arrival of the ship, and that the right to the payment is not conditional upon the delivery of the full cargo at the port of destination, and if part of the cargo has been lost by reason of a peril of the sea upon the chartered voyage, the lump chartered freight without deduction is nevertheless payable by the charterer to the shipowner on delivery of the remainder of the cargo at the port of discharge—see *Merchant Shipping Co.* v. *Armitage*, 22 W. R. 11, L. R. 9 Q. B. 99, and other cases cited by Mr. Carver in his excellent work on Carriage by Sea (ed. 1885), pp. 549 and 550—and this was not disputed at the bar. The plaintiffs consequently could have had no claim against the underwriters for loss of lump chartered freight, for the whole of this freight they could have recovered from the charterers, although a portion of the cargo had been lost on the voyage. That the liability of underwriters when underwriting lump chartered freight is very different and less onerous than when underwriting freight in general represented by bills of lading freights is obvious, and this cannot be denied. But the plaintiffs allege that in the charter-party in this case there is a cesser of liability clause coupled with a lien which appears to me to be of the ordinary description. It is as follows: "The master to apply at the offices of charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided the said cargo is worth the said freight, dead freight, and demurrage on arrival at port of discharge), but the vessel to have a lien thereon for the recovery of all freight, dead freight, demurrage. and all other charges whatsoever." It is argued for the plaintiffs that inasmuch as they had by this clause given up their right against the charterers for the £3,000 upon the shipment of the cargo, and that as they had taken no lien upon the cargo which arrived for "all freight," that is, for the whole of the lump freight of £3,000 but only for the respective bills of lading freights which amounted to the sum of £645 less than the lump freight of £3,000 by reason of cargo carrying that amount of freight having been lost during the voyage, they were, therefore, entitled to recover these bills of lading freights of £645 from the underwriters of the policy on lump chartered freight. Now, apart from the fact that a shipowner's right against a charterer under a cesser clause like the present only operates to the extent to which the shipowner has taken a lien for freight—see *Clink* v. *Radford*, 39 W. R. 355, [1891] 1 Q. B. 625, and *Hansen* v. *Harrold Brothers*—how do matters stand? It is said by the plaintiffs that under this cesser clause the charterers' liability ceased upon shipment of the cargo, and that as all the shipowners could look to upon the arrival of the ship for the lump chartered freight of £3,000 was a lien upon the cargo which arrived for the bills of lading freights thereon, and that as these bills of lading freights amounted to the sum of £645 less than the £3,000 lump freight by reason of a loss by sea perils of the portion of the cargo represented by the £645 bills of lading freights, this loss can be recovered from the underwriters as a loss occasioned by perils of the sea. Although the charter-party was not shown to the underwriters when they effected the policy, it is obvious that they must have known of the existence of a charter-party, for it was freight chartered or as if chartered valued at £3,000, which they insured against perils of the sea, and as Lord Blackburn, in *Inman Steamship Co.* v. *Bischoff*, 31 W. R. 141, at p. 144, 7 App. Cas. 670, at p. 678, said: "Though the underwriters knew . . . that there was such a charter-party, under which what was meant to be insured would accrue, it is not in any sense accurate to say that the policy is to be read as if the charter-party was set out in it so as to affect its construction. . . . But as soon as it is ascertained that the policy attached on the hire under a particular charter-party, the charter-party must be read in order to see how the subject-matter was affected by the misfortune which happened." And Lord Selborne, at p. 672, 31 W. R., at p. 142, thus expresses himself: "It appears to me that the question arising upon the policy ought to be determined in the same way as if the charter-party had been seen by the insurers and referred to in the policy, though not, of course, so as to extend the contract of the underwriters by any unnecessary implication to anything not properly covered by the express terms of the policy." Now, assuming that the underwriters had seen the charter-party in this case with its cesser clause and its corresponding lien, what would they have seen? They would have seen that the captain was to sign bills of lading at any rate of freight not under chartered rates, and that the vessel was to have a lien upon the cargo when shipped for the recovery *of all freight*, and it was in these circumstances that they undertook the risk of covering the lump chartered freight of £3,000 against perils of the sea. By whose act was it that the plaintiffs, the shipowners, had not a lien upon the cargo which arrived for all the lump chartered freight (the cargo which arrived being ample to secure this)? Surely that of the shipowners themselves by not taking bills of lading with either the words "freight and all other conditions as per charter-party" therein, or in some other form giving to themselves a lien over the whole cargo which arrived for the recovery of "all freight" as mentioned in the cesser clause. In my opinion there is nothing in the charter-party which would have prevented this being done, the clause as to signing bills of lading having reference only to the question at what rates of freight the bills of lading were to be given, and the clause has nothing to do with the form in which the bills of lading were to be taken. It may be that the shipowners desired to be able to have recourse to the bills of lading freights, if necessary, but this is

not what the underwriters have underwritten. Of the form in which the bills of lading were taken the underwriters knew nothing and were total strangers. Except as to rate of freight the form was in the power of the plaintiffs. If the plaintiffs had taken bills of lading giving a lien for the chartered freight over the whole cargo which arrived they would have lost nothing, for the cargo which arrived was, as before stated, of ample value to satisfy the lien for the lump freight. This, however, the plaintiffs did not do, and yet they now seek to recover from the underwriters the £645 bills of lading freights as being a loss by the perils of the sea, which was not covered by the policy. The proximate and real cause of the loss is by reason of the forms in which the plaintiffs took the bills of lading, and I agree with my brother Bruce that the plaintiffs have not established a loss of lump freight by perils of the sea, which is the only risk the defendants underwrote. For these reasons I think that this appeal must be dismissed with costs. Romer, L.J., concurs in this judgment.

VAUGHAN WILLIAMS, L.J., read the following judgment: The question in this case is whether there has been a loss of chartered freight covered by the policy of insurance entered into by the defendants. The defence as pleaded in effect is that on the arrival the cargo was worth the freight, dead freight, and demurrage; but the bill of lading freight was less than the charter-party freight, and that in that event upon the true construction of the charter-party the charterers remained liable to the shipowners for the charter-party freight, the subject-matter of the insurance, and the same was not lost, if at all, by the perils insured against.

This being an insurance of chartered freight, the shipowner must have an insurable interest in freight, and this he has if, having made a contract the execution of which will give him freight, his ship being in a condition to execute the contract breaks ground on the voyage described in the charter-party. It follows that in such case, if the ship is prevented from executing the contract contained in the charter-party by one of the perils insured against, the shipowner has lost his freight by that peril, and may recover for that loss.

There is no dispute but that the shipowners had an insurable interest in the chartered freight. The cargo contemplated by the charter-party was put on board and the ship duly proceeded on her voyage. The question raised is whether the ship was prevented by one of the perils insured against from executing the contract contained in the charter-party, and thus earning the chartered freight. It is said that the facts set out in the defence show that the shipowners were not prevented by one of the perils insured against from earning the freight because the ship arrived with a cargo worth the freight, dead freight, and demurrage, and that upon the true construction of the charter-party the charterer remains liable for the chartered freight.

I think that having regard to the terms of the policy the insurer must be taken to have had notice of the charter-party and its terms: see per Lord Selborne in *Inman Steamship Co.* v. *Bischoff*, 31 W. R., at p. 142, 7 App. Cas., at p. 672. This does not mean that the policy is to be construed as if the charter-party was set out in the policy so as to extend the contract of the underwriters to anything not covered by the express terms of the policy, but only that the charter-party must be read in order to see how the subject-matter of insurance has been affected, if at all, by the perils of the sea. If the insurance by the terms of the policy is of lump freight as per charter-party, nothing in the charter-party can convert the contract of the underwriters into an insurance of bill of lading freight, but if by the terms of the charty-party a lump freight is payable out of the bill of lading freight and *not otherwise*, a loss of cargo by the perils of the sea to such an extent that there is not sufficient bill of lading freight to pay the amount of the lump freight may be a loss of the lump freight by a peril of the sea. This is expressed in the passage in Lord Blackburn's judgment in *Inman Steamship Co.* v. *Bischoff*, cited by Barnes, J., in his judgment in *The Alps*, 41 W. R. 527, [1893] P. 109.

Now, having regard to the terms of the charter, party in the present case, the question is whether, according to those terms, the lump freight is payable out of the bill of lading freight and not otherwise, because if the chartered freight is by the terms of the charter payable out of the bill of lading freight and not otherwise, it would seem to follow that, if by the perils of the sea the goods are lost on the delivery of which only the bill of lading freight was payable, the chartered freight has been lost by the perils of the sea. Now, whether chartered freight was payable out of the bill of lading freight and not otherwise depends mainly on the terms of the cesser clause—*i.e.*, clause 18 of the charter-party. It runs thus: "Bills of lading.—The master to apply at the offices of the charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates or difference to be settled in cash or signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided said cargo is worth the said freight, dead freight, and demurrage on arrival at port of discharge), but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever."

Now, I have no doubt whatsoever but that the charterers' liability for freight has ceased, having regard to the fact of the shipment of cargo, and that the said cargo was worth the freight, dead freight, and demurrage on arrival at the port of discharge; nor do I think that it would have made any difference to the cesser of liability even it the shipowners had no lien or no effective lien for the recovery of freight; see *French* v. *Gerber*, 25 W. R. 113, 1 C. P. D. 737.

But it may still be that according to the true construction of clause 18 the lump freight was not lost by the perils of the sea, but lost because the shipowners having a lien on the cargo (which exceeded in value the amount of the lump freight) did not choose to exercise that lien, or voluntarily chose to sign or let the master sign bills of lading which precluded them from exercising the lien given to them by the charty-party on the cargo for the whole freight, because the bills of lading make the goods the subject thereof deliverable to each consignee on payment by him of the bill of lading freight due in respect of his parcel of goods.

Bruce, J., as I understand, was of opinion that under the charter-party the shipowners had a lien on the cargo which arrived (which cargo exceeded in value the amount of the lump freight) for the lump freight, and that the shipowners deprived themselves of their right to exercise their lien by reason of the master having signed bills of lading binding them to deliver the goods on payment of the bill of lading freight. If so, I agree that there has been no loss of lump freight by perils of the sea, and I have reluctantly come to the conclusion that this is the true construction. I tried hard to avoid coming to that conclusion, because it seems to me that the shipowners and the charterers as business men both intended that the master should have no option but to sign bills of lading making the goods, the subject

thereof, deliverable on payment of the bill of lading freight. The provision that the master shall sign bills of lading at any rate of freight the charterers may require, but not under chartered rates or difference to be settled in cash on signing bills of lading, is a strong indication that the shipowners were to look to the bill of lading freight only for the payment of the chartered freight. But the later words seem to give the shipowners a lien on the cargo for the chartered freight, and I do not see my way to construe those words in the way which is suggested by the earlier words in clause 18 without construing a lien on the cargo for the chartered freight as meaning a lien on the cargo for the bill of lading freight only, which is inconsistent with the words for "recovery of all freight, dead freight, and demurrage, and all other charges whatsoever." In other words, one cannot read the words as to the lien on the cargo as giving a lien subject to the signing by the master of bills of lading making the goods, the subject of each bill of lading, deliverable on payment of the bill of lading freight. I have come to this conclusion more reluctantly because the result seems to be that, having regard to the terms of the charter-party, the policy was mere waste paper; for if the ship arrived with goods of sufficient value to cover the freight, the lien would prevent any loss of freight; and if the goods were of insufficient value, the cesser clause would cease to operate, and the personal liability of the charterers would revive.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard, Englefield, & Co.*, for *Simpson, North, & Co.*, Liverpool.

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

Appeal.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 10.

APPLEBY v. HORSELEY CO. (LIMITED) AND LOVATT. (a.)

Master and servant—Employers' liability—Accident to workman—Amount of compensation—Average weekly earnings—Break in employment—Period of actual employment—Claim to indemnity—Notice—Indemnity as between respondents — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1), (a), (*i.*)—*Workmen's Compensation Rules,* 1898, *rr.* 19-23.

A workman who was killed by an accident on the 27th of September, 1898, *had been originally employed by his employers before the 27th of September,* 1895, *and from that date till March,* 1896, *he was earning wages of £2* 10*s. a week. There was then a break in his employment till February,* 1897, *when he commenced work again at wages of* 30*s. a week, and he continued to work at that rate of wages till his death.*

Held, that, in calculating the amount of compensation to which his widow was entitled under the Workmen's Compensation Act, 1897, *Schedule I.* (1), (a), (*i.*), *the period of work before the break ought not to be taken into account, and that the award ought to be for* 156 *times* 30*s.*

Where the respondents in an arbitration under the Workmen's Compensation Act are the undertakers and a person who has contracted with them, and the undertakers claim indemnity against the contractor, it is necessary, under rule 23 *of the Workmen's Compensation Rules,* 1898, *to give notice of such claim in the same way as is required by rule* 19 *in the case where a claim to indemnity is sought against a third party.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Two appeals by the Horseley Co. (Limited) from the decision of the judge of the Leicester County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who had been killed by an accident in the course of his employment. The proceedings were taken against the Horseley Co. (Limited) and Henry Lovatt. Lovatt had undertaken the work of carrying out certain alterations at Leicester railway station, and the Horseley Co. had entered into a sub-contract with him for executing a portion of the work—viz., the bridge work and iron work. The workman was in the employment of the Horseley Co. and was at the time of his death engaged on the work for which they had so contracted.

The county court judge, by his award, ordered the Horseley Co. and Henry Lovatt to pay £269 15s. to the applicant as compensation and also to pay the applicant's cost of the arbitration, and further ordered the Horseley Co. to indemnify Henry Lovatt against liability to pay the compensation and costs directed to be paid by the award.

The question in the first appeal, to which the applicant was respondent, was whether the county court judge had assessed the compensation on the right principle.

The second appeal, to which Lovatt was respondent, was against that part of the award which ordered the Horseley Co. to indemnify Lovatt.

The facts with regard to the first appeal were as follows: The workman was originally employed by the Horseley Co. before the 27th of September, 1895, as a riveter, in which capacity he earned wages at the rate of £2 10s. a week, and he continued so to work until March, 1896. In that month he met with an accident, and was in consequence thereof unable to do any work for eleven months. He was not, however, actually dismissed from the employment of the company, and in February, 1897, he commenced work again, being employed as a timekeeper and storekeeper, and earning wages at the rate of 30s. a week. He continued to work in this sort of employment until the fatal accident, which happened on the 27th of September, 1898. The applicant was wholly dependent on the earnings of the deceased at the time of his death.

The facts with regard to the second appeal were that no notice of a claim for indemnity was given by Lovatt to the Horseley Co. before the hearing of the arbitration, and the question of indemnity was first raised at the conclusion of the evidence, when Lovatt's solicitor asked the county court judge to make an order for indemnity under section 4 of the Workmen's Compensation Act.

McCardie, for the Horseley Co., in the first appeal.—The amount of compensation to which the applicant is entitled in this case is determined by section 1 (a), (i.), of the first schedule to the Act, which is as follows: "The amount of compensation under this Act shall be, where death results from the injury, if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury . . . And if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer." If the employment of the workman in this case is to be

treated as having been continuous, without any break, then the proper amount of compensation is the amount of actual earnings received by him during the three years from the 27th of September, 1895, to the 27th of September, 1898, which was £177. If, on the other hand, there was a break in the employment during the eleven months from March, 1896, to February, 1897, then the proper amount of compensation is 156 times his average weekly earnings during the period from February, 1897, to the 27th of September, 1898, which is £234. The county court judge found that there was a break of eleven months, and that the workman entered upon a new employment in February, 1897. But having found this, he treated the words "the period of his actual employment" at the end of the section as though they were "the periods of his actual employment," and he took the period before the break, when the workman was earning £2 10s. a week, and the period after the break, when he was earning 30s. a week, and calculated the average weekly earnings of those two periods added together, and multiplied that average by 156, which gave £269.

C. A. McCurdy, for the applicant.—The period of continuous actual employment in this case was less than three years; but the relationship of master and servant continued throughout the whole of the three years. The county court judge was justified in taking into account the earlier period of work before the break: *Keast* v. *Barrow Hematite Steel Co*, 15 Times L. R. 141. The object of the section is to give the applicant 156 times the average weekly earnings during the period of three years.

A. L. SMITH, L.J.—The question is, By what rule ought compensation to be assessed in this case? If the deceased was in continuous employment from September, 1895, to September, 1898, the compensation would work out at £177. The employer, however, does not contend for that; he says that there was a break of eleven months in the course of the three years, and that the only continuous employment was from February, 1897, to September, 1898. If that is right, as I think it is, the compensation works out at £234. On the other hand, the applicant says that the proper method is this—to take the period during which the deceased was earning 30s. a week, then to skip over the period of eleven months, and take the anterior period during which he was earning £2 10s. a week, then to calculate the average weekly earnings during those two periods, and multiply that average by 156, which works out at £269. I think that throughout section 1 (*a*)(i.), of the first schedule to the Workmen's Compensation Act, the word "employment" ought to be read as meaning continuous employment. Where the employment has been continuous for more than three years before the injury, the compensation is to be the amount of the man's earnings during those three years. But where the period of continuous employment has been less than three years, the compensation is to be 156 times his average weekly earnings during the time that he has in fact been continuously employed. Here the time of continuous employment before the injury was from February, 1897, to September, 1898. In my opinion, therefore, the amount of the award ought to be £234, not £269. I think the county court judge was wrong in reading the word "period" as including "periods." The appeal must be allowed.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal allowed.

McCardie, for the Horseley Co., in the second appeal.—The county court judge had no jurisdiction to make an order for indemnity, as no notice of a claim for indemnity had been given as prescribed by the Workmen's Compensation Rules, 1898. Rules 19-23 provide a code as to claims for indemnity. By rule 19, "Where a respondent claims to be entitled under section 4 or section 6 of the Act or otherwise to indemnity over against any person not a party to the arbitration, he shall, five clear days before the day fixed for proceeding with the arbitration, file a notice of his claim . . . ; and the registrar shall seal such notice and deliver it to the respondent, who shall serve the same . . . upon the person against whom such claim is made." Rule 22 (2) (*a*) empowers the county court judge, if the respondent and the third party consent, and if the third party admits his liability to indemnify the respondent, to make such award as the nature of the case may require in favour of the respondent against the third party. Then rule 23 says as follows: "(1) Where a respondent claims to be entitled to indemnity against any other respondent, a like notice may be issued and the like procedure may be adopted for the determination of questions between the respondents as might be issued and adopted if such last-mentioned respondent were a third party. (2) Provided that where both the undertakers as defined by the Act and a contractor with them are made respondents to an arbitration, and it is decided in such arbitration that the contractor is liable to pay compensation under the Act, the judge may, without any consent or admission of liability on the part of such contractor, make an award in accordance with paragraph (2) (*a*) of the last preceding rule in favour of the undertakers against the contractor." The result is that rule 19 requires notice to be given where indemnity is sought against a third party, and rule 23 says the same procedure is to be adopted where indemnity is sought against a person who is already a party to the proceedings as a respondent.

T. W. Chitty, for Lovatt.—The rules ought not to be construed as requiring notice, where the person seeking indemnity and the person against whom indemnity is sought are the undertaker and a contractor who are already parties to the arbitration as respondents. The county court judge acted in accordance with the proviso to rule 23.

A. L. SMITH, L.J.—The question is, Can an order for indemnity be made without notice in a case where indemnity is sought by the undertaker against a subcontractor, both of whom are respondents in the arbitration? The case is governed by rule 23, which refers back to rule 19, which requires notice in cases of indemnity against a third party. It is said, however, that the proviso to rule 23 dispenses with the necessity of notice in cases coming within that rule. I do not agree with that contention. In my opinion notice must be given. The appeal must, therefore, be allowed.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal allowed.

Solicitor for the applicant, *B. Wilkinson*, for *S. R. Wykes*, Leicester.

Solicitors for the Horseley Co., *Morgan, Price, & Mewburn*, for *Hargreave & Heaton*, Birmingham.

Solicitors for Lovatt, *Pritchard, Englefield, & Co.*

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) May 13.

Irons v. Davis & Timmins (Limited). (a.)

Master and servant—Employers' liability—Accident to workman—Compensation—Weekly payment—Wages the same after as before the accident—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched I., cl.* 2.

A workman, who lost his thumb in consequence of an accident arising out of and in the course of his employment, was received back after the accident into the employment of the same employer at the same rate of wages as before the accident, though he was not put at the same kind of work. The county court judge awarded him 2s. 6d. a week from the time when he resumed work after the accident.

Held, that, as the wages after the accident were the same as those before, there was no power at that time to award any weekly payment in respect of the period after the workman resumed work.

Appeal from an award of the judge of the Clerkenwell County Court under the Workmen's Compensation Act, 1897.

The respondent Irons, who was seventeen years of age, was in the employment of the appellants, Davis & Timmins (Limited), and he was injured by an accident arising out of and in the course of his employment within the Act, one of his thumbs being so injured that it had to be amputated. The respondent was absent from work on account of the accident for eight weeks. His wages before the accident were 9s. a week, and at the end of the eight weeks he came back to work with the appellants and received 9s. a week as wages, but he was not employed at the same work as before, it being stated that he was employed at odd jobs.

The county court judge awarded the respondent 27s. for the period during which he was absent from work, excluding the first two weeks, and 2s. 6d. a week for life. At the time of the award the respondent had gone back to his employment.

By clause 2 of Schedule I. of the Workmen's Compensation Act, 1897, "In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident. . . ."

A. T. Lawrence, Q.C., and *Rewlatt*, for the appellants.—There was no evidence upon which the judge could award any weekly payment. No question is raised as to the 27s. for the period during which the respondent was absent from work on account of the injury. The respondent's wages were the same after the accident as before. By clause 2 of Schedule I. the weekly payment is to be based upon the difference in wages before the accident, and those which the workman "is able to earn" after the accident. The respondent here was able to earn the same wages after the accident as before.

Ruegg, Q.C., and *E. Browne*, for the respondent.—The weekly payment is given for "total or partial incapacity for work": Schedule I., clause 1 (*b*). This means incapacity for the class of work at which the workman was employed before the accident; and the words "able to earn" in clause 2 refers to the same class of work. Though the respondent was earning the same wages after the accident as before, it was not at the same class of work, and he was not such a good wage-earning machine as he was before. He was put to do odd jobs. He was only receiving boy's wages before the accident, and it will be a great hardship on him if he cannot get any compensation because he was able to earn the same amount of wages after the accident. He will never be able to earn as high wages as a workman as he could do if the accident had not happened, and by clause 12 of the schedule, unless a weekly payment is awarded, the order can never be reviewed, as by that clause the weekly payment can only be "ended, diminished, or increased," and so the respondent will never get any compensation at all.

A. L. Smith, L.J.—There is no question as to the award of 27s., but the question is whether there was any evidence before the judge upon which he could award the 2s. 6d. a week. In my opinion there was no evidence before him to justify his awarding that or any other sum. The evidence shows that the respondent was earning the same wages after the accident as before. Clause 2 of Schedule I. says that "regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." Here those amounts are the same. The county court judge was therefore wrong. It has, however, been pointed out that clause 12 of the schedule can only be invoked when some weekly payment is awarded, and the appellants' counsel have consented, in order to get rid of any supposed hardship upon the respondent, to our awarding something so as to enable the respondent, if so advised, to apply at some future date under clause 12 to have the payment increased, and therefore by consent we order a weekly payment of one penny.

Vaughan Williams and Romer, L.JJ., concurred.

*Appeal allowed.**

Solicitors for the appellants, *Trower, Freeling, & Parkin.*

Solicitors for the respondent, *Pattinson & Brewer.*

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

From Q. B. Div.
(Lindley, M.R., and Rigby and Collins, L.JJ.) [and Q. B. Div. (Wright, J.)] March 21, 23, 29; May 12.

In re Gieve (Trading as Shaw).
Ex parte Mrs. L. E. A. Shaw v. Mason. (a.)

Bankruptcy—Proof—Postponement—Sale of goodwill in consideration of an annuity—Partnership Act, 1890, *ss.* 2 (3) (e), 3.

Where a business had been sold in consideration of the payment of an annuity to the vendor, not expressed to be payable out of the profits of the business,

Held, by the Court of Appeal (*reversing* Wright, J.), *that, upon the bankruptcy of the purchaser, the vendor was entitled to prove in respect of such annuity, and was not, under section* 3 *of the Partnership Act,* 1890, *postponed to other creditors.*

Appeal by a creditor from the rejection of her proof by the trustee in bankruptcy.

Mrs. Shaw, the appellant, in 1892 sold her deceased husband's business to the bankrupt Gieve and a Mr.

* See *Chandler* v. *Smith & Son*, 15 Times L. R. 480.

(a.) Reported by R. C. Mackenzie and P. M. Francke, Esqrs., Barristers-at-Law.

Willis (since deceased) upon terms which are fully set ut in the judgment of Wright, J., the most important eing that in consideration for the sale of the business he purchasers were to pay Mrs. Shaw an annuity of 2,650.

Upon the bankruptcy of Gieve, Mrs. Shaw sent a proof in which she valued her annuity at 29,000.

The trustee rejected her proof upon the ground that e annuity was payable out of the profits of the usiness, and any proof therefore must be postponed ll all other creditors should have been paid in full, rther that it had been valued at an excessive nount considering the speculative nature of the usiness upon which it was a charge.

Mrs. Shaw appealed.

Muir Mackenzie and *G. Cave*, for the appellant.

Reed, Q.C., and *Carrington*, for the trustee.

Cur. adv. vult.

March 29.—WRIGHT, J.—The deceased, John Shaw, rried on a very profitable speculative business as a ock and share dealer, and died leaving his widow s sole executrix and legatee. By an agreement ted the 25th of March, 1892, she assigned the busiss to Gieve and Willis. The agreement provided o far as material) as follows:

1. The business, goodwill, and trade-name, and the rniture and effects used in the business, and the ses of trade premises are sold to Gieve and Willis.

2. The vendor agreed to advance £8,000 for use in s business.

3 and 4. As the consideration for the sale of the siness the purchasers were to pay the vendor an nuity of £2,650, together with interest on £15,000, such part of £15,000 as she should have received payments of the annuity. The annuity was to be leemable after the payments on account of it should ve reached £15,000, by payment of a further 5,000. It is not expressly stated that the annuity tb be paid out of the profits of the business.

5. The capital advance of £8,000, with a further ,200 for the furniture, &c., were to be paid off by talments of £1,000 a year as a minimum, to be creased by the amount of any excess of profits over ,000 a year (inclusive of the amount of the annuity d interest) until the whole should be paid off.

9. The vendor's lien on the business is preserved.

10. The purchasers covenant to carry on the busis until the vendor's claims are discharged, and to est in it the £8,000 and also £2,000 of their own.

14. The vendor is to have access to books and ounts.

15. Upon any default by the purchasers the vendor y rescind the agreement, and in that case she is to paid any arrears then due, and an annuity of ,000 a year and a further amount (to be calculated a manner which is not intelligible).

In my opinion section 3 of the Partnership Act, 0, applies to this agreement. The payments to be de were all to be made out of profits, for dently no other fund was in fact contemplated out which they could be made; and where this is the e the reason for the enactment seems applicable. e creditors have been invited to give credit to the iness of the firm, and the assets of that business e been reduced by the annuity to the vendor, and y be to a great extent absorbed if the vendor is to k for the calculated value of the annuity. I see hing in the language of the enactment which its it to a contract by which the annuity is ressed to be payable only out of profits.

he same principle seems to me to be applicable to the £8,000 and the £2,200. The latter sum seems to be in substance an agreed price for the furniture, &c., which price is treated as lent to the firm. The language of clause 5 seems to express an intention that the repayment of these sums is to be made out of profits.

In this view the question does not at present arise whether the claim has been properly framed. Should it become necessary to determine this, I think that it ought to be held that the claim is wrong in so far as it is based on a merely arithmetical calculation of the value of the annuity. It must be valued by the trustee, and he would, in my opinion, be entitled to take into consideration the precarious nature of the business out of the proceeds of which the payments were to be made, and also the provisions for redemption and rescission.

Against this decision Mrs. Shaw appealed to the Court of Appeal. The appeal was heard on the 12th of May, 1899.

Muir Mackenzie and *George Cave*, for the appellant, referred to the Partnership Act, 1890, s. 2, subsection 3 (*c*) and (*e*), s. 3; and *In re Allen & Co., Ex parte Strong & Hanbury*, 10 Morrell 84.

Herbert Reed, Q.C., and *A. H. Carrington*, for the respondent, cited *Badeley* v. *Consolidated Bank*, 36 W. R. 745, 38 Ch. D. 238; and *In re Gieve, ante*, p. 441.

No reply was called for.

LINDLEY, M.R.—The rights of the parties in this case must be gathered from the written instrument into which they have entered; unless, of course, that instrument can be impeached as being a fraud against creditors, which is not suggested here at all. It appears to me that you cannot possibly bring this agreement within the sections which are relied upon by the learned judge—sections 2 and 3 of the Partnership Act, 1890.

This agreement obviously does not create a partnership, and there is in fact no partnership, between Mrs. Shaw and Mr. Gieve, who bought her husband's business. Such an arrangement was never contemplated by them. On the face of the agreement itself, or appearing from other circumstances if you go behind it, there is nothing of that sort. There is nothing, I think, at which we can legitimately look, to lead us to a different conclusion. Fraud is not alleged, except so far as the agreement itself may be a fraud. Now, in the absence of fraud, it is clear that, as I have said, the agreement must regulate the rights of the parties. We have, therefore, to examine what the rights of the parties under this agreement are. It is quite obvious, to my mind, that Mrs. Shaw was simply stipulating that a certain annuity should be paid to her, and that she is not a person receiving, as the consideration for the sale, a portion of the profits of the business, within the meaning of the provision in section 3 of the Partnership Act, 1890. I think it is a fallacy to argue that the person who has to pay her the annuity is a gentleman engaged in the business, and that, therefore, she is to receive from him a share of the profits. I do not doubt that it is quite true that, unless he carried on that business or a similar one, he would be unable to pay Mrs. Shaw her annuity; but it does not follow from that that she is to be treated as bargaining to receive a share of the profits of the business, any more than any of his other creditors, none of whom, presumably, would be paid unless he carried on some business and earned some income. You cannot bring this agreement within the terms of section 3 fairly construed. You cannot possibly say, having regard

to the terms of this agreement for the payment of an annuity, that this lady is going to receive by way of annuity or otherwise a portion of the profits of this business. With respect to section 3 of the Act of 1890, it must be borne in mind that she is not to be postponed unless she comes within the language of its provisions, which I will read: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied." I think you cannot, on the true construction of that section, treat the bankrupt as buying a business on the consideration of an agreement to pay to Mrs. Shaw by way of annuity a part of the profits. That appears to me to be so plain that if it were not for those clauses of the agreement which give the creditor a security on the business, I should think the case an absolutely unarguable one. Mrs. Shaw has, by the terms of the agreement, a right to rescind it, which right she has not exercised. That does not bring the transaction within this section. It appears to me that the learned judge took an erroneous view of the true construction of the section, and erroneously treated this bargain as coming within the Act. I think it is certainly not within the Act simply because the bankrupt was a person engaged in business, and will probably pay the annuity out of the profits. If it is not within the Act for that reason, it is not within it at all. As regards the value to be put on the annuity for the purpose of proof, if the parties had not asked us to refer that to the registrar to assess I should have felt some difficulty in doing so, because this is not a case where the trustee has attempted to assess the value, and there has been an appeal from him. But as both the parties request us to deal with the matter in that way, I see no difficulty at all, especially after what Mr. Reed has suggested, that he is prepared, on the trustee's behalf, to say that the trustee does not see his way in regard to assessing the value. The proper course will be to discharge the order of the learned judge, and by consent or at the request of the parties to refer it to the registrar to estimate the proper value to be put upon this annuity.

RIGBY, L.J.—I am of the same opinion, both as to the construction of the deed itself, as to the construction of the Act of 1890, and as to referring the valuation of the claim, in the circumstances of this case, to the registrar. I think there is no ground for supposing that there was any real bargain between the parties outside of this agreement.

COLLINS, L.J.—I am of the same opinion, on the same grounds.

Appeal allowed.

Solicitors, *Slark, Edwards, & Co.*; *Ingle, Holmes, & Co.*

High Court of Justice.

Chan. Div. North, J. — May 12.

LORD GIFFORD v. LORD FITZHARDINGE. (a.)

Settlement—Tenant for life—Payment off of mortgage—Presumption.

Where a tenant for life of a settlement pays off out of his own moneys a mortgage on a reversionary interest, assigned to the trustees of the settlement subject to the mortgage, and takes a reconveyance which in effect makes the payment off of the mortgage enure for the benefit of the settlement, the court will make a declaration that, notwithstanding the form of reconveyance, the tenant for life is entitled to have the charge kept alive for his own benefit, and that the sum so paid off has priority over the settlement.

Action.

In April, 1879, the plaintiff had executed to the defendant a mortgage of his reversionary interest in certain trust funds. In April, 1880, the plaintiff executed a marriage settlement which included the reversionary interest above mentioned. The trusts of the settlement were to pay the income of the trust funds to the wife for her life for her separate use, then to the plaintiff if he survived her for his life, with remainders to the children of the marriage as the plaintiff should appoint, with the ultimate remainder to the plaintiff.

The plaintiff's reversionary interest included in the settlement was made subject to the mortgage to the defendant.

There were no children of the marriage.

In October, 1896, the plaintiff, without taking legal advice, paid off the mortgage debt, and took a reconveyance.

No mention was made of the marriage settlement, as the mortgagee's solicitors who prepared the reconveyance were ignorant of its existence.

The plaintiff brought this action to have the reconveyance set aside, and to have a proper transfer of the mortgage made to him by the defendant.

The plaintiff, in his evidence, said that he had paid off the mortgage out of his own moneys, and that he had not intended to pay off the mortgage for the benefit of the settlement, and that he had not appreciated the legal effect of the reconveyance until he had recently consulted his solicitors.

E. C. Macnaghten, Q.C., and *Beddall*, cited *Burrell* v. *Lord Egremont*, 7 Beav. 205; *In re Harvey*, 44 W. R. 242; *Morley* v. *Morley*, 4 W. R. 75, 5 De G. M. & G. 610, and argued that in such a case the presumption always was that a tenant for life paying off a charge did so for his own benefit.

Beaumont, for the defendant, and

S. R. Earle, for the trustees of the marriage settlement and the wife, offered no opposition.

NORTH, J., accepted the plaintiff's statement of his intention in paying off the mortgage, and as the effect of the reconveyance was to benefit the settlement, the best course was to follow *Burrell* v. *Lord Egremont* and to make a declaration that notwithstanding the form of the reconveyance, the plaintiff, as tenant for life, having paid off the mortgage debt out of his own moneys, was entitled to have the charge kept alive for his own benefit, and that the £1,000 secured by the mortgage had priority over the settlement. The plaintiff was ordered to pay the costs of the action.

Solicitors, *Stevens, Bawtree, & Stevens*; *Jennings & Finch.*

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

Chan. Div.
Byrne, J. } June 1.

In re THE PRINTERS AND TRANSFERERS' AMALGAMATED TRADES PROTECTION SOCIETY. (*a.*)

Trades union—Dissolution of union—Unexpended funds—Resulting trust—Principle of division of funds.

A trades union society registered under the Trade Union Acts passed a resolution to dissolve itself. The rules contained no provision for the application of the funds in the event of a dissolution. The Crown laid no claim to the funds as bonâ vacantia.

Held, that there was a resulting trust in favour of the existing members at the time of the dissolution in proportion to the amount contributed by each member to the funds of the society, and that, in taking the account, it was not necessary to pay any regard to payments for fines and forfeitures or for benefits received under the rules.

Summons.

This was an application to the court to determine in what mode the funds of a dissolved trades union should be divided.

The facts of the case were as follows: The Printers and Transferers' Amalgamated Union was registered in 1872 under the Trade Union Act, 1871. The object of the union was by means of weekly contributions to enable its members to secure reasonable remuneration for their labour. The society was divided into two classes—printers and transferers, the printers being men and the transferers women, and under the rules the printers contributed to the funds of the union twice as much as the transferers, and were entitled to receive twice as much on the scale of payments made to members for their support during strikes or lock-outs. There were also in the rules provisions for fines and forfeitures for breaches of the rules, and for regulating the amount of payments in proportion to the time that a person had been a member of the society, and for a dissolution of the society by a vote of four-fifths of the members; but there was no provision made for the distribution of the funds in the event of such a dissolution.

In November, 1898, the union was duly dissolved by a vote of its members. At this time the society numbered 201 members, and its funds amounted to about £1,000. The application stood over for a communication to be made to the Attorney-General, but he did not appear, and it was understood that the Crown laid no claim to the funds as *bonâ vacantia.*

Buckmaster, for the trustees and liquidator of the society.

Farwell, Q.C., and *Kirby*, for certain members of the union.—There is here a resulting trust in favour of existing members at the date of the dissolution. Deceased members have no interest whatever, and the proper course is to divide the fund among the members in proportion to the amounts contributed by each member. The decision of Chitty, J., in *Cunnack* v. *Edwards*, 43 W. R. 325, [1895] 1 Ch. 489; reported on appeal 45 W. R. 99, [1896] 2 Ch. 679, applies here. There Chitty, J., held that there was a resulting trust for the representatives of deceased members, there being no surviving members left. The Court of Appeal reversed that decision and held that the funds were *bonâ vacantia*; but the grounds on which it reversed it do not here apply. The Lord Chancellor there remarks—[1896] 2 Ch. 681—that the entire interest had been exhausted in respect of each contributor. That is not so here, as there are members who can claim, and therefore there must be a resulting trust. Further, the Crown makes no claim to the fund here as *bonâ vacantia.* [BYRNE, J., referred to *Smith* v. *Cooke*, 40 W. R. 67, [1891] A. C. 297.]

Waggett, for the printers.—The fund should be divided among the existing members, according to the amounts which they have contributed; but the printers should receive twice as much as the transferers.

Dunham, for the transferers.—There ought to be an equal division among all members. It is not here strictly a case of a resulting trust. There is here a fund in the hands of trustees, and which belongs to the persons who are the *cestui que trust* of those trustees in equal shares.

Farwell, Q.C., replied.

Brown v. *Dale*, 27 W. R. 149, 9 Ch. D. 78, was also referred to.

BYRNE, J.—This is a trades union which has passed a resolution to dissolve itself, and the question as to which this application is made is as to the distribution of its funds. [After stating the constitution and referring to the rules of the society, his lordship continued:] The only persons interested in these funds are the persons who were existing members of the society immediately prior to its dissolution; the interest of such persons being of the nature of a contingent benefit to such of them as were entitled to payment under the rules of the union. In *Cunnack* v. *Edwards* a very similar question came before Lord Justice (then Mr. Justice) Chitty, and he held that the representatives of surviving members were not entitled to the funds, but that there was a resulting trust in favour of the members of the society from time to time or of their legal personal representatives in shares in proportion to the amounts contributed by each member to the funds of the society. With regard to the decision in *Cunnack* v. *Edwards* it should be observed that there was there no existing member of the association and the question there was, whether the funds had passed to the Crown as *bona vacantia* or were distributable among the persons who had contributed to the funds. The Court of Appeal decided that the funds were *bonâ vacantia*, and the leading ground of that decision was that on the true construction of the rules of that society each member on making a payment had parted with his money in favour of third persons. That circumstance does not exist in the present case. Here all are equally entitled to benefits on the happening of certain contingent events, and moreover in this case although a communication has been made to it, the Crown puts forward no claim to the funds as *bonâ vacantia.* To whom then do these funds belong and in what manner ought they to be distributed. I think that the members of the society existing at the date of the dissolution are the only persons who can establish any claim to the funds. The next question is, Ought these funds to be distributed among all the members of the society equally, or in proportion to the contingent benefits to which the two classes are entitled—that it is to say, in the proportion of one to two? Practically it comes to this, that I must decide that the funds are divisible here among the members equally or in proportion to their contributions to the funds. Here I think that the true ground to take is to hold that there is a resulting trust in favour of those who have contributed to the funds, and therefore I think that the proper and legitimate way here will be to divide them in accordance with the amounts contributed by the members at the date of

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

the passing of the resolution for dissolution. To carry out these rights to the fullest extent it might be necessary for me to direct an account, which would involve such matters as payments for fines and forfeitures and benefits received under the rules. I feel, however, as Chitty, J., felt in *Cunnack* v. *Edwards*, that the taking of such an account would cause delay and expense, and would very considerably eat into the funds. Following Chitty, J., I therefore think that I am justified in saying that such matters need not be considered. I therefore make the following declaration: It appearing that the Attorney-General makes no claim, there is a resulting trust in favour of the members of the society who existed at the date of the resolution for dissolution, and that the funds are divisible in accordance with the amounts subscribed irrespective of fines and forfeitures and without regard to any amount received under the rules by such members. The costs of all parties as between solicitor and client will be payable out of the funds.

Solicitors, *Carthew & Williams*, for *A. Ellis*, Burslem.

Chan. Div.
Cozens-Hardy, J. } June 6, 19.

DIXON v. WINCH. (a.)

Mortgage—Transfer—Notice to mortgagor—Omission to give—Negligence—Collusive sale by mortgagor and mortgagee—Satisfaction of mortgage.

The doctrine of Williams *v.* Sorrell, 4 *Ves.* 389, *and* Norrish *v.* Marshall, 5 *Mad.* 475, *is not applicable as against a transferee of a mortgage where there has been collusion between mortgagor and mortgagee to pay the debt to the mortgagee.*

W. having purchased and mortgaged to D., his vendor, certain land, built houses thereon and sold the houses to the plaintiff. Prior to the sale D. transferred the mortgage to the defendant. The conveyance to the plaintiff, to which both W. and D. were parties, recited (inter alia) *that D., being seised for an unincumbered estate in fee simple in possession, agreed to sell to W. for* £100, *but that no conveyance had been executed, which recital was false to the knowledge of W. The purchase-money was paid to D., who retained a sum for principal, interest, and costs, but it was not shown to the satisfaction of the court how the sum was arrived at. The plaintiff had not actual notice of the defendant's security, and W. had not had notice of the transfer of the mortgage given him by the defendant, and denied knowledge of the transfer. D., who had been employed by the defendant to collect the interest on the defendant's mortgage, after paying interest on the mortgage for some years to the defendaht, absconded, and nothing could be recovered from him.*

Held, that, although payment-off of the mortgage debt to the mortgagee by a mortgagor after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee, as settled by the above-named cases, this doctrine ought not to be extended to a case where the money which was said to have been paid in satisfaction of the mortgage was part of the purchase-money procured by a false recital in the conveyance to the purchaser to the effect that there was not and never had been any mortgage; that the case must be treated as one of collusion between W. and D. to obtain the purchase-money by means of false recitals; and therefore that the retention of part of the purchase-money by D. was not equivalent to payment-off of any part of the mortgage.

Action.

By a deed dated the 14th of July, 1886, some land at Harlow was conveyed to Dent in fee.

By a deed dated the 24th of March, 1892, Dent conveyed to the defendant Winch, a builder, a portion of this land, subject to certain building restrictions, and Dent acknowledged Winch's right to the production of the conveyance of 1886 in the usual way.

Winch, who was financed by Dent, built some houses on part of the land; and by a deed dated the 11th of January, 1893, Winch mortgaged this part of the land and the houses to Dent to secure £350 with interest at £5 per cent.

On the 16th of January, 1893, Dent transferred to the defendant Miss Ellman the mortgage debt of £350 and the mortgaged property subject to redemption. Miss Ellman received, and had since retained in her own possession, the conveyance to Winch and the mortgage from Winch to Dent with the transfer from Dent to herself indorsed thereon. Notice of the transfer was not given by Miss Ellman to Winch.

Dent paid Miss Ellman interest on the mortgage debt until 1898, when he absconded. He paid it together with interest on other mortgages collected by him for her, the letters inclosing his cheques expressly referring to Winch's mortgage.

On Dent's disappearance the following facts were discovered. By a deed dated the 15th of September, 1893, and made between Dent of the first part, Winch of the second part, and the plaintiff Mrs. Dixon of the third part, after reciting that Dent being seised of the lands thereinafter described for an unincumbered estate of inheritance in fee simple in possession, some time since agreed to sell the same to Winch at the price of £100, but that no conveyance thereof had been executed, and reciting that Winch had erected three houses and had agreed to sell the same to the plaintiff at the price of £685, it was witnessed that in consideration of £100 paid by the plaintiff to Dent and of £585 paid by the plaintiff to Winch, Dent and Winch conveyed to the plaintiff a portion of the land comprised in Miss Ellman's mortgage. The deed contained no reference to Ellman's mortgage, and there was no covenant for production of deeds.

By a deed dated the 25th of April, 1894, and made between the same parties and containing similar recitals, the rest of the land was, in consideration of £375 paid to Winch, conveyed by Dent and Winch to the plaintiff.

It appeared that on the 13th of September, 1893, Winch signed and gave to the plaintiff Mrs. Dixon a receipt in the following terms: "Received this 13th of September, 1893, of Mrs. Dixon the sum of £1 as deposit in purchase of my three cottages in Bury-road, Harlow, for the sum of £685, she to have a free conveyance prepared by Mr. Dent, and to accept my title from him. The purchase to be completed on the 16th of September, 1893.—(Signed) WALTER WINCH, MARY DIXON."

No abstract of title was furnished to the plaintiff, and no investigation of any sort made on her behalf. The first purchase by the plaintiff was completed at the plaintiff's house, Winch and Dent being present. The plaintiff gave to Dent a bearer cheque from her brokers for the amount of £685 1s. 6d., and received back £1 1s. 6d. from Winch. Dent retained £451 10s. for principal, interest, and costs, said to be due to him from Winch, and paid the balance to Winch by his own cheque. A document in Dent's handwriting was produced by

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Winch, which to a certain extent explained the transaction. It was as follows:

	£	s.	d.
Principal	425	0	0
Interest from the 11th of January, 1893, to the 15th of September, 1893 ...	12	10	0
Costs	14	0	0
	451	10	0
Cheque of Mrs. Dixon	685	1	6
	451	10	0
	£233	11	6

No account of the pecuniary dealings between Dent and Winch was ever furnished by Dent to Winch, and there was nothing to show how the £425 or the interest was made up. The interest was more nearly 4 per cent. on £450 than 5 per cent. on £350.

The circumstances attending the second sale were assumed by the court to be substantially the same.

It was not alleged that the plaintiff Mrs. Dixon in fact had any notice of the defendant Ellman's security, and Winch swore that he did not know of the transfer to Ellman.

The plaintiff claimed a declaration whether the defendant Miss Ellman's mortgage was a valid and subsisting security or not, and if it was, to be entitled to redeem and to be indemnified by Winch. The defendant Miss Ellman counterclaimed foreclosure or sale in default of payment.

H. T. Eve, Q.C., and *Christopher James*, for the plaintiff.

T. R. Hughes, Q.C., and *W. G. Hayter*, for the defendant Winch, contended that Miss Ellman must be treated as having been paid off, and in addition to the cases noticed in the judgment cited *Jones* v. *Gibbons*, 9 Ves. 407, footnote; *Withington* v. *Tate*, 17 W. R. 559, L. R. 4 Ch. App. 288; and *Bickerton* v. *Walker*, 34 W. R. 141, 31 Ch. D. 151.

N. Micklem and *J. E. Harman*, for the defendant Miss Ellman.—Both the plaintiff and Winch were affected with notice of the transfer. Moreover, Winch ought to have required the mortgage deed to be handed back. By not doing so he enabled the fraud. Under the circumstances neither the plaintiff nor Winch can make any case of payment off.

Eve, in reply, referred to *Kettlewell* v. *Watson*, 30 W. R. 402, 21 Ch. D. 685, and *Cave* v. *Cave*, 28 W. R. 793, 15 Ch. D. 639.

Other authorities were cited as to the application of the doctrine of constructive notice to a party through his solicitor, which was much argued, but was not material to the following decision.

COZENS-HARDY, J.—This action involves a difficult question as to who is to suffer by reason of the fraud of a solicitor named Dent, who has absconded, and from whom nothing can be recovered. The facts, so far as material, may be shortly stated. [His lordship stated the facts set out above, and continued:] In these circumstances it is necessary to consider upon whom the loss due to the fraud of Dent ought to fall.

Now, as to Winch it is clear that Dent was his solicitor throughout. It is also clear that by executing the two conveyances to the plaintiff containing recitals which were false to his knowledge—for he cannot be heard to say that he was not aware of the conveyance by Dent to him and the subsequent mortgage by him to Dent—he has been the real occasion of the fraud.

With reference to the defendant Miss Ellman, Dent was undoubtedly her solicitor in the matter of the transfer. She, however, got from Dent all that she was entitled to have, and the only negligence that can be attributed to her is the omission to give Winch notice of her transfer.

With respect to the plaintiff Mrs. Dixon there is more difficulty. I think, however, that I must hold that Dent was her solicitor in the matter of the two conveyances, although by the terms of her contract he was to be paid by Winch. The reasoning of Turner, V.C., in *Hewitt* v. *Loosemore*, 9 Hare 449, seems to me to apply to the present case.

Now, at the moment when the plaintiff's purchase was completed in September, 1893, the position of the parties was as follows: Miss Ellman was legal mortgagee of the entire property for £350 and interest. Mrs. Dixon acquired by her conveyance only the equity of redemption in part of the property subject to this mortgage, whether she had or had not notice of the legal mortgage. Winch remained owner of the equity of redemption of the remaining part of the property comprised in Miss Ellman's mortgage. Miss Ellman contends that nothing has happened to deprive her of the position which she admittedly held at the moment when Mrs. Dixon paid her purchase-money to Winch. On the other hand Mrs. Dixon contends, and in this contention she is supported by the defendant Winch, that nothing is due to the defendant Ellman on her mortgage, because Winch, in September, 1893, paid off Dent, the mortgagee, without having notice or knowledge of Dent's transfer to Ellman. It is well settled that where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer (*Matthews* v. *Wallwyn*, 4 Ves. 118); and it is also settled that payments of interest or payments on account of principal made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee: *Williams* v. *Sorrell*, 4 Ves. 389. This doctrine has been extended to the case where the whole mortgage debt is, under similar circumstances, paid off: see *Norrish* v. *Marshall*, 5 Madd. 475; *Allen* v. *Lord Southampton*, 29 W. R. 231, 16 Ch. D. 178.

Apart from these authorities, I should have thought it reasonable to hold that where the mortgagor, being entitled on payment off of the mortgage to the actual custody of the mortgage deed and other documents of title, which in fact are in the possession of the transferee, chooses to pay the mortgagee without asking for the deeds, he ought not to be allowed, as against the transferee, to justify such payment. I should have thought that this negligence on the part of the mortgagor was far greater than the negligence of the transferee in omitting to give notice of the transfer. But I am asked to apply this principle to a case where the money, which is said to have been paid by Winch to Dent in satisfaction of the mortgage, was part of the purchase-money procured by the solemn statement in the conveyance by Winch and by Dent that there was not any mortgage and that there never had been any mortgage. I decline thus to extend the doctrine. I am not satisfied how the £425 mentioned in the document above referred to was arrived at. I cannot treat Winch as an innocent and perfectly honest mortgagor making a payment to the mortgagee in good faith for the purpose of redeeming his mortgage; I must treat him as colluding with Dent to obtain Mrs. Dixon's purchase-money by means of false recitals. And I cannot recognize the retention by Dent of £451 10s. as equivalent to a pay-

ment off of the mortgage for £350 without notice of the transfer.

Moreover, the question is not now between Miss Ellman and Winch, but between Miss Ellman and Mrs. Dixon; and it would be a lucky accident for Mrs. Dixon if I should be driven to hold that the legal mortgage, subject to which she bought, had been since discharged without either party being aware of the fact by reason of a transaction between Winch and Dent. There is no equity in favour of Mrs. Dixon, and, in the circumstances, I am not prepared to destroy Miss Ellman's security for her benefit. In the view which I take it is not necessary for me to express any opinion upon the difficult question whether Mrs. Dixon is to be affected with the knowledge which her solicitor Dent had of Miss Ellman's security.

The result is that I must declare that Miss Ellman's mortgage is a valid subsisting charge for £350 with interest and the costs of the action and counterclaim. I understand that Mrs. Dixon will redeem. If the figures are not agreed there must be the usual foreclosure decree in favour of Miss Ellman. As between Mrs. Dixon and the defendant Winch, he must indemnify her against all payments she has to make to Miss Ellman, and must pay her costs of the action.

Solicitors for the plaintiff, *Druces & Attlee.*

Solicitors for the defendant Winch, *West, King, Adams, & Co.*

Solicitor for the defendant Ellman, *C. F. Ingram.*

Q. B. Div.
(Grantham and Lawrance, JJ.) June 14.

LONDON COUNTY COUNCIL *v.* HOLZAPFELS COMPOSITIONS CO. (LIMITED). (*a.*)

Petroleum Acts—Definition of petroleum—Composition containing petroleum—Petroleum Act, 1871 (34 & 35 *Vict. c.* 105), *s.* 3.

The term "petroleum," as used in the Petroleum Acts, is not confined to petroleum, or oils or products of petroleum in their simple state, but extends to a composition containing petroleum as one of its ingredients.

Case stated by a Metropolitan police magistrate.

Upon an information charging the respondents with keeping a quantity of petroleum (to which the Petroleum Acts of 1871 and 1879 applied) otherwise than in pursuance of a licence given by the local authority contrary to section 7 of the Petroleum Act, 1871, the following facts were proved:

The respondents were manufacturers of a substance known as Holzapfels, a composition which is used for coating ships' bottoms. On the 7th of December, 1898, a quantity of the composition was kept by the respondents at premises belonging to them in Robin Hood-lane. The respondents held no licence for keeping petroleum on these premises.

The composition was contained in 109 steel drums hermetically sealed. It contained about 33 per cent. of petroleum oils, and about an equal quantity of oil mixed with pigments, gum, &c., into the form of a paste, paint, or composition. 25 per cent. of the petroleum oils used in the composition would, when the composition was tested in the manner set forth in Schedule I. of the Petroleum Act, 1879, give off an inflammable vapour at a temperature of 73° Fahrenheit.

The magistrate dismissed the information upon the ground that the composition was not petroleum nor an oil or product of petroleum within the definition of petroleum in section 3 of the Petroleum Act, 1871. He held also that petroleum was not present in the composition in sufficient quantities to make the composition petroleum.

Section 7 of the Petroleum Act, 1871, enacts that, save as thereinafter mentioned, "petroleum to which this Act applies shall not be kept except in pursuance of a licence given by such local authority as is in the Act mentioned." The exceptions are not material to the present case. The appellants were the local authority having power to grant licences under the Act.

Section 3 provides as follows: "For the purposes of this Act the term 'petroleum' includes any rock oil, Rangoon oil, Burmah oil, oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, and any products of petroleum or any of the above-mentioned oils; and the term 'petroleum to which this Act applies,' means such of the petroleum so defined as, when tested in the manner set forth in Schedule I. to this Act, give off an inflammable vapour at a temperature of less than 100° of Fahrenheit's thermometer." The Petroleum Act, 1879, substituted 73° of Fahrenheit's thermometer for 100° as the minimum temperature.

Avory, for the appellants.—The decision of the magistrate is wrong, for it amounts to this, that petroleum ceases to be petroleum within the meaning of the Act when something else is mixed with it. In *The Pharmaceutical Society* v. *Armson*, 42 W. R. 662; [1894] 2 Q. B. 720, it was held, with regard to a patent compound which contained, as one of its ingredients, one of the poisons scheduled in the Pharmacy Act, that the compound did not cease to be a poison within the Pharmacy Act because the poison was mixed with other substances. If the composition came within the definition of petroleum in section 3, it was clearly also petroleum to which the Act applied, because it is found in the case that when tested it gave off an inflammable vapour at a temperature of 73° Fahrenheit.

Atherley Jones, Q.C. (*F. Newbolt* with him), for the respondents.—Whether the composition was petroleum or not is a question of fact which the magistrate has decided in the respondents' favour. It is quite fair to say that a substance which contained so small a proportion of petroleum as this composition did is not petroleum within the meaning of the Act.

GRANTHAM, J.—This appeal must be allowed. I am sorry to have to come to this conclusion, because I feel that it will interfere with the respondents in the conduct of their business. But we have to construe the Act of Parliament, and, in my view, it is clear that this composition comes within the definition of petroleum given in section 3 of the Petroleum Act, 1871; for it is clear that petroleum does not cease to be petroleum because something else is mixed with it. The petroleum might have been mixed with something which would have prevented it from throwing off an inflammable vapour at the temperature indicated by the Legislature. If that had been so, the composition would not have been petroleum to which this Act applied. But the composition under consideration is admittedly dangerous. It is therefore, also, petroleum to which the Act applies.

LAWRANCE, J., concurred.

Case remitted to magistrate.

Solicitor for the appellants, *Blaxland.*

Solicitors for the respondents, *Stokes & Stokes.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Darling and Channell, JJ.) April 13.

BROWN v. PATCH. (a.)

Gaming —"Place" used for betting—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

On a certain part of the ground upon which a race meeting was being held a bookmaker erected a structure consisting of four legs or supports made of bamboo fastened together. On the top there was a board on which from time to time the bookmaker wrote the odds offered against the different horses, and, lower down, a canvas screen or banner some distance off the ground, bearing the bookmaker's name. Throughout the day the bookmaker stood upon a box or stool close to the structure shouting the odds and betting with persons upon the ground.

Held, that the bookmaker was a person using a place for the purpose of betting with persons resorting thereto within the meaning of the Betting Houses Act, 1853, *there being a sufficient localization of the business of betting at the spot where he stood.*

Case stated by justices of Blandford, in the county of Dorset.

A summons was issued against the respondent, upon the complaint of the appellant, for unlawfully using a place—to wit, a particular part of the enclosure known as the Larmer Tree Grounds, in the parish of Farnham, for the purpose of betting with persons resorting thereto.

The following facts were proved: In the parish of Farnham, in the county of Dorset, are situated certain enclosed grounds known as the Larmer Tree Grounds. Once a year a meeting for horse-races is held in these grounds by permission of the owner. On the 8th of September, 1897, a race meeting was held in the grounds, at which several thousands of persons were present, among them being some six bookmakers, or professional betting men, with their clerks. All these persons, including the bookmakers and their clerks, were admitted without payment to all parts of the and outside the stands. The respondent was a bookmaker, and he entered the Larmer Tree Grounds with his clerk about 12.30 p.m. on the 8th of September, 1897. The two men erected on the ground a structure, of which the following is a description: It was made of bamboo cane, with four legs or supports, two in front and two at the back, fastened together in front. It was 5ft. or 6ft. high from the ground to the top. On the top of this structure there was a board, on which was painted in gilt letters the words, "Bob Patch. London. All in run or not. Pay first past the post." Below the board was a canvas screen or banner some distance off the ground, and the words "Bob Patch, London," were on the canvas. The respondent had a wooden box or stool close to the right hand side of the structure. From time to time during the day the respondent stood on the box or stool and shouted the odds against the different horses or bicyclists running in the different races, and invited all persons present to bet with him, and from time to time wrote on the board before referred to the odds offered against the different horses and bicyclists. When a bet was made the backer paid the amount to the respondent, and the respondent or his clerk, who stood by him on the ground, wrote down the bet in a book, and a ticket was given to the person making the bet.

After each race the persons who had backed the winning horses were, upon presenting the ticket, paid the amount they had won, together with the sum deposited.

During the whole time the racing continued the respondent's structure remained in the position and on the particular part of the grounds in which it was first placed. There was nothing surrounding the structure, whether for the purpose of excluding the public or for any other purpose, and the respondent had no exclusive right of user of any portion of the grounds. Other bookmakers erected similar structures and conducted a betting business in a similar manner.

The justices dismissed the summons.

Section 1 of the Betting Houses Act, 1853 (16 & 17 Vict. c. 119), provides: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; . . ."

Section 3 imposes a penalty upon any person who, being the owner or occupier of any such house, office, room, or other place, or person using the same, shall open, keep, or use the same for the purposes thereinbefore mentioned.

Clavell Salter, for the appellant.—The respondent ought to have been convicted. What he did amounted to using a place within the meaning of the Betting Houses Act: *Bows* v. *Fenwick*, 22 W. R. 804, L. R. 9 C. P. 339; *Liddell* v. *Lofthouse*, 44 W. R. 349, [1896] 1 Q. B. 295; and *Shaw* v. *Morley*, 16 W. R. 763, L. R. 3 Ex. 137.

Stutfield (*H. S. Cautley* with him), for the respondent.—The justices were right. The facts of this case are precisely similar to those of *Gallaway* v. *Maries*, 30 W. R. 151, 8 Q. B. D. 275, a decision on which the House of Lords have in *Powell* v. *Kempton Park Racecourse Co.*, *ante* p. 585, [1899] A. C. 143, thrown doubt. The only addition to the circumstances of that case are that in the present case the defendant, in addition to standing upon a stool or box, erected a structure close to it. That is not sufficient to afford a distinction. The Legislature clearly intended by the the word "place" to indicate some circumscribed and defined area in which persons could congregate. This is shown by sections 11 and 12, where provision is made for the police to enter and break into any suspected house, office, room, or place and to arrest the persons found therein. Any other construction of the word "place" would tend to turn the Act into an Act against betting.

DARLING, J.—In this case proceedings were taken against the respondent under the Betting Houses Act, 1853, and he was charged with an offence under section 3. [After reciting the facts, his lordship proceeded:] It is argued by the appellant that the respondent committed an offence under the Act because he kept and used a place for the purpose of betting with persons who resorted to it. It is said, on the other hand, that he did not use such place because the facts resemble those in *Gallaway* v. *Maries*, which has been overruled in *Powell* v. *Kempton Park Racecourse Co.* In the latter case all the cases on the subject have been reviewed by the House of Lords. Some of these have emerged as good law, including *Liddell* v. *Lofthouse*, *Bows* v. *Fenwick*, and *Shaw* v. *Morley*, while others have been shown to be bad law.

The Lord Chancellor, in his judgment, says, with regard to the meaning of the word "place," that any place which is sufficiently definite, and in which a betting establishment might be conducted, would

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

satisfy the words of the statute, and Lord James says that where there is a definite localization of the business of betting, there is a "place" for the purposes of conviction under the Act.

I will not attempt to define a "place," but having regard to the law laid down in *Powell* v. *Kempton Park Racecourse Co.*, can we say that the magistrate should have drawn the inference that this was a "place" within the meaning of the Act, either as being sufficiently defined, or on the ground that there was a definite localization of the respondent's place of business? I think that here the respondent localized his business at the spot where he had erected the structure, and he thereby converted that spot into a "place" within the meaning of the Act. It was not necessary that a "place" within the meaning of the Act should have a roof, or that it should have fixed boundaries. Here the respondent erected a structure with a board upon it announcing that he was there and was prepared to make bets. He went further. He took a stool, placed it close to the structure, and actually stood there carrying on the business of betting. He did not put up a sign and then walk about and make bets. He did not put up this board to say where he might be found. He stood close to it. In my opinion there was a definite localization of the business of betting.

CHANNELL, J.—I have come to the same conclusion. The law on the subject is fairly well settled. There is no difficulty as to what the law is. The difficulty is in applying it. It has become perfectly clear—if it were ever in doubt—that the statute was directed against betting houses and places, and not against betting persons. It is also clear that the statute does not prohibit a place being used by persons who go there to bet with each other; nor is a person prohibited by the statute from keeping a place for the purpose of people coming there and betting with each other. But what is prohibited is that a person should keep or use a place for the purpose of other people coming to bet with him. As the Lord Chancellor said in *Powell* v. *Kempton Park Racecourse Co.*, the important question is not what is the place, but what is the user of it; and although it is true that place must be *ejusdem generis* with house, office, or room, yet the analogy is in the way of its user rather than the place itself.

The House of Lords in the case referred to brings out clearly all these points. They are put especially clearly in the judgment of Lord James of Hereford. The question in each case is whether the business of betting has been localized. Assume that a man uses apparatus, be it a board or stool, or what not. That apparatus may be used merely to indicate his identity. If that is so it does not localize the business nor bring the man within the Act. But the apparatus may also be used for the purpose of indicating the place where the business is carried on. Then it becomes important. So that in each case one must look at the facts and see whether, on the one hand, the defendant is using the structure to indicate merely that he is prepared to bet, or whether, on the other hand, he is using it to indicate that there is a place to which people may come and make bets with him.

Though it is useful to see what view other judges have taken, yet it is not a decision binding on us when a judge from certain facts draws an inference. Here the facts are sufficient to enable us to draw the inference that the respondent did not say, in effect, "I am a man who bets," but that he did say, "I am carrying on business here in this place." If we draw that inference the case comes within the class of cases which in *Powell* v. *Kempton Park Racecourse Co.* have been held to be good law. On the other hand, if we had not drawn that inference the case would have fallen among the class of cases which have been held to be bad law.

I am guided in my decision in this case by the judgments in *Bows* v. *Fenwick*, and I think on the facts of this case that the business of betting was localized.

Case remitted to the justices.

Solicitors for the appellant, *Robbins, Hay, Water & Co.*, for *James Douglas*, Sherbourne.

Solicitors for the respondent, *Lumley & Lumley.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) March 20; April 25.

In re TANKARD.

Ex parte OFFICIAL RECEIVER v. MRS. A. HART. (a.)

Bankruptcy—Voluntary settlement—Gift of jewels and money—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52) *s.* 47.

Gifts of personal property made by a bankrupt within two years of his bankruptcy, without restricting the donee's power of alienation, but with intention that the donee shall use or retain the property for an indeterminate time, are voluntary settlements within the meaning of section 47 *of the Bankruptcy Act*, 1883, *and void as against the trustee in bankruptcy, but without prejudice to any sale or disposition of the property made by the donee before bankruptcy in good faith and without notice of an available act of bankruptcy. But the donee may have to account for the proceeds of any such sale or disposition remaining in his hands at the commencement of the bankruptcy.*

Motion by the official receiver as trustee in the bankruptcy for a declaration that certain gifts of jewels and furniture, or money to purchase furniture, made by the bankrupt to the respondent within two years of the bankruptcy were void as voluntary settlements within section 47 of the Bankruptcy Act, 1883.

In 1896 the bankrupt acquired the lease of a house in Curzon-street, Mayfair, at a rent of £325 per annum.

In June, 1897, he made over the lease at a nominal sub-rent to the respondent, and at the same time he gave her all the furniture and pictures in the house which were valued at about £4,000.

During 1897 and 1898 he made her gifts of jewellery of great value, including a pearl necklace which cost £2,350.

In July, 1898, he gave her £1,000 with which she purchased furniture for a house she had taken at Maidenhead.

On the 4th of February, 1899, a receiving order was made against the bankrupt, adjudication followed, and the official receiver became trustee in the bankruptcy.

The respondent gave up the lease which was disclaimed by the official receiver, but refused to give up the furniture and jewels, and after the adjudication in bankruptcy she sold the pearl necklace for £7[illegible]. The official receiver thereupon took these proceedings to recover the jewels and furniture or their value.

Reed, Q.C., and *Carrington*, for the official receiver.

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

—These gifts should be set aside as voluntary settlements. Section 47 of the Bankruptcy Act, 1883, defines a settlement as any conveyance or transfer of property, and it was held in *In re Vansittart, Ex parte Brown*, 41 W. R 32, [1893] 1 Q. B. 181, that a gift of diamonds to a wife was a settlement, and in *Ex parte Harvey, In re Player* (*No.* 1), 2 Morrell 261, that a gift of money to a son to buy shares was a settlement.

Rufus Isaacs, Q.C., and *J. Henderson*, for the respondent.—The gifts in question here were not in the nature of settlements, and the case is governed by *Ex parte Harvey, In re Player* (*No.* 2), 15 Q. B. D. 682, 34 W. R. Dig. 170, where the court held that a gift of money to a son made for the purpose of enabling him to start in business was not a settlement of property within section 47 of the Bankruptcy Act, 1883.

Reed, Q.C., replied.

Cur. adv. vult.

April 25.—WRIGHT, J., after stating the facts, continued: The bankrupt and the lady have been examined before me. I have no doubt that the proper conclusion of fact is that, on the one hand, there was no stipulation or reservation restricting the lady's power or right to alien the property, but, on the other hand, the bankrupt's intention was that it should be kept and used by her until necessity might require her to dispose of it. There is no evidence or suggestion of any trust for the donor. The lease has been given up to the trustee and disclaimed by him. I have to determine whether section 47 of the Bankruptcy Act, 1883, applies in the case of the other gifts.

I think that I am bound by the authority of *In re Player*, 2 Morrell 261, and *In re Vansittart*, to hold that that section applies only to such conveyances or transfers as are in the nature of settlements, in the sense of being dispositions of property by a person to be held and preserved for the enjoyment of some other person. The retention of the property in some sense must according to those cases be contemplated, and not its immediate alienation or consumption. But it is not necessary, according to those authorities, that there should be any actual restriction of the power of alienation by the donee. Accordingly, the section was held to apply to a gift of money by a father to his son to be spent in buying shares on which the son was to receive the dividends, although there was nothing to prevent the son from selling the shares immediately (*In re Player*), and in *In re Vansittart* it was held to apply to a gift of diamonds by a husband to his wife, an inference being drawn that the retention of the diamonds by her was contemplated, although no restriction upon the power of alienation was expressed or understood. In the present case I draw a similar inference, and think that the pearl necklace and other jewellery, and the furniture or money to buy furniture, were given and received with the intention that the necklace, jewels, and furniture should be kept for enjoyment by the donee for an indeterminate time, and that the section, even as so construed, applies. But for the decision in *In re Player* I should have thought that in section 47 the word "settlement" ought to be construed in accordance with sub-section 3, as including every kind of conveyance or transfer of property (which term by virtue of section 168 includes money), the word "settlement" in the earlier part of the section being apparently used merely for convenience of drafting. And this seems to have been the view of the Court of Appeal in *In re Farnham*, [1895] 2 Ch. 799, 44 W. R. Dig. 98, where Lindley, L.J., said: "It was admitted on all hands, looking to the last words of that section, that any gift of property is void as against a trustee in bankruptcy"; and *In re Carter and Kenderdine's Contract*, 45 W. R. 484, [1897] 1 Ch. 776, seems to be to the same effect: "this section 47 according to its terms hits a conveyance or transfer of property of any sort." Upon this construction of the section, any voluntary alienation by a person would, in the event of his becoming bankrupt within two years, become undone as from the date of the bankruptcy, and the property would from that date revest in the alienor, and therefore in the trustee in his bankruptcy, but not so as to undo or affect any transfer or charge acquired by any person *bonâ fide* and for valuable consideration before the bankruptcy: *In re Holden*, 36 W. R. 189, 20 Q. B. D. 43, per Cave and Smith, JJ.; *In re Vansittart*, and *In re Brall*, 41 W. R. 623, [1893] 2 Q. B. 381, per Vaughan Williams, J.; and *In re Carter and Kenderdine's Contract* in the Court of Appeal. And I conceive, though there seems to be no authority on the point, that neither the original alienee, nor the transferee from him, could be required to restore money which he has spent or property which he has aliened before the bankruptcy, and without notice of any act of bankruptcy (or, perhaps, without knowledge of insolvency), though the alienee probably is liable to account for any proceeds which remain in his hands at the time of the bankruptcy—at any rate, if the acquisition by him of those proceeds was an object of the gift to him so that the proceeds can properly be said to represent the gift. And, if this is the proper view of the meaning and consequences of the section, the inconveniences which seem to have been apprehended in *In re Player* would not occur. There would be no hardship in making the donee of a voluntary gift surrender what remains in his hands free of any charge or equity. If, however, this is not the proper construction of the section, it seems difficult to avoid the conclusion that "settlement" ought to be understood to mean such a conveyance or transfer as of itself limits the power of alienation by the donee and so preserves the fund, rather than to mean something so vague as to be satisfied by a gift which the donee is intended or expected to keep, but is free to alien. The decision, however, in *In re Player* does not seem to have been expressly questioned in *In re Farnham* or in *In re Carter and Kenderdine's Contract*, and it was before those cases followed, though apparently with some difficulty, by Vaughan Williams, J., in *In re Vansittart*. It is strange that, although somewhat similar enactments have existed in Bankruptcy Acts from (1604) 1 Jac. 1, c. 15, s. 5, which was in substance re-enacted by 6 Geo. 4, c. 16, and by the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), there were hardly any decisions upon their construction. The few reported cases appear to be three or four to the same effect as *Kensington* v. *Chantler*, 2 M. & Sel. 36, where Lord Ellenborough said that "the statute had not the word money, and seemed to be confined to things which were the subject of conveyance and capable of being conveyed or procured to be conveyed; and that the doctrine contended for would go the length of making a son liable to refund every portion of money given to him by his father for his maintenance." The existing enactment dates from 1869, and was not the subject of judicial construction until *In re Player*. The trustee is entitled to the order for which he asks, and if necessary there must be an inquiry as to the necklace.

Solicitors for trustee, *G. H. Barker & Son.*

Solicitors for respondent, *Wainwright, Pollock, & Co.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith and Vaughan Williams, L.JJ.) July 14.

SOFTLAW v. WELCH. (a.)

Married woman—Separate estate—Contract made during coverture—Liability after death of husband—Form of judgment—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.

A married woman entered into a contract before the passing of the Married Women's Property Act, 1893, *and was sued upon it after the death of her husband.*

Held, that the form of the judgment against her must limit the execution to such property as during her coverture was her separate property not subject to any restriction against anticipation.

Appeal from an order of Channell, J., at chambers.

The action was brought to recover £273 7s. 2d. upon three promissory notes made by the defendant, when a married woman, and upon a covenant in a mortgage deed executed by her during marriage. The contracts sued on were entered into by the defendant before the passing of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63). The action was commenced after the death of her husband. Upon an application for judgment under order 14 the master gave the plaintiff leave to sign final judgment in the ordinary form.* Channell, J., upon appeal, varied the order of the master, giving leave to sign final judgment against the defendant, execution to be limited to such property as during her coverture was her separate property not subject to any restraint on anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction.

The plaintiff appealed.

A. Powell, for the plaintiff.—By section 1, sub-section 2, of the Married Women's Property Act, 1882, a married woman can render herself liable in respect of and to the extent of her separate property upon a contract. This is a personal liability, though execution can only issue against her separate property: *Holtby* v. *Hodgson*, 38 W. R. 68, 24 Q. B. D. 103; *Jay* v. *Robinson*, 38 W. R. 550, 25 Q. B. D. 467; *Pelton* v. *Harrison* (*No.* 1), 39 W. R. 689, [1891] 2 Q. B. 422; *Pelton* v. *Harrison* (*No.* 2), [1892] 1 Q. B. 118, 40 W. R. Dig. 181. Before the Act of 1882 this liability was not a personal one: *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454. When a married woman becomes discovert she ceases to have separate property, and the personal liability can be enforced against all her property: per Lindley, L.J., in *Holtby* v. *Hodgson*. The order of Channell, J., limiting the judgment to the form settled in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120, as in the case of a married woman was wrong, and the judgment ought to be in the ordinary form. This question cannot arise with regard to contracts made by a married woman after the passing of the Married Women's Property Act, 1893, because by section 1 (*c*) of that Act every such contract is enforceable against all property which she may thereafter whilst discovert be possessed of.

He also referred to *Beckett* v. *Tasker*, 36 W. R. 158, 19 Q. B. D. 7; *Hood Barrs* v. *Cathcart*, 42 W. R. 628, [1894] 2 Q. B. 559; *Hood Barrs* v. *Heriot*, 44 W. R. 481, [1896] A. C. 174.

Wootton, for the defendant.—Under the Act of 1882 the liability of a married woman is only a proprietary and not a personal liability (per Bowen, L.J., in *Scott* v. *Morley*; see also *In re Lynes, Ex parte Lester & Co.*, 41 W. R. 488, [1893] 2 Q. B. 113; *Aylesford* v. *Great Western Railway Co.*, 41 W. R. 42, [1892] 2 Q. B. 626), or if the liability is personal it is subject to the limitations imposed by the Act—namely, that her free separate property alone can be taken in execution. In either case the judgment must be limited to such separate property not subject to a restraint on anticipation as the married woman possessed during coverture. It is necessary to prove that the married woman had separate property at the time she entered into the contract: *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519; *Stogdon* v. *Lee*, 39 W. R. 467, [1891] 1 Q. B. 661; *Harrison* v. *Harrison*, 36 W. R. 748, 13 P. D. 180. This shows that a married woman contracts only as regards her free separate estate, and this liability cannot be enlarged by her becoming discovert.

A. Powell, in reply, referred to *Whittaker* v. *Kershaw*, 39 W. R. 22, 45 Ch. D. 320.

Cur. adv. vult.

July 14.—VAUGHAN WILLIAMS, L.J., read the following judgment: This is an appeal from the decision of Channell, J., at chambers, given on appeal from the order of Master Manley Smith. The action is brought by the plaintiff against the defendant, Lucy Price Welch, a widow, to recover £273 7s. 2d., principal and interest, due on three promissory notes. Two of such notes being notes made by the defendant alone during coverture, and the other note being a joint and several note signed by the defendant and her husband also made during coverture. Alternatively there is in respect of the £100, the subject of the last-mentioned note, a claim against the defendant on a covenant contained in a mortgage deed executed by the defendant and her husband. The notes were made and the covenant was executed by the defendant before the passing of the Married Women's Property Act, 1893. Application was made by the plaintiff for the judgment under order 14. The defendant put in an affidavit stating that at the time she contracted the debt sued for in this action she was a married woman, and that the debt was incurred by her in respect of her separate estate only. Master Manley Smith made an order giving the plaintiff leave to sign judgment. The defendant appealed, and Channell, J., ordered the judgment signed under Master Manley Smith's order (which was a judgment in the ordinary form as if the defendant had been a *feme sole*) to be set aside, and ordered that the plaintiff should be at liberty to sign judgment against the defendant for the amount indorsed on the writ with interest and costs, and that as regards the defendant such sum and costs be payable out of her separate property as thereinafter mentioned and not otherwise, and that execution on such judgment should be limited to such property as during her coverture was her separate property not subject to any restraint against anticipation, unless by section 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction. From that order of Channell, J., the plaintiff now appeals to us. It was stated in argument and not denied that at the date of the making of the promissory notes sued on and of the execution of the mortgage deed the

* It was assumed for the purposes of this case that at the date of the contracts the defendant had some free separate property.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

defendant had no separate estate not subject to restraint against anticipation. The argument before us on behalf of the plaintiff was that the death of the husband having put an end to the restraint on anticipation, the plaintiff in an action commenced after the husband's death against his widow was entitled to judgment against her as a *feme sole*, and not in the *Scott* v. *Morley* form as ordered by Channell, J. In other words, it was argued on behalf of the plaintiff that a married woman who during coverture made a promissory note thereby became the personal debtor of the person in whose favour the note was made, and that the restraint on anticipation being removed by the death of the husband the plaintiff was entitled to sue the widow on the notes made during coverture as a *feme sole* and to have the ordinary judgment against her as such. But in my judgment the effect of the death of the husband is not to enlarge the right which the creditor theretofore had against the married woman. It seems to me clear from the judgment of Kay, L.J., in *Pelton* v. *Harrison* (*No.* 1), which was the judgment of the whole court, that if the judgment is, as it was in that case, in the *Scott* v. *Morley* form, such a judgment cannot, after the death of the husband and the determination of the restraint on anticipation consequent thereon, be enforced against property as to which during coverture she was restrained from anticipation. It may be urged that the judgment in *Pelton* v. *Harrison* may be supported as being based on the *Scott* v. *Morley* form of the judgment, which in that case was sought to be enforced against the widow; but I think it is clear from the latter part of the judgment that Kay, L.J., meant to decide the case on principle and not on the form of the judgment. He seems to me to put it quite plainly that the Married Women's Property Act did not intend to enable a married woman by a contract entered into by her during coverture to incur any liability except in respect of and to the extent of her separate property held by her during coverture without restraint on anticipation, or, as it has been called, her free separate property, and that the Act did not intend to make liable on such a contract during coverture, or on a judgment obtained in an action brought to recover a debt arising on such a contract, property acquired by her after the death of her husband, nor any property, though separate property, as to which during coverture she was restrained from anticipation. This construction of the Married Women's Property Act accords with the judgment of the Divisional Court in *Beckett* v. *Tasker*, and in particular the judgment of Wills, J. This construction of the Act also accords with the view expressed by the Court of Appeal in *Scott* v. *Morley* that the Married Women's Property Act is a new provision imposing upon a married woman's separate estate a liability at law corresponding to the liability that before could only be produced by proceedings in equity, which took the form of a declaration charging her separate estate with the amount of the debt: see the judgment of Lord Esher, M.R. At common law a married woman during coverture could not personally enter into any contract, and Bowen, L.J., says that this liability of a married woman upon her contracts is the creation of the section (section 1, sub-section 2, of the Married Women's Property Act, 1882), and, as the section begins by limiting her liability to the extent of her separate property, so it closes it by repeating that satisfaction is only to be obtained out of her separate property. It seems to me that this clearly means the separate property which the Act has enabled her to charge by her contracts during coverture—that is, her free separate property owned by her at the date of such contract or coming to her during coverture. The cases of *Palliser* v. *Gurney* and *Tetley* v. *Griffith*, 36 W. R. 96, which decide that a married woman who has no separate property is incapable of entering into a contract at all, also go to show that the only contracts which the Married Women's Property Act, 1882, enabled a married woman to make during coverture are contracts affecting her free separate property held by her as such during coverture.

The only authority which at all conflicts with this continuous line of cases is *Holtby* v. *Hodgson*, or rather the *dictum* of Lindley, L.J., in his judgment in that case to the effect that separate property that she (the wife) is restrained from anticipating, which cannot be got at in any way while her husband is living, becomes immediately subject to the judgment as soon as he is dead. The judgment itself in *Holtby* v. *Hodgson* involved no such proposition. The husband in that case was alive, and the only question in the case was whether a judgment obtained against a married woman in her husband's lifetime substantially in the *Scott* v. *Morley* form in an action on a contract made by her during coverture could be enforced by a garnishee order under ord. 45, r. 1, attaching a judgment debt due on a judgment recovered by her in an action for malicious prosecution brought by her during coverture. Two points were argued. First, it was said that the judgment against the married woman only created a proprietary liability, and that such a judgment was not a judgment or order for the payment of money within the meaning of those words in ord. 45, r. 1, and further, that the judgment did not make a married woman a debtor within the meaning of that order; but the court decided that such a judgment was a judgment for the payment of money, and that the married woman was a debtor personally liable, although execution was limited to her separate estate. Secondly, it was urged that the judgment obtained by the married woman did not create a debt due to her, but only gave her damages as part of her separate estate. The court held that the judgment created an attachable debt. There is nothing in this judgment, or in the finding that a married woman is under such a contract a personal debtor, inconsistent either with the limitation of the contracting power of a married woman or with the limitation of the satisfaction of damages recovered against her to separate property coming to her possession during coverture, which seems to me to be the limitations established by the cases to which I have called attention.

The case of *Holtby* v. *Hodgson* was followed in *Pelton* v. *Harrison* (*No.* 2) by Lopes and Kay, L.JJ., a case in which it was held that a judgment against a married woman is a personal one although enforceable against her separate estate only, and that costs due to a married woman in respect of an interlocutory application might be satisfied by an order for set-off under ord. 65, r. 27 (21), of costs due from the married woman under a judgment in the *Scott* v. *Morley* form. *Pelton* v. *Harrison* (*No.* 1) was cited, but neither Lopes, L.J., nor Kay, L.J., seems to have considered that case inconsistent with *Holtby* v. *Hodgson*. It is further to be observed that both in *Pelton* v. *Harrison* and in *Beckett* v. *Tasker* the judgment in the *Scott* v. *Morley* form was obtained in an action brought after the death of her husband. Having thus gone through the authorities, I have come to the conclusion that the order of Channell, J., was right in principle —that is to say, that the *Scott* v. *Morley* form is the right form of judgment whenever the action is brought on a contract made by a married woman before the Act of 1893 during coverture; but a difficulty arises in this case, because counsel for Mrs.

Welch admitted before us that he could not take the point that there ought to be no judgment against his client because he had admitted before the master and the judge that in some form judgment must go, and on the facts as stated in argument there was no free separate estate at the date of the contracts—viz., the promissory notes—by reason of all the wife's property being subject to restraint against anticipation. It is said that this makes a *Scott* v. *Morley* form of judgment impossible, and that therefore the judgment must, on the admission that there must be judgment, be in the ordinary form; but I do not think we ought on this to order judgment in the ordinary form. I think the defendant's counsel has only precluded himself from setting up the fact that at the date of the alleged contracts there was no free separate estate and claiming judgment for the defendant as was successfully claimed in *Tetley* v. *Griffith*.

A. L SMITH, L.J.—I agree, and only wish to add this, that the fact of a married woman becoming discovert does not extend her liability upon a contract made by her during coverture before the passing of the Married Women's Property Act, 1893.

Appeal dismissed.

Solicitors for the plaintiff, *Stock & Slater*.

Solicitors for the defendant, *Layton, Sons, & Lendon*.

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) July 5.

NIX AND THE BEESTON BREWERY CO. (*Appellants*) v. JUSTICES FOR THE CITY OF NOTTINGHAM (*Respondents*). (*a*.)

Licensing law—Licence—Beer licence—"Real resident holder and occupier"—Beerhouse Act, 1840 (3 & 4 *Vict. c.* 61), *s.* 1.

By section 1 *of the Beerhouse Act*, 1840, "*No licence to sell beer or cider by retail . . . shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed.*"

Held, that the fact that the applicant for a beer licence in respect of a dwelling-house is paid a salary by brewers, and has to pay over to them the profits made upon the sale of the beer, does not of itself in law prevent him from being the "real resident holder and occupier" of the house.

Appeal from the decision of a Divisional Court upon a special case stated by the quarter sessions for the county of Nottingham on an appeal against a refusal by the respondents, the licensing justices, to grant to the appellant, Eliza Nix, a renewal certificate to apply for and hold an excise licence to sell beer by retail to be consumed off the premises, 79, Dame Agnes-street, Nottingham. The licensing justices on the 5th of October, 1898, refused to grant the renewal on the ground that Nix was not the real resident holder and occupier of the premises within the meaning of the Beerhouse Act, 1840. The quarter sessions dismissed the appeal subject to a case.

The case stated that at the hearing of the appeal the facts as to the holding and occupation of Eliza Nix were proved as follows: The premises in question were a dwelling-house and shop. Eliza Nix had been in possession of the premises since the 20th of December, 1897, during the whole of which time she held a licence in respect of the premises. Upon taking possession of the premises she paid a valuation amounting to £20 to the former tenant and licensee. She had been a weekly tenant of the Beeston Brewery Co. since she first entered the premises at a rent of 8s. a week, such rent being duly paid by her, and on the 5th of October, 1898, she still continued such tenant. At the hearing before the licensing justices she refused to produce any receipt for rent alleged to have been paid by her from time to time in respect of the premises, and she stated that she had no written agreement of tenancy. She had always lived and slept in the premises, occupying, together with her family, the whole of the dwelling-house, and had complete control over the same. She had paid in respect of the premises poor rates as assessed. She sold in the shop the beer of the Beeston Brewery Co., who were the owners of the premises, and she received a salary of 12s. a week from the company for selling their beer as their manager and servant, and accounted to the company for the profits made upon the beer so sold by her on their account. She continued so to sell the beer of the company up to the 5th of December, 1898, after which date she carried on business for and on account of herself.

Upon the above facts the quarter sessions were of opinion that Eliza Nix was not in law the real resident holder and occupier of the premises upon the 5th of October, 1898, upon the ground that, instead of receiving the profits of the business, she received a salary and had to account to the company for all moneys received as aforesaid, and they confirmed the decision of the licensing justices on that ground.

The question for the opinion of the court was whether the quarter sessions were right in law in holding that upon the above facts Eliza Nix was not the real resident holder and occupier of the premises within the meaning of the Beerhouse Act, 1840. In the Divisional Court Grantham, J., was of opinion that upon the facts stated Eliza Nix was the real resident holder and occupier of the premises within the meaning of the Act, while Lawrance, J., was of opinion that she was not. In the result the decision of the quarter sessions stood affirmed.

The appellants appealed to the Court of Appeal.

Hugo Young, Q.C. (*W. H. Stevenson* and *T. Lindley* with him), for the appellants.—The facts as found in the case show that Nix was the real resident holder and occupier of the premises within the meaning of section 1 of the Beerhouse Act, 1840. The word "real" is used in contradistinction to a sham residence; "resident" means that the licensed person must sleep on the premises (*Reg.* v. *Allmey*, 35 J. P. 534; *Reg.* v. *Manchester Justices*, *ante*, p. 410, [1899] 1 Q. B. 571); and "holder" means tenant. Nix was clearly the "occupier" as she paid the poor rates and had complete control ever the premises. Section 4 of the Act uses the words "real resident in and occupier of the dwelling-house"; and section 2 of the Beerhouse Act, 1830, uses the word "householder." All these expressions convey the same meaning. The quarter sessions have held that a person who is in fact the real resident holder and occupier of the premises ceases to be so in law if he or she is not interested in the profits arising from the sale of the beer on the premises. That proposition cannot be supported. The destination of the profits of the business cannot affect the question whether the licensed person is the real resident holder or occupier.

W. Appleton, for the respondents.—The quarter

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

sessions have affirmed the finding of the licensing justices that Nix was not the real resident holder and occupier of the premises, though they have given a wrong reason for their finding. Their finding is a finding of fact and cannot be overruled in this court. Assuming, however, that the quarter sessions treated the question as one of law, a mere manager or servant of the brewery company, who has no voice in the management of the business, is not the real resident holder and occupier within the meaning of the Beerhouse Act, 1840. Section 1 says that no licence to "sell" beer shall be granted to any person who is not the "real resident holder or occupier." Those words show that the person to be licensed must sell the beer on his own account. Section 8 confirms this. The Legislature intended that the licensed person should carry on his own business on the premises. The quarter sessions were therefore right.

Hugo Young, Q.C., replied.

A. L. SMITH, L.J.—It seems to me that the only difficulty in this case arises from the way in which the case has been stated. The question arises upon section 1 of the Beerhouse Act, 1840, which provides that "no licence to sell beer . . . shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house." The meaning of that enactment is that the licensee must be the real resident householder and occupier of the dwelling-house. Whether a person is the real resident householder and occupier of the dwelling-house is a question of fact in each case and not of law, and, as was pointed out by my brother Williams during the argument, section 5—now repealed, though that is immaterial for this purpose—distinctly recognises that the question is one of fact. If I did not feel myself embarrassed by the way in which the case is stated, I should say that there was evidence before the justices upon which they could find that Nix was not the real resident householder and occupier of the dwelling-house. But that is not the question put to us. We can only give judgment upon the facts as stated, and it is not for us to draw inferences of fact. The quarter sessions must find the facts. The quarter sessions have found that the facts as to the holding and occupation were proved as stated in the case. Those facts are that Nix, upon taking possession paid a valuation of £20 to the former tenant. She was a weekly tenant to the brewery company at a rent of 8s. a week, and on the 5th of October, 1898, she still continued such tenant. The quarter sessions have stated that as a fact, and have not found the tenancy to be a sham. Why the quarter sessions go on to state that she refused to produce any receipt for rent "alleged to have been paid" I cannot conceive, because they have already found that the rent was duly paid. Then the case finds that Nix always lived and slept there, occupying the whole of the premises, and having complete control over them; she paid the poor rates; and she received a salary of 12s. a week from the brewery company. Those facts are all evidence that Nix was the real resident holder and occupier; and I agree with the Queen's Bench in *Reg.* v. *Allmey* and *Reg.* v. *Manchester Justices* that the object of the Legislature is to ensure that the licensee shall be actually resident in and in occupation of the house. But having found those facts, the quarter sessions go on to state that upon the above facts they were of opinion that Nix was not in law the real resident holder and occupier of the premises upon the 5th day of October, 1898, upon the ground that instead of receiving the profits of the business she received a salary and had to account to the company for all moneys received as aforesaid, and they confirmed the decision of the licensing justices on that ground; and they ask the court to say whether they were right "in law" in holding that upon those facts Nix was not the real resident holder and occupier of the premises within the meaning of the Beerhouse Act of 1840. In my opinion that is not a good ground for the decision. If Nix was on the facts the real resident holder and occupier of the premises, the mere fact that she handed over the profits on the sale of the beer to the company did not make her the less the real resident holder and occupier. Therefore I agree with the view taken by Grantham, J., entirely on account of the way the case was stated. For these reasons I think that the appeal should be allowed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. It is provided by section 1 of the Beerhouse Act, 1840, that no licence to sell beer shall be granted to any person who is not the real resident holder and occupier of the dwelling-house. In my judgment the applicant for the licence must therefore be the real resident holder and occupier of the dwelling-house where it is proposed to sell beer, not in form only, but also in substance, and the question whether the applicant is such a holder and occupier is a question of fact in each case. In my judgment there was ample evidence in this case upon which the licensing justices were entitled to come to the conclusion that Eliza Nix was not the real resident holder and occupier of the house in question. I may point out before I pass on that the words "resident holder and occupier" are not a lengthy way of stating that the applicant must be the occupier of the house. They constitute three different essentials to the qualification to hold the licence. The applicant must be resident on the premises and must be the holder and occupier of them in substance and in fact. A man may well be resident on the premises without being either the holder or the occupier of them within the meaning of the section. That being the state of things, and the licensing justices having decided that Nix was not the real resident holder and occupier of the premises, an appeal was brought to quarter sessions. The quarter sessions affirmed the decision of the licensing justices, not as a conclusion of fact, but upon the ground that Nix, instead of receiving the profits from the sale of the beer received a salary, and had to account to the brewery company for all moneys received, and that this as a matter of law prevented her from being the real resident holder and occupier. In my opinion the quarter sessions were wrong in that conclusion. The fact that Nix received a salary and was accountable to the company for the profits does not of itself in law negative her being in substance and in fact the real resident holder and occupier. Our duty upon the case as stated is to answer the question put to us by the quarter sessions, and we must answer that question in the negative.

Appeal allowed.

Solicitors for the appellants, *F. Osbaldeston & Co.*, for *Green & Williams*, Nottingham.

Solicitors for respondent, *T. B. & W. Nelson*, for *W. T. Cartwright*, Nottingham.

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) June 29.

PURVES v. "STRAITS OF DOVER" STEAMSHIP CO. (LIMITED). (a.)

Ship — Seaman — Termination of service abroad — "Passage home"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 186, *sub-section* 2 (c).

By section 186 *of the Merchant Shipping Act,* 1894, *where the service of any seaman belonging to any British ship terminates at any port out of her Majesty's dominions, the master shall, as one of several alternatives,* (*by sub-sections* 2 (c)) "*provide him with a passage home.*"

Held, that a "passage home" means a passage to the port in her Majesty's dominions at which the seaman was originally shipped, or to some port in the United Kingdom agreed to by him.

Dicta *in* Edwards *v.* Steel, Young, & Co., 45 *W. R.* 689, [1897] 2 *Q. B.* 327, *followed.*

Appeal by the defendants from the judgment of Mathew, J.; reported in [1899] 1 Q. B. 38, 4 Com. Cas. 1.

The action was brought to recover £1 5s. 3d. for passage and maintenance money under section 186, sub-section 2 (*c*), of the Merchant Shipping Act, 1894.*

The facts were as follows: The plaintiff was a sea-going fireman, and the defendants were the owners of the steamship *Straits of Dover*. On the 19th of January, 1898, the plaintiff shipped on board *The Straits of Dover* at Newport, Monmouth, as a fireman, under articles of agreement of that date, wherein the plaintiff's birthplace was described as Everlady, Haddington, his port of engagement address as 4, Windmill-street, Newport, and his home address as 90, Roseley-drive, Denniston, Glasgow, and the intended voyage was described as being "Newport to Rio de Janeiro and (or) any ports or places within the limits of 75deg. N. and 60deg. S. latitude, the maximum time to be one year's trading in any rotation and to end in the United Kingdom or Continent of Europe between the Elbe and Brest (inclusive) at master's option." The plaintiff served on board the vessel on the voyage contemplated, which ended on the 9th of May, 1898, at Antwerp, which is between the Elbe and Brest.

On the termination of the voyage the master paid off the crew at Antwerp, and in addition to their wages tendered, in the manner provided by the Merchant Shipping Act, 1894, to each member of the crew the sum of 12s. 6d. for the purpose of providing him with a passage to Harwich, together with maintenance on the passage. All the members of the crew accepted this sum except the plaintiff, who refused to accept either his wages or his passage and maintenance money unless he were paid in respect of the latter sufficient to enable him to proceed to Newport, and claimed in respect of such passage money and maintenance £1 5s. 3d., which the master refused to pay. The wages due to the plaintiff were remitted in the ordinary course to the Mercantile Marine Office at Newport, where they were received by him. It was agreed that the sums of 12s. 6d. and £1 5s. 3d. were proper sums to provide the plaintiff with passage money and maintenance from Antwerp to Harwich, and from Antwerp to Newport respectively.

Mathew, J., held that, as the master had elected to provide the plaintiff with a passage home under clause (*c*), he was bound to provide the plaintiff with a passage to the port at which he was shipped. He therefore gave judgment for the plaintiff for £1 5s. 3d. claimed.

Joseph Walton, Q.C., and *Lewis Noad,* for the defendants.—The words "passage home" in section 186, sub-section 2 (*c*), of the Merchant Shipping Act, 1894, mean a passage to a home port—that is, a port in the seaman's country. Clauses (*a*) and (*b*) refer to the port at which the seaman was originally shipped or a port in the United Kingdom agreed to by the seaman. The language of clause (*c*) is purposely altered, and does not refer to the same port as that mentioned in clauses (*a*) and (*b*). Section 186 is not confined to British seamen, and the words "passage home" in sub-section 2 (*c*) mean a passage to a port in the seaman's country. "Home" cannot mean the seaman's place of residence, because that may be inland, and the enactment deals only with a sea passage. It must mean some port in the seaman's country, as, for instance, an English seaman would have to be sent to a port in England, an Irishman to a port in Ireland, and so forth. Sections 190, 191, relating to distressed seamen, show that this must be the meaning of "passage home" in section 186, sub-section 2 (*c*). In *Edwards* v. *Steel, Young, & Co.,* 45 W. R. 553, [1897] 1 Q. B. 712, before Collins, J., the question as to the meaning of "passage home" in clause (*c*) was argued, and the learned judge decided that question in favour of the shipowners. In the Court of Appeal, 45 W. R. 689, [1897] 2 Q. B. 327, the question was not argued on the part of the shipowners, and the opinions expressed by the judges, that "passage home" means a passage to the port at which the seaman was originally shipped or to a port in the United Kingdom agreed to by the seaman, were *obiter dicta,* and ought not to be followed.

Robson, Q.C., and *J. D. A. Johnson,* for the plaintiff, were not called upon.

A. L. SMITH, L.J.—Notwithstanding the arguments which have been addressed to us, I see no reason to alter the opinion which I expressed in *Edwards* v. *Steel, Young, & Co.* I have a distinct recollection of that case. Many points were argued in it, at any rate by one side, and all these points were before us. Mr. Joseph Walton, who appeared for the defendants in that case, no doubt argued only one point, but we thought it right to express our opinion upon all the points brought before us.

As to the present case I wish first of all to say in regard to this long Merchant Shipping Act, 1894,

* Section 186 of the Merchant Shipping Act, 1894: "(1) In the following cases, namely: . . . (*b*) where the service of any seaman or apprentice belonging to any British ship terminates at any port out of her Majesty's dominions the master shall give to that seaman or apprentice a certificate of discharge in a form approved by the Board of Trade, and in the case of any certificated officer whose certificate he has retained shall return such certificate to him. (2) The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either (*a*) provide him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped or to a port in the United Kingdom agreed to by the seaman, or (*b*) furnish the means of sending him back to some such port, or (*c*) provide him with a passage home, or (*d*) deposit with the consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home."

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

that in construing a section under one heading or division of the Act, it is generally of little use to look at other sections under other headings. Section 186 occurs in Part II. of the Act under the heading "Masters and Seamen," and under the sub-heading "Leaving Seamen Abroad." By section 186, sub-section 1 (*b*), "where the service of any seaman or apprentice belonging to any British ship terminates at any port out of her Majesty's dominions," then, by sub-section 2, "the master shall also, besides paying the wages to which the seaman or apprentice is entitled, either (*a*) provide him adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman." That clause seems fairly clear. When a seaman is discharged abroad, the shipowner must send him back to the port at which he was originally shipped, or to some port in the United Kingdom agreed to by the seaman. If the shipowner does not do that, he may "(*b*) furnish the means of sending him back to some such port"—that is, to the port specified in clause (*a*); or he may "(*c*) provide him with a passage home." In my opinion that refers to the same port as that described in clauses (*a*) and (*b*)—that is, the port at which the seaman was originally shipped or some port in the United Kingdom agreed to by the seaman. I cannot agree with the view taken by Collins, J., in *Edwards* v. *Steel, Young, & Co.*, that the words "passage home" in clause (*c*) indicate something different from the port described in clauses (*a*) and (*b*). It seems to me that these words merely write short what is written at length in the two preceding clauses. Then comes clause (*d*), which allows the master another alternative—namely, to deposit with the consular officer or merchants such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of the seaman's maintenance and passage home. Supposing the master adopts that alternative, how much is he to deposit? If the defendants' contention is correct, it would be a compliance with the Act if the master deposited a sum of money sufficient to take the seaman to the nearest port in his own country, though the sum deposited were quite insufficient to take the seaman back to the port at which he was originally shipped. According to that contention, if a seaman were shipped at Newcastle and discharged abroad, the master could send him or provide the means of sending him to Falmouth. I cannot think that that is the meaning of the Act. In my opinion the shipowner is not entitled to send him to any port he pleases. It must be to the port at which the seaman was originally shipped or to some other port agreed to by the seaman.

Now with regard to the case of *Edwards* v. *Steel, Young, & Co.* In that case Lord Esher, M.R., said: "The next alternative is 'or (*c*) provide him with a passage home.' Collins, J., appears to have thought that a 'passage home' would include a passage to any port in the United Kingdom. I hardly think that that is the right view. If a seaman were shipped on the Clyde, could a 'passage home' mean a passage to London? I incline to think—and I state my opinion upon this point, though it is not strictly necessary to decide it, because this is a test action and the parties desire to know the construction which we place upon the statute—that a 'passage home' means a passage to the port at which the seaman was shipped, or to some other port in the United Kingdom agreed to by the seaman." That was the opinion of the Master of the Rolls. I see that in the judgment which I delivered in that case I said: "I agree with the Master of the Rolls that a 'passage home' means a passage to the port at which the seamen was shipped, or a port in the United Kingdom to which he agrees to go." Notwithstanding the excellent arguments which have been addressed to us to-day, I remain of the opinion which I expressed in that case. For these reasons I think that this appeal should be dismissed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. The question we have to determine is, What is the meaning of section 186, sub-section 2 (*c*), of the Merchant Shipping Act, 1894? I agree with the view expressed by Lord Esher, M.R., in *Edwards* v. *Steel, Young, & Co.*, and I feel bound to differ from the view of Collins, J., in that case. If we adopt the view of this court in *Edwards* v. *Steel, Young, & Co.*, we give the words "passage home" in clause (*c*) a definite meaning—namely, as being a short way of referring to that which is stated at length in clauses (*a*) and (*b*) when defining the duty of the ship towards a seaman discharged at a foreign port. According to my view, section 186, sub-section 2, contemplates only one obligation imposed on the master in the case of a seaman discharged abroad, and clauses (*a*), (*b*), (*c*), and (*d*) merely define the alternative modes of carrying out that single obligation. If this view is correct, it follows that in using the words "passage home" in clause (*c*) the Act did not mean to create a new or different obligation, but only to provide one of several modes of carrying out the one obligation. It may be said that, if this view is correct, there is no real difference between the several modes provided by the clauses. I think that there is a difference. The obligation is to send the seaman home. Under clause (*a*) the master may send him home by providing him with adequate employment on a British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman. Clause (*b*) gives the master the alternative of sending him home by furnishing him with the means of going to some such port, and I understand that to mean that the master may provide him with money for that purpose. Then clause (*c*) gives the master another alternative—namely, he may provide the seaman with a passage home. I understand that to mean that the master may provide him with a ticket for a passage on some ship bound to the port specified in clause (*a*). The master has, under clause (*d*), another alternative. He may deposit a sum of money to defray the expenses of the seaman's maintenance and passage home. In my opinion these four clauses merely prescribe several alternative modes of carrying out the single obligation to send the seaman home to the port at which he was originally shipped or to some other port in the United Kingdom agreed to by the seaman. Clause (*c*) does not alter that obligation, it only describes the obligation shortly.

ROMER, L.J.—I am of the same opinion. The question seems to me to be a difficult one. It is admitted that the word "home" in clause (*c*) does not mean the residence of the seaman without reference to a port. It does not mean the home address which the seaman has to give when he signs the articles of agreement. I agree that "home" means some port in some place. The word "passage" tends to show that that is so, if there were any doubt about it. The word "home" referring to some port and not to the seaman's residence, it must be remembered that the section has reference only to seamen or apprentices belonging to a British ship. In my opinion the word "home" is used in a general sense so as to exclude a foreign country. It is a word used in reference to a seaman or apprentice

belonging to a British ship, and I do not think it was intended to distinguish, for instance, between Englishmen, Irishmen, Scotsmen, and Welshmen. I think it is used in a general sense of excluding all notion of a foreign country when dealing with a British ship. Taking the word as referring to a home port, is there anything in the section to show that the master is at liberty to select the port and the seaman is to have no voice in the matter? Looking at the enactment as a whole I do not think that the Legislature had any such intention. I think that clause (*c*) must be construed by reference to clauses (*a*) and (*b*), and it means that the seaman must be provided with a passage to some port agreed to by him, or failing an agreement to the port at which he was originally shipped. I see no ground for holding that the master is at liberty to send the seaman to any port, not in a foreign country, which the master may select, having regard to the nationality of the seaman. If the master chooses to provide the seaman with a passage home, he must send the seaman, failing an agreement as to a port, to the port at which the seaman was originally shipped.

Appeal dismissed.

Solicitors for plaintiff, *Pattinson & Brewer.*

Solicitors for defendants, *Botterell & Roche.*

High Court of Justice.

Chan. Div. North, J. — April 11.

THE DUNLOP PNEUMATIC TYRE CO. *v.* NEAL. (*a*).

Patent — Infringement — Repairs — Agent of plaintiff causing infringement by requesting article to be made.

The sale of a patented article implies a license to do simple repairs during the life of the article, but does not authorize a reconstruction of the article, making up precisely the combination which is the subject of the letters patent.

Position of defendant discussed when article is made at request of plaintiff's agent.

Kelly *v.* Batchelar, 10 *Rep. Pat. Cas.* 289, *distinguished.*

Motion.

The fourth claim of the plaintiff's patent was for "a rubber or elastic tyre having the form of a saddle or arch in section lined with canvas in combination with two wires or sufficiently inelastic cores for securing the same to the rims of tyres substantially as herein described."

The plaintiff commenced this action to restrain the defendant from infringing and claimed an interlocutory injunction until the trial of the action or further order to restrain the defendant from infringing the patent by manufacturing or selling pneumatic tyres of the same construction as those described in the specification or only colourably differing therefrom.

From the affidavits of J. T. Rowland it appeared that Rowland took the defendant a worn-out tyre originally made by the plaintiff under the patent. The defendant took out the wires, repaired the same, and re-covered them, so that Rowland received back a new cover constructed precisely on the same lines as the tyres made under the patent.

The defendant by his affidavit alleged that Rowland was the regular agent of the plaintiff, and had, in effect, incited him to infringe, and moreover, that what he (the defendant) did was regularly and as a matter of course done in the trade.

Rowland in his affidavit in reply said, after denying that he was the plaintiff's regular agent: "The plaintiff company informed me that the defendant was making infringing tyres under the guise of repairing old tyres, and asked me to see if it was so. Accordingly I took the old worn-out cycle cover to him and he pointed out how he was going to do what he called repair same, and brought me specimens of the indiarubber strips he intended putting on and told me what the cost would be if I chose the best of them."

Moulton, Q.C., and *J. C. Graham*, for plaintiffs.—The validity of the patent has already been established in other proceedings. What the defendant has done is not repairing, it is making a new article, and there is no license to do that. As to the point that Rowland was the agent of plaintiff and incited the defendant to infringe, this case is distinguishable from *Kelly* v. *Batchelar*, 10 Rep. Pat. Cas. 289, relied on by defendant, for there the person who gave the instructions had authority to do so. Rowland was not so authorized, and only went to find out what defendant was doing.

Terrell, Q.C., for defendant, relied on *Kelly* v. *Batchelar* on the point that Rowland was the agent of the plaintiff, and further, that what the defendant did was *bonâ fide* repairing such as might be done by anyone.

NORTH, J.—First, as regards *Kelly* v. *Batchelar.* That case is distinguishable. There the person who directed the article to be made had authority to do so. In the present case there was no such authority. [The learned judge read the passage from Rowland's affidavit above set out.] What it comes to is that this was an employment of an agent to see what really the defendant would do. The defendant did not know that Rowland was the plaintiff's agent at all, nor did he deal with him on that footing. For this reason it seems to me that this case is not within *Kelly* v. *Batchelar.* Then as regards what was actually done I am in a little difficulty, because there is no suggestion that the defendant has done the same kind of thing before or intends to do it again. There is no threat on his part to continue to infringe in this way, and no injunction that I can grant can prevent his finishing and delivering and receiving payment for the article dealt with in this case. When you look at the fact that the defendant was employed in the way of his trade to do this thing, and asks no questions, but accepts the order and points out the way in which he is going to do it, it may be taken for granted that what he did he did in the course of trade, and that he will do it again if he gets a similar order. I must add that I do not think that the defendant is justified in saying that the mere fact that these wires had been used before in an article made by the plaintiffs is a license to use them again for any article of a similar kind. In my opinion the authority or license given by the fact of sale is to use them till worn out. Simple repairs may be done by a person without a license from the manufacturer; but when the whole thing is taken and practically a new tyre sold with only the old wires in it, I think there is no license to use these old wires for the purpose of putting them into and making up precisely the combination claimed by the patent.

Solicitors, *J. B. & F. Purchase; L. W. Taylor.*

(*a*.) Reported by R. SILLEM, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. March 29; April 12.

CHARNOCK v. COURT. (a.)

Trade union—Watching or besetting—"Place"—Conspiracy and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 7.

Two members of a workmen's union met men who had been brought over from Ireland to replace workmen on strike at the landing-stage of the steamer, informed them of the strike, and paid their railway fares to places unaffected by the strike.

Held, that this was a watching or besetting of a place where workmen happened to be, within sub-section 4 *of section* 7 *of the Conspiracy and Protection of Property Act*, 1875, *as there was nothing in the statute which necessarily implied any prolonged watching, nor was its operation limited to a place habitually frequented by the workmen; nor was this attending at a place merely to communicate information within the proviso at the end of section* 7, *inasmuch as the two members of the workmen's union attended to hold out inducements to the men to go elsewhere.*

This was a motion by the plaintiffs in an action brought by three members of the Union of Master Joiners at Halifax, suing on behalf of themselves and all other members of the union, against the president, the secretary, and one of the members of the executive committee of the Amalgamated Society of Carpenters and Joiners, a trade union registered under the Trade Union Act, 1871, for an injunction to restrain the defendants until the trial of the action from (*inter alia*) watching or besetting the landing-stage at Fleetwood or the railway station at Halifax, or the works of the plaintiffs or any of them, or of any other member of the masters' union or the approaches thereto, or the place of residence of any workman employed by or proposing to work for the plaintiffs or any of them, or any other member of the said union, for the purpose of persuading or otherwise preventing persons from working for the said union or any member thereof, or for any purpose except merely to obtain or communicate information. An objection having been taken that the plaintiffs could not sue on behalf of themselves and all other members of the masters' union, the action being one of tort, the writ was amended by making all members of the masters' union plaintiffs.

It appeared that on the 2nd of January, 1899, a strike commenced, and was still continuing, of the journeymen carpenters and joiners at Halifax. To replace the men on strike the masters brought men from other places, particularly Belfast. The Belfast men were procured through a Mr. Forster, who, on the 20th of February, sent nine men by steamer to Fleetwood and thence by rail to Halifax, and on the next day sent thirteen other men by the same route. Before starting each man signed a document whereby he agreed to work at Halifax as a non-union man for twelve months, and by the same document the master joiners of Halifax bound themselves to find work for the holder for the same period. The nine men arrived at Halifax railway station on the 21st of February, and were there met by three master joiners, of whom one of the plaintiffs was one. The defendant Court was also there. He informed the men of the strike, with the result that only two of them went to work at Halifax. The thirteen men were met at Fleetwood by two men named Walker and Wadsworth, who acted under the instructions of the men's union. Walker and Wadsworth informed the Belfast men of the strike and that if they would go elsewhere to work their expenses would be paid and work would be found for them, and they provided several of the men with tickets for Morecambe and Glasgow, and also with money for one night's lodging. These expenses were paid out of a sum provided for that purpose by the secretary of the men's union. The result was that only four out of the thirteen men went to work at Halifax.

Upjohn Q.C., and *R. J. Parker*, for the plaintiffs.—There has been a watching or besetting within the Conspiracy and Protection of Property Act, 1875, s. 7, sub-section 4. The decision in *J. Lyons & Sons* v. *Wilkins*, 45 W. R. 19, [1896] 1 Ch. 811; *ante*, p. 291, [1899] 1 Ch. 255, shows that to bring the case within the proviso at the end of section 7 the defendants must prove that what was done was merely for the purpose of communicating information. The landing-stage at Fleetwood and the railway station at Halifax are places where the workmen "happened to be" within sub-section 4.

Jenkins, Q.C., *Godefroi*, and *W. L. Richards*, for the defendants.—The words "other place where he happens to be" must be construed with reference to the words immediately preceding and do not include a place to which the general public have access.

Upjohn, Q.C., replied.

Cur. adv. vult.

April 12.—STIRLING, J., stated the facts and continued: The construction of the Conspiracy and Protection of Property Act, 1875, has been considered by the Court of Appeal in the recent case of *Lyons & Sons* v. *Wilkins*. Two points decided in that case are material for the present purpose. First of all it is decided that watching or besetting is unlawful within the meaning of section 7, sub-section 4, unless it is in order merely to obtain or communicate information; and secondly, that watching or besetting a house or other place where the workmen are is unlawful if done in order to compel a master to do or abstain from doing what he has a legal right to abstain from doing or to do. Applying the law thus laid down to what took place on the arrival of the steamer at Fleetwood I think in the first place that the attendance of Walker and Wadsworth there was with a view to deprive the masters of the assistance of workmen brought over from Ireland, and so compel them to conduct their business in accordance with the requirements of the men; secondly, I think that their attendance was not in order merely to obtain or communicate information. Walker and Wadsworth went there provided with money which was used to send the Irish workmen to other places—namely, Morecambe and Glasgow. It seems to me that they went there in order to hold out inducements, and attending at a place to hold out such inducements is, in my opinion, not within the proviso at the end of section 7.

The next question is whether the case is within sub-section 4, which prohibits watching or besetting the house, or the place where a person resides or where he happens to be. It was known or suspected that workmen would arrive at Fleetwood by steamer upon the 22nd of February. Walker and Wadsworth go there, await the arrival of the steamer, and then enter into communication with the men who land. It seems to me that that is watching a place where the workmen happen to be. There is nothing in the statute which defines the duration of the watching. It may be, it seems to me, for a short time, and as to that I refer to the words of the proviso itself which speaks of attending at or near a house or place where the person resides or

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

works or happens to be. The word "attending" does not necessarily imply any lengthened attendance upon the spot, nor is there anything in the statute to limit its operation to a place habitually frequented by the workmen, such as a house where he resides or the place where he works. On the contrary the words "place where he happens to be" seem to me to embrace any place where the workman is found however casually.

[His lordship then considered the question whether the defendants were liable for the acts of Walker and Wadsworth, and came to the conclusion that they were so liable. He then dealt with the case so far as it related to the proceedings at the Halifax railway station, and as to that he came to the conclusion that the evidence was too conflicting to enable the court to grant an interlocutory injunction.

With regard to the proceedings at Fleetwood he granted an injunction in the following terms "to restrain the defendants or their agents or person authorized by them from watching or besetting the landing-stage at Fleetwood or any other place to which any person or persons employed or about to be employed by the plaintiffs or any of them may be brought."]

Solicitors, *Helliwell, Harby, & Evershed*, for *Jubb, Booth, & Helliwell*, Halifax; *Fielder & Fielder*, for *R. Wilkinson*, Halifax.

Chan. Div.
Kekewich, J. } June 24.

In re BLAIBERG AND ABRAHAMS' CONTRACT. (*a.*)

Vendor and purchaser—Disclosure of trust—Mortgagees—Trustees—Devolution of trustees' title.

On a sale of freeholds a mortgage debt thereon was to be paid off. It was inadvertently disclosed that the mortgage money belonged to the mortgagees as trustees of a settlement, and that they were not the original trustees thereof. On a vendor and purchaser summons,

Held, that the vendor must trace the devolution of the title of the trustees from the date of the settlement, in order to enable the purchasers to get a good discharge for the payment of the mortgage money.

On the 12th of October, 1880, the owners in fee of certain freehold property in Stoke Newington mortgaged them to secure £6,000 and interest.

On the 12th of May, 1882, the mortgage debt and security were transferred to Sir J. Commerell and Mr. Pierse Kelly in consideration of £6,000 recited by the deed of transfer to be paid by them out of moneys belonging to them on a joint account.

On the 14th of February, 1899, Benjamin Blaiberg, who had become the owner in fee simple of the property subject to the mortgage of the 12th of May, 1882, entered into an agreement with Louis and Alfred Abrahams to sell the property to them in fee simple in possession free from incumbrances, it being arranged to pay off the mortgage debt of £6,000 out of the purchase-money.

Pierse Kelly, it appeared, had died, and by a mistake the purchasers acquired the knowledge that R. H. Kelly had been appointed as a trustee in his place, that the moneys advanced by Commerell and Pierse Kelly belonged to them as trustees of a marriage settlement of 1848, that they were not the original trustees of the settlement, and that the appointment of the new trustee was invalid. No transfer of the mortgage had, however, been made to him. The purchasers by their requisitions thereupon required to know how the original trustees had been got rid of, and how Commerell and Pierse Kelly had been appointed trustees. The vendor replied that as there had been no transfer to R. H. Kelly, and he had not been duly appointed trustee, in effect all that had happened was that one of the trustees had died, that the trust had not been brought on the title, and although by mistake the fact of its existence had been revealed the purchasers were not affected by it, and that Sir J. Commerell as surviving trustee would give a good discharge for the mortgage money. The purchasers insisted on their requisition. The vendor took out this summons asking that it might be declared that the requisition had been sufficiently answered, and that Sir J. Commerell, as sole surviving trustee of the settlement, could give a good discharge for the mortgage money.

R. F. Norton, for the vendor.—Sir J. Commerell admits he is trustee. If he is not a *de jure* he is a *de facto* trustee for the properly appointed trustees, and as such can give a proper discharge for the mortgage money. It would be contrary to the practice of the court to require us to answer such a requisition as this: *In re Harman and Uxbridge and Rickmansworth Railway Co.*, 31 W. R. 857, 24 Ch. D. 720.

Warrington, Q.C., and *J. M. Solomon*, for the purchasers.—The trusts have been disclosed, and therefore we must see that the money is paid to the person capable of giving a good discharge.

They distinguished *In re Harman and Uxbridge and Rickmansworth Railway Co.*

KEKEWICH, J.—The mortgage in question was made to Sir John Edward Commerell and Mr. Pierse Kelly, and contained the usual recital that the money advanced belonged to them upon a joint account. That, of course, would have enabled Sir J. Commerell now to give a receipt for the mortgage money on the death of Mr. Pierse Kelly being proved. It may be that if, contrary to the usual and more cautious form, the mortgage deed had contained a recital showing that the mortgagees held the money as trustees on the joint account, there would nevertheless have been no difficulty on the payment now being required to be made to the survivor of the original trustees. But unfortunately a slip has been made here, and the trusts of the settlement upon which the mortgagees held this money have been disclosed. That shows not only who are beneficially entitled under the settlement, but also that Sir J. Commerell and Mr. Pierse Kelly were not the original trustees of the settlement. It may be that they never were trustees at all or that they held the money as trustees for the duly appointed trustees, but it is not shown that they were at the date of the mortgage the properly appointed trustees of the settlement. It follows that there is nothing to satisfy the purchasers that Sir J. Commerell is the surviving trustee of the settlement. Are they, therefore, entitled to ask that? It is better perhaps to put it a little stronger and to inquire whether they are bound to ask it, that is, for their reasonable protection? They are not, if they can get a proper discharge from Sir J. Commerell, if as a matter of fact and in law Sir J. Commerell is the surviving trustee of the settlement. Counsel for the vendor argues, and with perfect soundness, that Sir J. Commerell has acknowledged himself to be the trustee, and that he therefore is a trustee for all the persons entitled under the settlement. But that does not show that he is the person capable of giving a good discharge for the mortgage money. Then, the trusts of the settlement having been disclosed, and not merely the beneficial trusts

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

of the estate but the title of the trustees, it seems to me that, although the risk in this case is perfectly trifling and inappreciable, still a purchaser cannot be too careful, and if it should in fact turn out that there was some flaw in the appointment of Sir J. Commerell, then the purchasers would not have paid the money to the *de facto* or the *de jure* trustee of the settlement and the result would be that if the difficulty hereafter arose, they would have to prove that Sir J. Commerell had accounted to the persons who could give a complete discharge. The objection taken is extremely technical, but I cannot hold that the purchasers are wrong in saying that they must have a complete discharge, which I think the vendor must give them. With regard to the case before Pearson, J., of *In re Harman and Uxbridge and Rickmansworth Railway Co.*, I think it does not govern this case, because there the trust deed was not disclosed. All that was disclosed there was that the testator was a trustee. But there was nothing to show that originally any person other than the testator ever had anything to do with the trust. If there as here the trusts had been disclosed it might have been necessary to go into the title of the trustees, notwithstanding the reluctance with which Pearson, J., would have done so; a reluctance which I share. I must therefore make a declaration that the requisition has not been sufficiently answered.

Solicitors, *Gordon, Dalbiac, & Pugh; Edward Le Voi.*

Chan. Div. }
Kekewich, J. } June 22.

In re MARYON-WILSON.
WILSON *v.* MARYON-WILSON. (*a.*)

Inland revenue—Settlement estate duty—Incidence—Property settled by instrument outside will—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 2, 4, 5, 6, 8—*Finance Act,* 1896 (59 *&* 60 *Vict. c.* 28), *s.* 19.

Where property given by the will of a testator is settled, not by the will itself, but by an instrument outside the will, settlement estate duty must be borne, not by the testator's general residue, but by the settled property.

By a settlement dated the 23rd of July, 1895, made on the marriage of Eva K. Maryon-Wilson with G. C. Hardy, Sir Spencer Maryon-Wilson, the father of the wife, covenanted, in consideration of the marriage, with the trustees of the settlement, and also separately with the husband and wife, that his executors or administrators should, within six months after his death, pay to the trustees of the settlement £25,000 with interest at 3½ per cent. from the date of his death "without any deduction." And it was further declared that the trustees should hold the £25,000 upon the trusts thereinafter declared in favour of the wife, the husband, and the issue of the marriage, with an ultimate trust in favour of Sir Spencer Maryon-Wilson, his executors, administrators, and assigns.

Sir Spencer Maryon-Wilson died on the 31st of December, 1897, having by his will dated the 1st of August, 1896, devised certain freehold estates to the trustees of his will for a term of 2,000 years upon trusts to raise thereout and pay, *inter alia*, £25,000 to the trustees of the marriage settlement in performance of his covenant to that effect in the settlement. The testator also declared that estate duty and further estate duty in respect of any devises, legacies, or bequests made by him, should be borne by the respective devisees and legatees.

This was a summons by the trustees of the will to determine how as between themselves and the trustees of the marriage settlement (1) the rateable part of the estate duty, and (2) the settlement estate duty in respect of the sum of £25,000 ought to be borne. It was admitted that the estate duty must be borne by the testator's general residue.

O. L. Clare, for the executors and trustees of the will.—If the £25,000 had been settled by the will itself, settlement estate duty, which is a different duty from estate duty, would be payable by the trustees of the settlement out of the settled property under section 19 of the Finance Act, 1896 (59 & 60 Vict. c. 28). It has, however, been settled by an instrument outside the will—namely, the marriage settlement, the trustees of which ought to pay it. Moreover the £25,000 was not property of which the testator was at the time of his death "competent to dispose" under section 2 (1) of the Finance Act, 1894 (57 & 58 Vict. c. 30), for it was a debt due from his estate. He also referred to sections 6 (1) (2) and 8 (3) of the Finance Act, 1894.

Crawley, for the trustees of the marriage settlement.—Settlement estate duty is part of estate duty and ought, therefore, to be borne by the general residue: *In re Webber, Gribble* v. *Webber*, 44 W. R. 489, [1896] 1 Ch. 914; Finance Act, 1894, s. 5 (1) (*a*). The Finance Act, 1896, s. 19, does not apply to this case: *In re Gibbs, Thorne* v. *Gibbs*, 46 W. R. 477, [1898] 1 Ch. 625. All the duties are payable out of the testator's general residue, for he covenanted to pay "without any deduction": *In re Parker-Jervis, Salt* v. *Locker, ante*, p. 147, [1898] 2 Ch. 643.

He also referred to section 8 (3) of the Finance Act, 1894.

Austen Cartmell, for another party interested.

KEKEWICH, J.—The distinction to be borne in mind is that between a legacy including a share of residue settled by a will and a legacy or share of residue given whether in satisfaction of an obligation or merely as an act of bounty to persons who either themselves have agreed to make a settlement or to persons who as trustees are recipients under an outside settlement creating limitations in succession which render it liable to settlement estate duty under the Finance Act. That is the distinction, and it is a distinction which has been approved both by judicial decision and by legislative enactment in the Finance Act, 1896, which has overruled, and by overruling has recognized as right under the Act of 1894 the decision of North, J., in *In re Webber, Gribble* v. *Webber*. There the testator had made a bequest, in a form with which conveyancers are very familiar, on certain trusts for the daughter-in-law for her life with remainders over according to the usual trusts of a marriage settlement, and North, J., held that in a case of that kind the legacy must be paid free of all estate duty, and the mere fact that the bequest was itself settled made no difference. The result was that not only was the ordinary estate duty ordered to be paid out of the testator's general estate on the whole of the testator's estate, including the bequest, but also the additional settlement estate duty which attached to the settled legacy. North, J., considered that if that was not done the testator's intention to give the legacy would not be carried out, for if settlement estate duty were deducted from the legacy the beneficiaries under the will would not receive what the testator intended to give them. That is the substance of North, J.'s, decision. Then the Legislature interposed, and by the Finance Act of 1896, s. 19, provided that "the settlement estate duty leviable in respect of a legacy or other personal

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

property," that includes, of course, a share of residue, "settled by the will of the deceased shall, unless the will contains an express provision to the contrary, be payable out of the settled legacy or property in exoneration of the rest of deceased's estate." That section overrules North, J.'s, decision, thereby, however, recognizing that that decision was a right one on the Act of 1894, because an Act of Parliament would not have been required unless the decision had been right. That section, however, leaves at large the question how settlement estate duty is to be borne when the settlement is made outside the will. In this case the settlement was not only within the testator's knowledge, but he was a party to it himself, and he had covenanted that his executors would pay the £25,000 after his death. What he did by his will was merely to perform the obligation, not to give the legacy. But what difference does that make? Suppose he had covenanted to pay to his daughter this £25,000, and she had then settled it by an independent instrument; or suppose he had merely bound himself by a voluntary bond to pay £25,000 to a person who, without the testator being a party to the transaction, had then settled it; or suppose a case where the settlement follows a long time after the covenant, how could it be said that the testator had put himself under an obligation to pay the settlement estate duty which attached by virtue of the settlement made, not by the testator, but by the person to whom the testator was bound to pay the £25,000. I see no reason for it in the Finance Acts, and see no reason for it on principle. I agree with the argument of counsel for the executors when he says that section 8 (3) and (4) of the Finance Act, 1894, rather assists him than his opponents. I think that the testator's estate has performed its duty when the £25,000 has been handed over intact and free of the ordinary estate duty to the trustees of the marriage settlement. Either because the testator covenanted to pay it to the trustees, or because he covenanted to pay it to his daughter, who has to give it to the trustees (that, to my mind, being quite immaterial), the trustees must bear the burden of the settlement estate duty. They are accountable for that additional duty in respect of what comes to them as settled property.

Then it is argued that the testator covenanted to pay this £25,000 "without any deduction," and that "deduction" ought to cover estate duty. Be it so. The result is, the executors must pay £25,000 free of estate duty, but not free of the duty which attaches to the settlement which is made of that £25,000. In other words they are bound to pay the duty which intervenes between the estate which pays and the estate which receives—that is, the ordinary estate duty. The trustees are to receive £25,000 without any deduction on account of the ordinary estate duty, but having so received it they hold it as a settled fund, and they are liable to pay the additional settlement estate duty. I think, therefore, that the distinction which is contended for exists, and that when property is settled, not by the will itself, but by an instrument outside the will, settlement estate duty must be borne by the settled property. I hold, therefore, that the executors must pay the ordinary estate duty out of the testator's general residue, and that the additional settlement estate duty must be paid out of the £25,000 by the trustees of the marriage settlement.

Solicitors, *Bell, Steward, May, & How; Evans, Foster, & Wadham.*

Q. B. Div. (Grantham and Bruce, JJ.) July 4.

BELTON v. BUSBY AND ANOTHER. (a.)

Gaming—Betting-house or room—User—Public-house—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119)—*Licensing Act,* 1872 (35 & 36 *Vict. c.* 94). *s.* 17 (2).

A professional betting man went day by day, between the hours of 12 *noon and* 3 *p.m., to a public-house. He generally sat in the part of the house known as the saloon, and there conducted the business of ready-money betting, receiving bets and stakes and paying the bets when won. The proprietor and licensee of the public-house was aware of and consented to what the betting man did, but the latter paid no rent. Besides the betting business the ordinary business of a public-house was carried on in the saloon. The betting man had no interest in the latter business, neither had the licensee of the public-house any interest in the betting business.*

Held, that the betting man used the public-house for the purpose of betting with persons resorting thereto, and was therefore guilty of an offence against section 3 *of the Betting Houses Act,* 1853, *and that the licensee was guilty of an offence against section* 17 (2) *of the Licensing Act,* 1872.

Case stated by a Metropolitan police magistrate under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

The respondent Alfred Woods was charged before the magistrate upon five summonses issued at the instance of the appellant, for that he, on the 25th of February, the 1st, 2nd, 3rd, and 4th of March, 1899, being a person using the Royal Pair beerhouse, Gloster-grove, Kensington, did use the same for the purpose of betting with persons resorting thereto, contrary to section 3 of the Betting Houses Act, 1853.

The respondent Samuel Busby was charged for that he, on the same dates, being the licensee of the Royal Pair beerhouse, did suffer it to be used by Alfred Woods in contravention of section 3 of the Betting Houses Act, 1853, contrary to section 17, sub-section 2, of the Licensing Act, 1872.

The following facts were proved:

The respondent Woods was a professional betting man or bookmaker. The respondent Busby was during all material times the keeper and proprietor and licensee of the Royal Pair beerhouse.

On each of the days to which the summonses referred Woods came to the Royal Pair beerhouse shortly after 12 noon, and remained there till shortly before 3 p.m. Busby was always present in the beerhouse when Woods was there, and it was found by the magistrate as a fact that what Woods did in the beerhouse was done with the knowledge and permission of Busby. Woods only bought beer at the beerhouse on one occasion, and on two occasions he sent out for, and bought elsewhere, a bottle of whiskey, which was drunk by both Woods and Busby. Except for some cigars and for the beer bought on the occasion above referred to Woods was not a customer of the beerhouse.

The business of the beerhouse was carried on on the ground floor. The business premises consisted of a bar, a saloon, a public bar, and a tap-room.

In the saloon there was a screen or partition which partially divided one part of it from the other. Woods always came to the saloon and generally remained near and on one side or the other of the partition. He went from there to other parts of the saloon and to the public bar and tap-room as occasion arose, returning to the neighbourhood of the partition. While he was in the saloon Woods received bets,

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

which were generally made at starting prices. Slips of paper, bearing the names of the dog or horse backed, together with the money staked, were handed to him by persons wishing to make a bet, and when a bet was won Woods paid the money in the saloon. Disputes and discussions about the bets also took place in the saloon. Bets occasionally also took place between Woods and Busby and were settled over the counter in the saloon.

The two respondents conversed about bets, horses, and racing. Woods invited persons coming to the house to bet with him, sometimes successfully and sometimes unsuccessfully, the man invited making an excuse, such as that he had no money. The magistrate found on these facts that Woods conducted in the saloon the business of ready-money betting, and stated that the evidence led to the inference that Woods was known to his customers to be at the above-mentioned times at the Royal Pair beerhouse and to carry on his betting business there, and that persons did come there for the purpose of transacting betting business with him.

Apart from the betting business carried on by Woods the ordinary business of a beerhouse was carried on at the Royal Pair beerhouse. Woods had no interest of any sort in the latter business or in the house itself. He did not take any part in the management of the house, nor had he any control over the business of the house. There was no evidence that Busby had any interest in bets made by Woods.

The magistrate dismissed the summons against both respondents, holding that the respondent Woods did not use the bars of the beerhouse in such a manner as to constitute an illegal user within the meaning of the Betting Houses Act, 1853, and that the respondent Busby did therefore not permit an illegal user of his house.

Section 3 of the Betting Houses Act, 1853, enacts that "any person who, being the owner or occupier of any office, house, room, or other place, or a person having the same, shall open, keep, or use the same" for the purpose of betting with persons resorting thereto shall be liable to a penalty.

Section 17 of the Licensing Act, 1872, enacts that if any licensed person . . . (2) opens, keeps, uses, or suffers his house to be opened, kept, or used in contravention" of the Betting Houses Act shall be liable to a penalty.

Danckwerts, for the appellant.—The case shows that Woods conducted the business of betting at the beerhouse, and that he was generally known to be there for the purpose of that business at certain times. The effect of *Powell* v. *Kempton Park Racecourse Co.*, *ante*, p. 585, [1899] A. C. 143, was that, to be within the Betting Houses Act, a person must have some different right to be in the place where the prohibited act is done than the right possessed by the ordinary frequenter. This right Woods had, for Busby consented to his using the bar of the beerhouse he did, and so, in effect, gave him a license to carry on his betting business there. It was not necessary to show that Woods owned or occupied the premises. All that it was necessary to show was that he was entitled to use them for his betting business. *Hornsby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20, is in point. Woods committed an offence against the Betting Houses Act it is clear that Busby committed one against the Licensing Act: *M'William* v. *Dawson*, 15 J. P. 182.

The respondents did not appear.

GRANTHAM, J.—I am sorry that no one appears here to-day on behalf of the respondents, because it is possible that we may have overlooked some argument in their favour. Nevertheless, I am bound to say that I have no doubt that our judgment ought to be in favour of the appellants. The better course is for me to deal first with the case of Woods, because if Woods ought to have been convicted, it is clear that Busby ought to have been convicted also.

The great distinction between this present case and the cases of *Hawke* v. *Dunn*, 45 W. R. 359, and *Powell* v. *Kempton Park Racecourse Co.* is this, that in the case of racecourses persons go there in order to bet with each other. All are treated alike, whether they be backers of horses or bookmakers. A man goes to the enclosure either to get a better view of the races, or because he wants to back a horse and he hopes to find there someone who, holding an opposite view about the capabilities of the horse, will bet against him. Persons such as these, whether they be bookmakers or backers, are not in any sense owners or proprietors of the enclosure, nor are they, therefore, keeping or using the enclosure for betting in the sense intended by the Betting Houses Act. That is the general effect of the judgments delivered in the *Kempton Park case*. What we have to see is, whether the public-house kept by Busby in such a way that a professional bookmaker used it for the purposes of his betting business is in the same position as an enclosure on a racecourse. It seems to me that the two cases are quite distinct, and that the user of the public-house by Woods was clearly within the mischief of the Betting Houses Act.

In that Act the Legislature were probably trying to put a stop to the keeping of betting-houses used solely for betting. But then, as soon as the bookmaker found that he could not keep a betting-house of that kind, by ordering a bottle of whiskey or other drink he induced the proprietor of a public-house to allow him to carry on his business there. It brought trade to the house, and, in the present case, it suited Busby to give Woods the right to be on his premises day after day. No rent was paid for the right; still, Woods had something in the nature of a license to be there, and he was there regularly and at certain defined times for the purpose of making bets. The public-house became, in effect, as much a betting-house as the betting-houses against which the Act of 1853 was specially levelled. The word "place" was introduced into the Act because, when the bookmakers were excluded from the house, they would conduct their business in a place outside, such as a back-yard, and it was intended to bring persons using such places also within the meshes of the enactment. In my opinion Woods did use the public-house for the purpose of betting with persons resorting thereto within the meaning of the Act. The house was in fact just as much a betting-house as if it had been a room which Woods had hired for the purposes of his betting business.

That being so, I think that Woods was guilty of an offence under the Betting Houses Act, 1853, and that Busby was guilty of an offence under the Licensing Act, 1872. The case will therefore be remitted to the magistrate with this expression of our opinion.

BRUCE, J.—I agree. This room was used by Woods for the purpose of betting with persons resorting thereto. He used it in the sense that he regularly resorted there. He resorted there day by day, and was the person in control of the betting business carried on there. I entertain no doubt that Woods was guilty of the offence with which he was charged. What Woods did was done with the entire consent of Busby, and therefore Busby was guilty of the offence of suffering his licensed premises to be used in contravention of the Betting Houses Act.

Case remitted to the magistrate.

Solicitors for the appellant, *Wontner & Son.*

Q. B. Div.
(Grantham and Bruce, JJ.) June 15.

JEFFREY v. WEAVER. (a.)

Licensing law—"Keeping open for sale" of liquors after closing hours—Doors closed and locked—Customers afterwards seen to leave the premises—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

The respondent was summoned for "keeping open" his licensed premises after closing hour, contrary to section 9 *of the Licensing Act,* 1874. *The evidence in support of the summons was that the house was duly closed and the doors locked at* 11 *p.m., but that two customers remained inside drinking until* 1.30 *a.m., when they were seen to leave the premises by the back door.*

The justices dismissed the summons, on the authority of Tennant *v.* Cumberland, 7 *W. R.* 161, 1 *E. & E.* 401, 23 *J. P.* 51, *and* Jefferson *v.* Richardson, 35 *J. P.* 470.

Held, on appeal, that the justices were right, since the evidence did not prove that the house was "kept open" within the meaning of section 9.

Special case.

Appeal by informant from a decision of the justices for the county of Worcester dismissing a summons against the respondent for keeping open his licensed premises for sale of intoxicating liquors after closing hour (in this cases 11 p.m.), contrary to section 9 of the Licensing Act, 1874.

The case stated that the justices had found as facts that the house was required to be closed at 11 p.m. At 11.25 p.m. two men were heard by the police from the outside to be talking in the bar. Both the front and back doors of the premises were then found to be locked. To allow the passage to be swilled with water, as was customary at night, the front door was opened and the police sergeant went in and found two men, and the respondent's wife in the act of handing them glasses of whiskey and soda. It was said that they were friends who were going to stay there that night and had taken beds. It was subsequently admitted that both men had been supplied with liquors as ordinary customers between ten and eleven o'clock, and had stayed on after closing hours at the invitation of the respondent's wife, who managed the business. The evidence of the police was that at 1.25 a.m. the respondent's wife opened the front door and looked out, and at 1.30 a.m. the men left by the back door and ran down the lane. When the police officer called the respondent's attention to this, he said, "I can't help it, it is my wife's fault."

The justices, when the summons came before them, were of opinion that they were bound by the decisions in *Tennant* v. *Cumberland*, 7 W. R. 161, 1 E. & E. 401, 23 J. P. 51, and *Jefferson* v. *Richardson*, 35 J. P. 470, and that to establish a charge of keeping open a licensed house there must be evidence that the outer door was open or ajar, or that someone was ready to open it and admit when notice was given by a customer. In the present case it was admitted that both the outer doors were locked at 11.25 p.m., and they dismissed the summons on the ground that there was no evidence that the house had been kept open, and they gave their determination against the appellant without calling for or hearing any evidence on behalf of the respondent.

Amphlett, Q.C. (*Sidney Clarke* with him), for the appellant.—The sole question here is whether there was evidence upon which the justices ought to have convicted. The Legislature in the Act of 1874 used the phrase "open" and also "keeping open," and the offence of "keeping open" consists of continuing to do business with customers who remain on after closing hours and after the doors of the house have been closed. If that submission is correct then there is evidence upon which the justices ought to have convicted: *Finch* v. *Blundell*, 26 J. P. 71; *Thompson* v. *Greig*, 34 J. P. 214. In *Brewer* v. *Shepherd*, 36 J. P. 373, and *Brigden* v. *Heighes*, 24 W. R. 272, 1 Q. B. D. 330, the court held that the evidence of keeping open was insufficient to support a conviction, but the distinction between the offence of keeping a house open—*i.e.*, not closing licensed premises to the exclusion of customers, and keeping open the house—*i.e.*, doing trade with customers already on the premises after closing hours, is one that ought not be drawn, for there is nothing in the Act to warrant it. Moreover, it is a distinction without any practical difference, and is opposed to the whole object for which the statute was passed. The justices were therefore in error when they considered that the two cases referred to by them in the special case were conclusive in favour of the respondent.

J. B. Matthews, for the licence-holder.—The justices were right in dismissing the summons, for under the statute a victualler may be charged either with selling during prohibited hours or with keeping open his house during such time, and the present proceedings seem to be an attempt on the part of the police to get rid of the difference between these two offences. There is no evidence of this house having been kept open for the purpose of giving access to outsiders to enter and obtain drink. In *Tennant* v. *Cumberland* the house was found closed, and it was held that, though a man was found there at 2 a.m. on Sunday, there was no evidence of "keeping open" the house, or that the man there had not been let in on the previous Saturday night. Crompton, J., in that case said it was a wrong offence that was charged, it should have been that of serving during prohibited hours, for there was no evidence of the house having been kept open during prohibited hours merely because a stranger was found on or was seen to leave the premises. In *Jefferson* v. *Richardson*, also, the Queen's Bench held that there was not sufficient evidence to support the conviction of keeping open, though there might have been sufficient evidence of wrongful selling.

THE COURT dismissed the appeal.

GRANTHAM, J.—I feel this to be a case of some difficulty, but upon the whole I think the safer view to take is for us to hold that the expressions "opening" and "keeping open" in the enactment under consideration must have their ordinary interpretation—namely, that the house must be open or kept open for the purpose of people going in, and not merely for the purpose of serving people already there. If people stay on to have drink after proper hours that would constitute another offence. Selling liquor during prohibited hours is a distinct offence, and in all the cases that have been cited the judges have kept strictly to the evidence of "keeping open" in the particular case. Here the people were proved to have been in the house before closing time and it was admitted that the house was in the ordinary sense closed, for both the front and the back doors were locked and the police could not get in at either of them. Indeed, they would not have got in but for the man who was engaged in swilling the floor. Taking the facts as admitted or proved in the case I think that the house was not open or kept open in the ordinary sense for people outside to go in, and I ought not in face of the authorities cited to hold that there was evidence here of keeping open to support a

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law

conviction within the words of the statute. The appeal fails and must be dismissed.

BRUCE, J., concurred.

Appeal dismissed.

Solicitors for the informant, *Clarke & Blundell*, for *S. Thorneley*, Bromsgrove.

Solicitors for the respondent, *Thomas White & Sons*, for *J. & F. Holyoake*, Worcester.

Q. B. Div.
(Darling and Channell, JJ.) April 25.

BASTER *v.* LONDON AND COUNTY PRINTING CO. (*a.*)

Master and servant—Dismissal—Negligence.

The question whether a single act of forgetfulness on the part of a servant will justify his dismissal without notice depends upon the character of the act.

A workman having the charge of a valuable machine, through forgetfulness, caused damage to the machine to the extent of £30.

Held, that his employer was justified in dismissing him without notice.

Case stated by a Metropolitan police magistrate.

A complaint was made by the appellant before the magistrate claiming £4 8s., two weeks' wages alleged to be due to the appellant in lieu of notice.

The appellant was in the employ of the respondents, and on the 16th of December, 1898, had charge of a printing machine called the "Century," which was worth £800. While he was in charge of it a cylinder called the "top rider" got jammed into the machine and did damage to the extent of £30. When the appellant was asked by the respondents' manager for an explanation, he replied that the top rider had jumped out of the forks in which it revolved and so fouled the machine. The respondents' manager did not accept the appellant's explanation, but believing that the appellant had caused the accident by omitting to place the top rider in its proper position in the forks before starting the machine, as it was his duty to do, paid him the wages then due to him and dismissed him without notice.

The magistrate was satisfied that the only way in which the accident could have occurred was by the appellant's forgetfulness to fix the end of the top rider in the forks before starting the machine, notwithstanding the appellant's strong belief that he had done so, and the magistrate held that such forgetfulness in the performance of an important part of the appellant's duty amounted to neglect which justified his dismissal without notice. He accordingly dismissed the complaint subject to this case.

It was admitted that, apart from this ground of dismissal, the wages would have been due.

W. M. Thompson, for the appellant.—Forgetfulness upon a single occasion is not a sufficient ground of dismissal, and does not amount to neglect. Neglect to be a ground of dismissal must be habitual. Parke, B., in *Callo* v. *Brouncker*, 4 C. & P. 518, enumerates the grounds of dismissal. They are: "Moral misconduct, either pecuniary or otherwise, wilful disobedience, or habitual neglect." See also *Edwards* v. *Levy*, 2 F. & F. 94.

Colam, for the respondents.—The principle on which dismissal without notice is justified is that, if a servant has behaved himself in such a way that it would be manifestly injurious to his master's interests to retain him in his employ, the master is justified in dismissing him. Whether that was so in the present case is a question of fact which the magistrate has found in the respondents' favour.

DARLING, J.—The magistrate was right. It has been argued that forgetfulness cannot amount to neglect. That cannot be so, because negligence or neglect as often arise out of forgetfulness as from anything else. That it should be a ground for dismissal in every case does not follow. The act of forgetfulness might be of so trivial a nature as not to be a ground for dismissal. But to be forgetful in a matter which might cause damage to the master or his property or to the other servants, that was forgetfulness of so serious a character as to amply justify dismissal. For instance, in the case of a signalman, who would say when he omitted to signal a train, and so occasioned a railway accident, that he did it from any cause but forgetfulness. Yet no one would say that such an act on his part would not justify his instant dismissal. Another argument was that negligence is not negligence such as to justify dismissal unless it is habitual. How many times may a servant be negligent? Twice, or three times? That argument is as dangerous for the working man as for his employer. You have a complicated machine, one moment of forgetfulness in the management of which might cause the death of hundreds, and yet it is said that negligence in the person having the care of such a machine is not negligence which justifies his dismissal unless it is habitual.

CHANNELL, J.—I am of the same opinion. It is impossible to give an exhaustive definition of negligence that would justify the dismissal of a servant. Whether a single act of negligence would justify dismissal depends upon the character of the act. The magistrate was right, and it is sufficient to say that on the facts the dismissal of the appellant was justified. It is a question of fact.

Appeal dismissed.

Solicitor for the appellant, *George Jolly*.

Solicitors for the respondent, *Powell & Skues*.

Q. B. Div.
(Lawrance and Channell, JJ.) Feb. 17.

REG. *v.* DR. TRISTRAM (JUDGE OF THE CONSISTORY COURT OF LONDON). (*a.*)

Ecclesiastical law — Burial—Disinterment—Faculty—Jurisdiction of Consistory Court—Burial Act, 1857 (20 & 21 *Vict. c.* 81), *s.* 25.

An ecclesiastical court has no power, in granting a faculty to disinter a body buried in consecrated ground, to cite the cemetery company to whom the ground belongs to appear before it for the purpose of making an order against such cemetery company that the body should be disinterred.

A faculty was granted by an ecclesiastical court to open a certain vault in consecrated ground and to open the lid of a coffin interred therein. In order to open the lid of the coffin it would be necessary to remove another coffin which contained a body.

Semble, *that a licence of a secretary of state, pursuant to section 25 of the Burial Act*, 1857, *was required for such removal in addition to the faculty.*

Rule to the judge of the Consistory Court of London for a prohibition to prohibit him from citing

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the directors, proprietors, and the secretary of the London Cemetery Co. to appear before him for the purpose of binding them by orders and directions inserted or to be inserted in a faculty.

On the 9th of March, 1898, an *ex parte* application was made by Anna Maria Druce and Sidney George Druce to the judge of the Consistory Court of London for a faculty to open a certain vault in the consecrated portion of the North London Cemetery at Highgate, the property of the London Cemetery Co., and to open the lid of a coffin interred therein with the view of ascertaining whether the coffin contained the remains of Thomas Charles Druce, and to remove, so far as was necessary for that purpose, other coffins in the vault.

The surviving executor of the will of Thomas Charles Druce and certain of the children of Thomas Charles Druce and their descendants intervened and opposed the application.

A petition was then filed and it appeared upon the affidavits that in order to examine the coffin of Thomas Charles Druce it would be necessary to remove the coffin containing the remains of Annie Maria Druce, his widow.

A question arose during the hearing of the petition as to whether, having regard to section 25 of the Burial Act, 1857, it was necessary to obtain the licence of a secretary of state to open the coffin said to contain the remains of Thomas Charles Druce and to remove that containing the remains of Annie Maria Druce.

On the 25th of November, 1898, the judge of the Consistory Court delivered judgment upon the application and decreed a faculty to issue after the expiration of fifteen days, the terms of the faculty to be settled by the registrar. He also held that it was not necessary for the petitioners, in order to enable them to act upon the faculty, to obtain a licence from a secretary of state.

On the 14th of December, the judge of the Consistory Court issued a citation to the directors, proprietors, and the secretary of the North London Cemetery Co. to appear before him to show cause why he should not, in pursuance of his decree of the 25th of November, insert in the faculty to be issued an order on the directors, proprietors, and the secretary of the company, as custodians of the consecrated ground in which the vault and coffin, the subject of the faculty, were, by themselves or their agents to execute the directions contained in the faculty, or to admit Anna Maria Druce or her agents to the cemetery to execute such directions. The citation was served at the offices of the cemetery company on the 16th of December. The company thereupon applied for, to the High Court, and obtained, the present rule for a prohibition.

Section 25 of the Burial Act, 1857, provides as follows: "Except in the case where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body which may have been in any place of burial, without licence under the hand of one of Her Majesty's principal secretaries of state, and with such precautions as such secretary of state may prescribe as the condition of such licence; and any person who shall remove any such body or remains contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal shall, on summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding £10."

Statham (*Campbell Johnson* with him) shewed cause.—The cemeteries belonging to the London Cemetery Co. are excluded from the operation of section 25 of the Burial Act, 1857, by section 54 of the Burial Act, 1852 (15 & 16 Vict. c. 85), into which the Act of 1857 is incorporated. That section provides: "Nothing in this Act contained shall extend to take away, diminish, alter, or prejudice any of the rights, powers, or authorities vested in any of the cemetery companies incorporated under the several Acts mentioned in the said schedule (B) of this Act, but all such rights, powers, and authorities shall be as good, valid, and effectual as if the Act had not passed." The Act incorporating the London Cemetery Co. is one of those referred to. The application of section 25 to the cemeteries of the London Cemetery Co. would involve an interference with the rights, powers, and authorities of the cemetery company. The judge of the Consistory Court has power, in the exercise of his jurisdiction over vaults and graves, to cite persons to appear before him who have an interest in the subject-matter of a faculty which is being prayed for: *Bulwer* v. *Hase*, 3 East 217. This is his time-honoured right. Further, it is the well-established practice of the Consistory Court to cite persons who are the custodians of consecrated ground, and to order them to do specific and positive acts. Whether the court has machinery to see that its orders are carried out is a different question. Though it cannot attach for contempt, it can punish the delinquent by admonition and by condemning him in costs. If the court made a wrong order that would be matter of appeal and not for a prohibition. It is conceded that prohibition would lie if the court attempted to try a common law right, such as the ownership of a grave. But here no attempt is being made to try the ownership of the grave. The court has jurisdiction to grant a faculty to open the grave in spite of the protest of relations of the persons buried therein or of the owner of the grave, and it has power to order it to be done: *Bradford* v. *Fry*, 4 P. D. 93. [CHANNELL, J.—There the order was to remove something in a church which was placed there illegally.] In *Adlam* v. *Colthurst*, L. R. 2 A. & E. 30, 16 W. R., A. & E. Dig. 16, the order was made against a person who was not even the custodian of the consecrated ground, but a mere parishioner. [CHANNELL, J.—In both these cases the persons against whom the order was made were persons who had done something without first obtaining a faculty to do it.] The court has power to make an order upon the custodians if they do anything wrong. The cemetery company would be doing something wrong if they obstructed the doing of the acts authorized by the faculty. The court has power to order the cemetery company to assist in the execution of the acts authorized by the faculty, and has power to insert such orders in the faculty.

Sir R Finlay, S.G. (*Sir R. Webster, A.G.*, and *H. Sutton* with him), in support of the rule, on behalf of the Home Secretary.—The argument that section 25 of the Act of 1857 does not apply, on the ground that section 54 of the Act of 1852 reserves the rights and privileges of certain cemetery companies, is not valid. The cemetery companies could not be said to have a right to stop people from disinterring dead bodies. The right or privilege referred to in section 54 is some special privilege acquired by some particular cemetery company: *Reg.* v. *Sharpe*, 5 W. R. 318, 7 Cox C. C., 214. [CHANNELL, J.—We decided that point, raised in relation to another Act, in *Starey* v. *Graham*, *ante* p. 392, [1899] 1 Q. B. 406.] The only exception to section 25 is in the case of removal of a body from one consecrated place of burial to another. It was considered by the Legislature that in that case a faculty was sufficient. But here it is a case of the

removal of a body to be put back again in its original position. That case falls within the body of the section, and the licence of the Home Secretary is accordingly required for such removal.

Danckwerts (*Somers James* with him), in support of the rule, on behalf of the London Cemetery Co., was stopped.

LAWRANCE, J.—The real question in this case is whether the judge of the Consistory Court has a right, while exercising his jurisdiction to grant a faculty for the disinterment of a body buried in the consecrated ground of a cemetery, to cite the cemetery company to appear before him and to order them to disinter the body. The faculty itself is a mere licence, and there appears to be no authority for the powers claimed by the judge of the Consistory Court. The cases cited to us in support of the pretensions of the Consistory Court are entirely distinct from the present case, for in those cases the orders were orders made to put an end to something which had been done without the licence of the Consistory Court.

Moreover, assuming that the judge had power to do what he did, section 25 of the Burials Act, 1857, would be a full answer to the order proposed to be made. It seems clear that without the licence of the Home Secretary there would be no power to interfere with the grave.

CHANNELL, J.—I agree that the rule must be made absolute. The matter stands thus: Interfering, without proper authority, with a body buried in consecrated ground is an ecclesiastical offence; it is probably also a common law misdemeanour. If it involves the removal of the body it appears, further, that the act is illegal by section 25 of the Burial Act, 1857, unless the licence of the Home Secretary has been first obtained. As regards the ecclesiastical offence, the ecclesiastical court has clearly power to authorize the act to be done, and so prevent it being an ecclesiastical offence. That is the meaning of granting a faculty. The faculty gives permission to do that which would, without the faculty, be an ecclesiastical offence. That is the entire operation of a faculty so far as I know. What power the ecclesiastical court has to order a disinterment I do not know. No authority for it has been shown. What is sought in this case is not a mere permission to disinter a body, but an endeavour is apparently being made by the ecclesiastical court to order the disinterment. If that is so, it seems to be clear that the court is going beyond its jurisdiction. What the ecclesiastical court has done is to issue a citation to the cemetery company ordering them to come before the court and to argue the question whether an order should not be made adversely to them directing that the disinterment should be carried out by one person or by another. I can see no authority in the court to do that. It is impossible to read the citation in the only way which would make it legal—that is, as a request to the company to come and say whether they had any objection to Mrs. Druce having the dispensation she asked.

The only cases cited to show that orders had been made by the ecclesiastical court were cases in which an ecclesiastical offence having already been committed the offender was ordered to restore the original state of things and to undo what he had unlawfully done. That was quite different from ordering a thing to be done in the first instance.

But assuming that, apart from section 25 of the Burial Act, the ecclesiastical court would have had power to order the disinterment, that provision is an additional reason for saying that the court are going beyond their jurisdiction.

Rule made absolute.

Solicitor for A. M. Druce, *F. J. Macarthur.*

Solicitor for the Treasury, *The Treasury Solicitor.*

Solicitors for the cemetery company, *Baker, Blaker, & Hawes.*

Solicitors for the interveners, *Freshfields & Williams.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Romer, L.J.) — July 14, 15.

In re HOPE.
DE CETTO *v.* HOPE. (*a.*)

Settled land—Tenant for life—Heirlooms, sale of—Sanction of court—Discretion—Tenant for life in pecuniary difficulties caused by extravagance—Opposition of remaindermen—Jewel of unique character—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 37.

The fact that a tenant for life has, by his own extravagance, brought himself into pecuniary difficulties, will not induce the court to relieve him by ordering a sale of heirlooms under the discretionary power conferred by section 37 *of the Settled Land Act,* 1882.

An application by the tenant for life for the sanction of the court to a contract by him for the sale of the Tavernier Blue (or Hope) Diamond refused.

The court ought, on such an application, to have regard to the wishes of persons entitled in remainder, and even to their sentimental preferences—as, e.g., the wish to preserve in the family a celebrated jewel of a unique kind. It ought to consider what was the intention of the settlor, what are the wishes of the family generally, and what would be for the benefit of the estate as a whole.

Decision of Byrne, J. (ante, *p.* 536), *affirmed.*

Appeal from a decision of Byrne, J. (*ante*, p. 536, where the facts are sufficiently stated).

Sir Edward Clarke, Q.C., Farwell, Q.C., and *Martelli,* for Lord H. F. Hope Pelham Clinton Hope, who appealed, referred to sections 37 and 53 of the Settled Land Act, 1882; *In re Earl of Radnor's Will Trusts,* 45 Ch. D. 402, 39 W. R. Dig. 202; *In re Marquis of Ailesbury's Settled Estates,* 40 W. R. 243 [1892] 1 Ch. 506 (affirmed in House of Lords, 41 W. R. 318, [1892] A. C. 356); and *In re Hope's Settlement,* 9 Times L. R. 506.

Counsel for the other parties were not called upon.

Mulligan, Q.C., and *A. à B. Terrell,* for the parties interested as tenants in tail in remainder.

J. E. H. Benn, for the Duke of Newcastle.

J. H. Young, for mortgagees of the life estate.

E. S. Ford, for the trustees of the will.

LINDLEY, M.R.—It appears to us that this is a case in which we ought not to differ from the learned judge in the court below. I do not wish to say anything unpleasant or unkind, reflecting unduly on Lord Francis Hope, the present applicant; but it is quite obvious that he has brought himself into these money difficulties by his own folly. That is not a reason for the court to grant such an application as this. No doubt the financial position of the tenant for life is a circum-

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

stance to be considered; but when we look at the matter, and see for whose benefit the proposed sale is to be, it is obvious that it is for nobody's benefit except that of the tenant for life. The whole object of this application is to increase his income by the interest which, if this jewel were sold, could be got by means of the purchase-money. Not only does nobody else want the sale; everybody else objects. It is said that the desire to keep this jewel in the family is a mere matter of sentiment, and a sentiment which we ought not to regard. I cannot go to that extent. Even if the sentiment is fanciful, I am not prepared to say that we ought to pay no regard to it. I daresay this diamond has not, historically, the value of some other jewels which have a longer pedigree. But it is evidently an object with the family to avoid parting with it. They might not object so much to the sale of some of the other heirlooms. We cannot ignore the fact that their feeling is that they wish to keep in the family a very beautiful and up to the present moment almost unique diamond. It is of a colour not seen at all until modern times. Another blue diamond has lately been brought from South Africa, and it is possible that more of the same colour may be obtained there. But there is no reasonable probability of the value of this particular diamond being diminished by anything which is at all likely to come from that quarter. Why, then, should this Hope diamond be sold? I think Chitty, J., was quite right when he said that when a tenant for life comes to the court with an application under section 37 of the Settled Land Act, 1882, to obtain its sanction to a sale there must be some reason to induce the court to give its sanction. The observations which Mr. Farwell pressed, and very properly pressed, upon us, about the tenant for life in the case of *In re Marquis of Ailesbury's Settled Estates*, 40 W. R. 243, [1892] 1 Ch. 506, affirmed in House of Lords, 41 W. R. 318, [1892] A. C. 356, being master of the situation, amount only to this. I was there addressing myself to a totally different set of circumstances, and what I meant was that under section 3 of the Act the tenant for life was master of the situation, because he could ruin the estate by selling the whole of it except the mansion-house. The question there was not upon whom, when an application is made for leave to sell the mansion-house, the burden of proof lies. As to that matter, I think the view of Chitty, J., is right, when he said, in regard to the present estate, when the question of selling the pictures was before him, that a tenant for life who makes an application under the Settled Land Act for the sanction of the court ought to make out a case, and not a doubtful case, for the interference of the court. I think we certainly ought not to say that when the tenant for life asks for our sanction to a sale it is for those who oppose the sale to satisfy us that we ought not to sanction it. However, in the present case it does not matter on whom the burden of proof is. We have all the facts before us, and I cannot see that it is for the benefit of anyone except this extravagant tenant for life that this diamond should be sold. I think I should myself have taken the same view as Byrne, J. has done if the case had come before me in the first instance. The only point Mr. Farwell made which impressed me at all was that the estate duty had to be considered and provided for. No doubt it has; and the estate duty, or rather the Finance Act of 1894 which imposes it, has rendered it necessary very often to break up family collections, and goes far to render a sale unavoidable. But that is no reason for us to accede to the present application. The appeal will therefore be dismissed.

ROMER, L.J.—I agree with the Master of the Rolls in what he has said with reference to this case, and I will add only a few words.

The sole reason, as the Master of the Rolls has pointed out, for this application is that the tenant for life may increase his income. At the present time he has an allowance of £2,000 a year as his means of support, having by his own extravagance dissipated the whole of his life income in this estate. One cannot help feeling, and seeing, that but for the extravagance of the tenant for life, the present applicant, no such application as this would probably have been made. The application is opposed by all the members of the family who are interested in these estates; and I do not think one ought to minimize a family feeling of this kind. The diamond is called by the name of the family, and is widely known by that name. Very philosophical minds may, no doubt, smile at and even deride pride in the possession of a celebrated jewel. But the court cannot ignore the existence of that feeling. We are sitting here to act as men of the world in dealing with a question of this kind, and undoubtedly many families do take a great pride in possessing jewels widely known and celebrated, and especially jewels of a unique type. I think the whole family may reasonably say that they desire the family should retain this celebrated diamond, widely known by their own name.

I do not think we ought to consider the Settled Land Act as suggesting or in any way laying down that the wishes of the testator are to be entirely disregarded. The testator certainly did intend this gem to be treated as a settled heirloom, and I do not think that intention ought to be ignored. The Settled Land Act has not said that the wishes of the testator are to be entirely disregarded, and I do not think that that was the intention of the Settled Land Act. The court, sitting to consider, on any special application, whether a sale of heirlooms ought to be made, ought to look at the whole case: the intention of the testator, the wishes of the family, and the circumstances showing whether a sale would be for the benefit of the estate as a whole. I cannot help thinking that if this estate is looked at apart from the peculiar condition of the present tenant for life—seeing that the income of the estate is about £16,000 a year—the family may well desire that an estate bearing that income should retain the Hope Diamond, and may say that it is not for the benefit of the members of the family from time to time that a jewel of this character should be sold.

For these reasons it appears to me that the judgment of the court below is correct, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors, *Maddisons, Leman, & Co.; Richard Smith & Sons*, for *Marshalls & Bate*, East Retford; *Devonshire, Monkland, & Co.; Rickards & Nightingale.*

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — July 4.

In re MOSS.

KINGSBURY *v.* WALTER. (*a.*)

Will—Construction—Gift to a class—Gift to A. and the children of B. in equal shares—Death of A. before testator—Lapse.

A gift by will to a class properly so called (i.e., a

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

number of persons indicated by a general description) and A., a named individual, in equal shares, is primâ facie, *in legal contemplation, a gift to a class; so that, on the death of A. in the testator's lifetime, the whole of the property will be divisible amongst the other legatees.*

Decision of North, J., *reversed.*

Appeal from North, J.

The testator, one Moss, died on the 24th of March, 1893, having by his will given all his share or interest in the *Daily Telegraph* newspaper to trustees upon trust to pay the income thereof to his wife for her life, and after her death upon trust for the testator's niece, Elizabeth Jane Fowler, and the child or children of his sister, Emily Walter, who should attain twenty-one, equally to be divided between them as tenants in common. The residue of the estate the testator gave to his wife. The niece, Elizabeth Jane Fowler, died in the testator's lifetime, having attained twenty-one, but not having been married. The testator's wife survived him, dying on the 24th of September, 1897. The sister was still living, as were also all of her five children. The question having arisen whether the disposition of the interest in the *Daily Telegraph* was of the nature of a gift to a class, so that Elizabeth Jane Fowler's share was divisible among the children of Mrs. Walter, or whether her share lapsed and fell into residue, the representatives of the testator's widow took out an originating summons to have that question determined by the court.

North, J., decided that the gift was not a gift to a class, and that, by reason of the niece's death in the testator's lifetime, her share lapsed and passed under the residuary gift.

Mrs. Walter's children appealed.

Swinfen Eady, Q.C., Henry Terrell, Q.C., and *J. G. Fawcus,* for the appeal, referred to 1 Jarman on Wills (5th ed.), p. 232; *In re Stanhope's Trusts,* 27 Beav. 201; *Aspinall* v. *Duckworth,* 14 W. R. 527, 35 Beav. 307; *Pearks* v. *Moseley,* 29 W. R. 1. 5 App. Cas. 714, 723; *Clark* v. *Phillips,* 17 Jur. 886; *Knapping* v. *Tomlinson,* 34 L. J. Ch. 3; and *In re Jackson, Shiers* v. *Ashworth,* 32 W. R. 194, 25 Ch. D. 162.

Haldane, Q.C., and *E. F. Ball,* for the legal personal representatives of the widow, cited *In re Chaplin's Trusts,* 33 L. J. Ch. 183; 12 W. R. Ch. Dig. 108; *Wilson* v. *Atter,* 29 W. R. 480; and *Drakeford* v. *Drakeford,* 11 W. R. 977, 33 Beav. 43.

W. Hatfield Green, for the trustees.

No reply was called for.

LINDLEY, M.R.—It is very difficult to construe this will by the light of the authorities. But in one respect I entirely agree with North, J. I do not think the authorities help us much because they are in inextricable confusion. I do not think any case can be cited on either side which cannot be matched by a case on the other side more or less undistinguishable from it. In the present case we have to deal with this will, and the practical question we have to decide is what is to become of the share of the testator in the *Daily Telegraph.* When the testator made his will he had a niece named Elizabeth Jane Fowler and a sister named Emily Walter, both living. Miss Elizabeth Jane Fowler was a spinster, and was then, as I understand, nearly but not quite twenty-one years of age. Mrs. Walter had several children then and might have more. What the testator has done by his will is this: he has given his share in the *Daily Telegraph* to trustees upon trust to pay the income to his wife for her life, and after the death of his wife upon trust for the said Elizabeth Jane Fowler and the child or children of his sister Emily Walter who should attain the age of twenty-one years, equally to be divided between them as tenants in common. Miss Elizabeth Jane Fowler died in the testator's lifetime, and Mrs. Walter is alive and has five children. The wife is now dead and the time for dealing with the share in the *Daily Telegraph* has therefore arrived. Who, then, is to take it? There are several rival views about that. One view is—and that is the view adopted by the learned judge in the court below—that the share which Elizabeth Jane Fowler would have taken if she were alive (that is, one-sixth, as I understand it) has lapsed and has fallen into the residuary estate; so that, according to that view, one-sixth of the testator's share or interest in the *Daily Telegraph* has gone to persons who certainly were never intended by him to take it. That he did not intend this is obvious. It may be the legal result of the words he has used, but it is obvious that it was never dreamed of by the testator. What he intended was that this interest in the *Daily Telegraph* should go among the persons he has named, and not to other persons who merely represent his residuary legatee. The difficulty of the present case lies in this. We hear about classes, and about gifts to classes, and about the definition of a class. You may define a class in a thousand ways. Anybody may make any number of things or persons a class by singling out one or more attributes which are common, more or less, to them all, and making that attribute, or those attributes, the definition of a class. We have been referred, not improperly at all, to Mr. Jarman's definition of a class, for the purpose for which lawyers want such a definition—that is, for the purpose of construing a will. I think Mr. Swinfen Eady is right in saying that if you look at that definition the gift in this will does come within it. But, after all, whether you call this a class, or whether you call it a number of persons who are treated by the testator as if they were a class, that, it appears to me, is a mere matter of language, and I should seek to avoid deciding it. Age and caution have made me very reluctant to frame definitions, unless you can make a law to accord with your definitions, which judges cannot do. We have to decide what is to be done with the share given to the lady who has died. The testator says that his interest in the *Daily Telegraph* is to be equally divided between her and the children of Emily Walter—to be divided equally between them all. If some of those persons between whom it is to be equally divided are dead, are the shares of those who are dead to go to somebody else, or are they to go to those who survive? That is the real practical question, whether you say that the legatees are in effect a class (as Mr. Theobald does in a passage at p. 645 of the 4th edition of his book, where he says: "It is clear that a gift to A. and the children of B. may in effect be a gift to a class, if the testator treats the legatees as a class"), or whether you call them a number of persons who are to be treated as a class, does not really matter in the least. The guiding question here is, What is to be done with this property? What is to be done is that this interest is to be divided among these people, and, I will add, among such of them as shall be living. That is the obvious intention. The alternative view takes the share of the deceased niece away where it was never intended to go; and on that ground it appears to me that we ought to differ from the learned judge in the court below. I confess that if this case had come before me in the first instance I think I should have decided it as North, J., did, but my brother Romer has convinced me that his view is the right one.

JEUNE, P.—I agree, and I do not propose to add

anything. I have no wish to say anything to make the decisions on this subject, which are contradictory and complicated, more so than they already are.

ROMER, L.J.—In the absence of any context negativing the view, I think that when a testator gives property X. to A. and a class of persons (say, the children of B.) in equal shares, he intends the whole of X. to pass by his gift if any one of the children of B. survives him, even although A. does not. Clearly if A. survived and none of the children of B. survived so as to share, then A. would take the whole, for A. would have to take either the whole or nothing; unless, indeed, it could be said that you are to look at the number of children of B. living at the date of the will, and that you are to say there is an intestacy as to the share of each such child dying between the date of the will and the testator's death. That, to my mind, is clearly an untenable proposition. If the testator intended that A. should take the whole if none of the children of B. survived him (the testator) so as to share, I think also he intended the children of B. to take the whole if A. did not survive so as to share. There is no satisfactory reason, to my mind, to distinguish between these two cases. I think that in such a gift as I have mentioned what the testator really means is that the property is to be shared equally by a body constituted of such of the following as shall be existing at the date of the testator's death (that is to say), A. and the children of B.; and generally when a testator gives property to be shared at a particular period equally between a class, properly so called, and an individual or individuals (and there is nothing to negative this view in the rest of the will), I think that what the testator must, *primâ facie*, be taken to mean is that you are to see which of that aggregated body is to share in that property at the time it comes for distribution, and that such a gift is really a gift to a class. Though I am perfectly well aware of the danger there is in attempting to lay down general propositions, and though few judges would more shrink from doing so than I, knowing as I do how a general proposition laid down often hampers judges in dealing with succeeding cases, yet I do think that in the present case I may venture to make the following statement, especially as the authorities are so conflicting, and as there is no express decision of the House of Lords or of the Court of Appeal upon the point. In my opinion it is correct to say that a gift by will to a class (properly so called) and A., a named individual, to share equally—so that the testator contemplates A. taking the same share that each member of the class will take—is *primâ facie* a gift to a class.

For these reasons—applying these principles to the case before us—I have no hesitation in saying that in my opinion the gift here was a gift to a class; that Elizabeth Jane Fowler was intended to share only as one of a class; and that, inasmuch as she did not survive to share, the rest of the class take the whole of the property.

Appeal allowed. Declaration that the gift was or was to be treated as a gift to a class, and that the share of E. J. Fowler did not lapse.

Solicitors, *Tilleards; V. I. Chamberlain.*

From Q. B. Div.
(Lord Russell of Killowen, C.J., and A. L. Smith and Collins, L.JJ.) } May 15.

HORSEY ESTATE (LIMITED) v. STEIGER AND THE PETRIFITE CO. (LIMITED). (a.)

Landlord and tenant—Lease—Proviso for re-entry—Covenant against assigning or underletting—Liquidation of lessee company—Notice—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14—Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 2, sub-section 2.

A lease granted by the plaintiffs' predecessors contained a covenant against assigning or underletting without the consent of the lessors, and also a proviso for re-entry if the lessees should commit any breach of covenant, or if (inter alia) *the lessees, being a company, should enter into liquidation, whether compulsory or voluntary. The lease was, with the consent of the lessors, assigned to the defendants, who were an individual and a limited company. The defendant company went into liquidation, not in consequence of insolvency, but for the purpose of being reconstructed, and, having agreed to sell the lease to a new company, let the new company into possession pending the completion of the purchase, the new company undertaking to pay all rents, rates, and outgoings. Within a year of the liquidation the plaintiffs commenced an action to recover possession under the proviso for re-entry.*

Held, (1) *that the proviso for re-entry if the lessee company should enter into liquidation was a condition running with the land;* (2) *that the defendant company had entered into liquidation within the meaning of the proviso;* (3) *that, by virtue of section 2, sub-section 2, of the Conveyancing Act, 1892, notice under section 14 of the Conveyancing Act, 1881, was necessary before the plaintiffs could enforce a forfeiture on the ground of the liquidation of the defendant company; and* (4) *that the letting the new company into possession did not constitute a breach of the covenant against assigning or underletting.*

Appeal from the judgment of Hawkins, J., at the trial of an action without a jury, [1898] 2 Q. B. 258, 46 W. R. Dig. 89.

The action was brought to recover possession of premises under a proviso for re-entry contained in a lease. By the lease in question, which was dated the 4th of November, 1889, the trustees of the will of Thomas Horsey, deceased, demised the premises to John Donelly and a limited company for a term of twenty-one years.

The lessees for themselves and their assigns, and as a separate covenant, each of them for himself and itself respectively and his and its respective assigns, covenanted to pay the rent, to repair the premises, and not at any time or times during the term to assign or underlet the premises, or any part thereof, without first obtaining the consent of the lessors in writing, which consent was not to be unreasonably or vexatiously withheld in the case of the lessees satisfying the lessors that the proposed assignee was a substantial, respectable, and responsible person. There was a proviso in the lease for re-entry "if the lessees shall at any time fail or neglect to perform or observe any of their covenants, or if the lessees shall become bankrupt or enter into liquidation for the benefit of or compound with their creditors, or, being a company, shall enter into liquidation whether compulsory or voluntary."

On the 1st of August, 1894, the lessors conveyed their interest in the premises to the plaintiffs. On

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the 31st of March, 1896, the lessees, with the consent of the plaintiffs, assigned the residue of the term to the defendants, Jacob Steiger and the Petrifite Co. (Limited). The consent of the plaintiffs was expressly limited to that particular assignment. In December, 1896, the Petrifite Co., at a general meeting, duly passed, under section 129 of the Companies Act, 1862, a resolution for a voluntary winding up. This resolution was duly confirmed at a meeting in January, 1897, and a liquidator was appointed. The liquidation was not on account of any pecuniary embarrassment of the company, but simply for the purpose of reconstructing the company and increasing its capital. In furtherance of this object a new company was in September, 1897, duly formed and registered under the same name.

On the 29th of October, 1897, a notice under section 14 of the Conveyancing Act, 1881, was served by the plaintiffs on the original lessees and the defendant Steiger. On the 2nd of November a similar notice was served on the defendant company. It stated as grounds of forfeiture that the defendant company had entered into liquidation, and that there had been breaches of the covenant to repair. On the 4th of November the action was commenced.

On the 2nd of December, 1897, an agreement was entered into between the defendants and the new company, by which it was agreed that the defendant company, with the approval of the defendant Steiger, should sell, and the new company should purchase, all the right and interest of the defendants in the lease. The agreement contained a stipulation that, though the purchase might not then be completed, the new company should be let into possession of the premises within seven days of the first allotment of shares in the new company, and should as from that date pay all rents, rates, taxes, and outgoings, but that in the event of a rescission of the agreement (which had not happened) possession of the premises should be redelivered to the defendants. The new company was accordingly let into possession, but no assignment of the lease was made. The plaintiffs alleged that what had been done under this agreement constituted a new ground of forfeiture, as being a breach of the covenant against assigning or underletting, and it was agreed on terms that this alleged new ground of forfeiture shall be treated as having been in existence before the issue of the writ. At the trial the allegation of breaches of the covenant to repair was abandoned. Hawkins, J., gave judgment for the plaintiffs on the ground that the defendant company had entered into liquidation within the meaning of the proviso for re-entry.

The defendants appealed.

Herbert Reed, Q.C., Hammond Chambers, Q.C., Coome, Clarke Williams, and *Timins,* for the defendants.

Christopher James and *B. A. Cohen,* for the plaintiffs.

Cur. adv. vult.

May 16.—Lord RUSSELL OF KILLOWEN, C.J., read the following judgment: The question is whether the plaintiff company has established the right to re-enter upon the demised premises upon either of the grounds of forfeiture alleged—namely, (*a*) that the defendant company has entered into liquidation; or (*b*) that the defendants have underlet the demised premises. First, as to the liquidation—that the defendant company has entered into liquidation is not denied, but it was argued for the defendants (1) that upon the true construction of the lease the liquidation, within the meaning of the condition or proviso in the lease, must be a liquidation brought about by, or in consequence of, insolvency, which (it was admitted) was not the case here; (2) that the proviso in the lease only applied in case the individual lessee was bankrupt or had liquidated with his creditors *and* the company had entered into liquidation in consequence of insolvency; (3) that, if these contentions failed, the proviso or condition in question did not run with the land so as to bind the defendants, who were assigns merely of the original lessees; (4) that due notice under the Conveyancing Act of 1881, s. 14, had not been given before action, and that this was a condition precedent to the right to maintain any action; and lastly (5) that the defendants were, all these contentions failing, entitled to apply to the court for relief. I propose to consider these points *seriatim.*

As to the first point, in my judgment the determining event is the entering into liquidation in fact, and the cause which led to that event, or its object, is wholly immaterial. The contention of the defendants involves the introduction into the proviso after the word "voluntary" of the words "in consequence of insolvency." It seems to me the condition or proviso must be construed according to its plain meaning and without this qualification.

As to the second point, I think that the condition is carefully framed so as to make the proviso for re-entry apply, if either the individual lessee became bankrupt or compounded with his creditors, which is the first clause of the condition, or if the company lessee entered into liquidation. If, therefore, this were an action against the original lessees, the plaintiff company would, subject to the question of notice, be entitled to re-enter under the condition. But this is an action against the assigns of the original lessees.

The third point, which presents the greatest difficulty, has therefore to be considered—namely, is this condition of re-entry in the event of the company entering into liquidation one which, in the language of the common law, "runs with the land"? It is to be noted that this question was not raised in the court below, and the judgment of the learned judge is silent upon it. It was put in argument that the question here turned upon a condition and not upon a covenant, and it was suggested that the cases dealing with covenants were therefore not authorities on the present question. I cannot assent to this view. Whether a particular covenant or contition does or does not run with the land is determined by the common law, and it is enough to say that the authorities uniformly treat them as governed by the same principles: *Stevens* v. *Copp,* 17 W. R. 166, L. R. 4 Ex. 20. Further, the statute 32 Hen. 8, c. 34, s. 1, which gives assignees of the reversion the same benefit and remedies as lessors or grantors in respect of covenants and conditions, couples them together, and section 2 of that Act, which gives lessees the same remedies against assignees of the reversion which they had against the lessor or grantor, in like manner couples conditions and covenants together. Is, then, the condition in question one the burden of which runs with the land so that its obligation binds the assignee of the lease? The answer to this question depends, in this case, upon whether it is a condition touching the thing demised or is merely collateral. I say "in this case" because there are undoubtedly collateral covenants or conditions which on equitable principles, but only in a restrictive sense, bind the assignee. But this principle is confined to covenants and conditions of a negative character, and depends upon notice. But apart from cases of this class the true principle is that no covenant or condition which affects merely the person, and which does not affect the nature, quality, or value of the thing demised or the mode of using or enjoying the thing demised, runs with the land: see *Mayor of Congleton* v. *Pattison,* 10 East 130. Does,

then, the condition or proviso in question "run with the land"? On the whole, and after much hesitation, I have arrived at the conclusion that it does. It must be taken as fully established that a covenant against assignment and also a proviso for re-entry in the case of bankruptcy run with the land: see *Roe* v. *Sales*, 1 M. & S. 297; *Doe* v. *David*, 1 C. M. & R. 405; *Doe* v. *Ingleby*, 15 M. & W. 465; *Williams* v. *Earle*, L. R. 3 Q. B. 739, 17 W. R. C. L. Dig. 74; *Varley* v. *Coppard*, 20 W. R. 972, L. R. 7 C. P. 505; *Smith* v. *Gronow*, 40 W. R. 46, [1891] 2 Q. B. 394. I think that a proviso for re-entry in case of liquidation by a company or individual falls within the principle of these cases, and indeed that the proviso as to liquidation is cognate both to a covenant against assignment and to a proviso relating to bankruptcy. It partakes of the character of each of them. The proviso against bankruptcy was introduced into leases in consequence of the ordinary covenant against assignment being held not to apply to the involuntary assignment which is the consequence of bankruptcy (see *Doe* v. *Ingleby*); and, like the covenant against assignment, it touches the question who shall have and occupy the premises demised, and therefore touches and concerns the thing demised: see *Williams* v. *Earle*, per Blackburn, J. I find myself unable to draw any distinction in principle between these cases and the case of a proviso for re-entry in case the assign of the lessee should enter into liquidation. I think the result, that covenants against assignment and provisoes for re-entry in the event of bankruptcy or liquidation stand on the same footing, is made clearer by considering what are the consequences following from a company entering into liquidation. By section 129 of the Companies Act, 1862, the company may be wound up, as in this case, by a special resolution, and by section 130 the winding-up is deemed to commence when the resolution is passed. By section 131, the special resolution having been passed, the company ceases to carry on its business except as far as may be required for its beneficial winding up; it is moribund, if not dead. By section 133 its property, after payment of creditors, must be distributed amongst its members, and by sub-section 7 of section 133 the liquidator may, without its being necessary to obtain any sanction from the court, exercise all the powers of the official liquidator; and amongst these powers is that given by section 95, enabling the liquidator to sell the real or other property to any person or company, or to sell the same in parcels. In the present case the original and confirmatory resolutions for winding up having been passed, it cannot be contested that liquidation has in fact been entered upon, and although it is true that the winding up has not been completed within the meaning of sections 142 and 143, I see no power in the company to undo what it has done. The winding up must go through, and must involve the dealing with the property of the company, including their interest in the premises in question, in the manner provided in the foregoing sections. I arrive, therefore, at the conclusion that the proviso for re-entry in case of the assigns of the original lessees entering upon liquidation applies, and that unless there is some other answer the plaintiffs can insist on re-entering.

I have now to consider the remaining, the fourth, point—namely, that no proper notice was given under section 14 of the Conveyancing Act, 1881. Was any such notice necessary? The answer to that question depends upon two considerations: (1) Is the liquidation in this case equivalent to a bankruptcy within sub-section 6 of section 14? And if so (2) What is the effect of sub-section 2 of section 2 of the amending Act of 1892? As to the first, I think, looking to the wide words of the interpretation section (2) of the Act of 1881 referring to bankruptcy, that liquidation is within the meaning of bankruptcy as interpreted by sub-section 6 of section 14 of the Act of 1881. It follows that, if the Act of 1892 has not effected a difference, the plaintiff company was not bound, as to this ground of forfeiture, to give notice at all. Has, then, the Act of 1892 made any difference? I think it has. I think the effect of section 2, sub-section 2, of that Act, which is very difficult of construction, is to take the case of forfeiture for bankruptcy or liquidation out of the cases in which notice is not necessary for one year from the bankruptcy or liquidation. If, then, notice is necessary, has it been given?

To determine the character of the required notice, what it shall contain and when it ought to be given, it is necessary to consider the scope of section 14 of the Act of 1881 as a whole. The object seems to be to require in the defined cases, (1) that a notice shall precede any proceeding to enforce a forfeiture, (2) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear; he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and if so, what compensation; and finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him. The notice in question is dated the 29th of October, 1897, and alleges that the defendants, the company, had entered into liquidation; and, further, that they had broken the covenant to repair. It then proceeds to demand compensation, and gives notice that if the defendants fail to remedy the breaches within a reasonable time the plaintiffs will re-enter. To the notice is annexed a schedule requiring very extensive repairs to be done, which would require a considerable time to accomplish. This notice was served on the 2nd of November, and the writ in the action was served on the 4th of November. It is now admitted that the plaintiffs were not in a position to rely upon the alleged breach for non-repair. In these circumstances can this be said to be a proper notice within the Act? On the whole I think not. In the first place, if the entering upon liquidation had alone been put forward, the defendants would have had the opportunity of considering whether they had any answer, and, if not, whether they could make terms with the plaintiffs, but this was impracticable so long as the claim for breach of covenant to repair was made. Again, if non-repair was alone relied on, the defendants might possibly by offer of compensation accompanied by undertaking to repair, have made terms with the plaintiffs. Further, the statute clearly contemplates that a reasonable interval shall elapse after service of notice and before action. Can two days' notice be said, in all the circumstances, to be a reasonable notice? I think not. On the whole, therefore, I am of opinion that the notice was bad and did not comply with the condition precedent to action within section 14 of the Act of 1881.

Finally, as to the alleged breach by underletting. It is admitted that there has been no assignment within the meaning of the covenant against assignment. What has taken place is this. The defendants, having agreed to sell to the new company, have let them into possession pending the completion of the purchase, the new company undertaking to pay all rents, rates, and outgoings in connection with the

premises or the business there carried on. There is a provision for redelivery of possession to the defendants if the contract should be rescinded. It is contended that this makes the new company the defendants' undertenants. But on what terms? The new company pay no rent to the defendants; they have undertaken no obligations to the defendants except those mentioned, which are not necessarily obligations of tenancy. But it is said the proper implication from these facts is that a tenancy at will has been created. Whether this may be technically so or not the practical answer to this contention seems to be that the defendants could not by the exercise of their will turn the new company out. The effective answer of the new company would be, "We have come in as purchasers, and we are willing to carry out our terms of purchase." In plain sense and according to the ordinary understanding of men, this is not a case of underletting at all, but merely a case in which the new company has been let in on terms of purchase. Had the covenant been (as is of late years often the case) against parting with possession without license of the landlord, the plaintiff company would have proved a breach of such a covenant, but they have not established a breach of the covenant in question, which is against underletting only. My learned brethren agree with this judgment. The appeal will therefore be allowed with costs.

Appeal allowed.

Solicitors for the plaintiffs, *Druces & Attlee.*

Solicitor for the defendant Steiger, *T. Durant.*

Solicitor for the defendant company, *P. Warner.*

High Court of Justice.

Chan. Div. } Byrne, J. } May 9.

SIXTH WEST KENT MUTUAL BUILDING SOCIETY *v.* HILLS. (*a.*)

Building society—Society known to be insolvent—Rule passed to enable society to facilitate realization—Rule ultra vires*—Breach of trust—Classes of shareholders—Distribution of assets.*

It is competent for a building society, even when in a state of insolvency, to pass a new rule for the purpose of facilitating the realization of the assets of the society, provided that such rule is bonâ fide *passed for such purpose and does not affect the rights of the members of the society* inter se *in respect of their liability or in respect to the distribution of assets.*

Trial of action.

This was an action by a building society against certain of its directors for a declaration that certain conveyances of property belonging to the society were *ultra vires*, and that the defendants were liable to account to the plaintiffs in respect of payment to a certain class of shareholders known as the C class at a time when there were no profits out of which payments could be made, and for all necessary accounts and inquiries.

The facts of the case were as follow: The plaintiff society was in 1878 duly registered under the Building Societies Act, 1874, as a terminating building society. In 1889 it was registered as a permanent building society. There were then classes of shares A, B, C. The A and B shares were subscription shares, the A shares being paid up gradually by instalments extending over a term of years, the B shares being subscribed by payment of one sum down, each sum maturing at the end of a term of years so as to entitle the holders to an advance or to repayment on withdrawal according to the rules of the amount paid with interest. The C shares were immediate advances to the society bearing a fixed rate of interest at 5 per cent. repayable on three months' notice on either side if the shares should have been in existence for twelve months, and having a preference over other shares in regard to interest.

The object of the society was to raise a fund for advances to be made to members on the security of freehold or leasehold estate by way of mortgage.

By the original rules all members were liable to contribute rateably to losses, and the right of withdrawal was regulated by rules 89 to 92 of the society's rules. These rules provided for repayment of subscriptions with interest to unadvanced members giving notice of withdrawal subject to certain deductions. In October, 1889, resolutions were passed making the society permanent and substituting for rules 89 to 92 a new section.

This new section provided: "After the 31st of December, 1890, no further advance shall be made upon shares then existing. From and after the passing of this rule the withdrawal of shares (other than C shares) by priority of notice shall cease, and all funds derived from repayment of advances, from realization of properties in possession, or any other source, shall be applied as follows: first to the expenses of management and the secretary's salary and the payment of capital and interest on C shares."

At the time when this new rule was made the society was in an insolvent condition and its members were aware that it would be necessary to dissolve it under the Building Societies Act, 1874.

A minute of the directors' meeting held on the 12th of December, 1888, showed that the secretary reported to the board that after properly weighing the matter concerning the close of the society in two years (the society as a terminating society would have closed in 1890) he had come to the conclusion that the best mode of securing reasonable and proper prices for the property on hand was to convert the society into a permanent one, thus obtaining the extension of time that might prove necessary for the accomplishment of this object.

No new members were admitted subsequently to the passing of the new rule in 1889, nor was any business transacted beyond protecting, getting in, and realizing assets. Prior to October, 1891, the society had taken possession of a number of properties in mortgage to it, and in October, 1891, the following new rule was passed:

"In order to facilitate the realization of any properties now or at any time in possession of the society, the directors shall have power to sell the same or any part thereof to any member, and receive in payment, either wholly or in part, any fully paid up or subscription shares held by the members, whether under notice of withdrawal or not, provided that such shares shall be taken subject to the deduction of any withdrawal fee in force for the time being.

"The directors shall have power to dispose of any properties now or at any time in possession to any depositor with the society, and to transfer until the usual notice of withdrawal any deposit standing in his name in payment or part payment of the same."

In accordance with this rule the directors proceeded to transfer to the shareholders property in exchange for shares on the basis of the valuation in the society's

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

books, the difference being paid in cash. There was no evidence that in this transaction any shareholder had been treated more favourably than any other. The C shareholders had received interest in lieu of profits.

In 1894, upon a special case stated by consent for the opinion of the court as to the rights of the various classes of shareholders and Messrs. Shore, Hudson, and Blackmoor, Stirling, J., made an order appointing certain persons then before the court to represent the respective classes, and declaring that the C shares in the society in respect of which notice of withdrawal was not given before the change in the rules in October, 1889, were preferential as regards payment of interest only, and not as regards capital, but that the holders of C shares who gave notice to withdraw before the change of rules in October, 1889, were entitled to be preferred over the holders of shares who had not then given such notice, and that the new rule of October, 1889, was invalid, in so far as it varied any then subsisting rights of members. In 1896 the society was ordered to be dissolved under an award of the registrar of building societies, and a liquidator was appointed.

Neville, Q.C., and *Sims*, for the plaintiffs.—The rule of October, 1891, was *ultra vires*. Practically the business of the society stopped when the rule of October, 1889, was passed, for it was then admitted by the society themselves that they could no longer carry on business: *In re Sunderland 36th Universal Building Society*, 38 W. R. 509, 24 Q. B. D. 394; *Strohmenger* v. *Borough of Finsbury Permanent Investment Society*, 46 W. R. 69, [1897] 2 Ch. 469; *Barnard* v. *Tomson*, [1894] 1 Ch. 374.

Farwell, Q.C., and *T. M. Stevens*, for two of the defendants.—The rule was not *ultra vires*, for the society had power to alter their rules: *Pépé* v. *City and Suburban Permanent Building Society*, 41 W. R. 548, [1893] 2 Ch. 311. No doubt if the directors had not been acting *bonâ fide* in the distribution of the property, or if they had favoured one shareholder or one class of shareholders at the expense of another, they would have been acting *ultra vires*, and would have been liable for a breach of trust. All that they did was to divide assets in specie for the purpose of avoiding the expense of a sale by auction: *Brett* v. *Monarch Investment Building Society*, 42 W. R. 209, [1894] 1 Q. B. 367; *Laing* v. *Reed*, 18 W. R. 76, L. R. 5 Ch. App. 4.

Ashton Cross, for the two other defendants.

Neville, Q.C., replied.

The following cases were also cited in the argument: *In re Kingston Cotton Mill Co.*, 44 W. R. 363, [1896] 1 Ch. 331; *Reg.* v. *Braybrook*, 69 L. T. Rep. 718.

BYRNE, J. (after stating the facts).—The terms of the special case before Stirling, J., agree with the conclusion that I have come to on the evidence before me in regard to the surrounding circumstances and the object and intention of the alteration of the rules in October, 1889. The result is to establish the right of the C shares to preference in respect of interest, to negative preference in respect of capital, and to determine, in accordance with the case of *In re Sunderland 36th Universal Building Society*, that the right of withdrawal by priority ceased in October, 1889, by reason of the condition of insolvency of the society. The main point which I have to consider is whether or not the rule of October, 1891, is invalid. In view of the decisions in *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society* and *Pépé* v. *The City and Suburban Permanent Building Society*, it is impossible to contend successfully that the right of a member of a building society like the present may not be varied by a new rule made under and in accordance with its statutory power of altering rules, and the rules may be varied so as to affect the rights of a member, even after he has given notice of withdrawal. But as was pointed out by the late Chitty, L.J., in *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society*, a rule must not change the constitution of the society, and the power of making and altering rules must be confined to the internal rights of the members of the society. In the same case it was also pointed out that there are obvious limits, which the learned judge did not attempt to define, as to the powers of making and altering rules which have to be considered as the cases arise. These were decisions in respect of the right of making rules, when no question of known insolvency at the time of making the rules had arisen.

I think that the case of the *Sunderland 36th Universal Building Society* only extends what had been held in *Brownlie* v. *Russell*, 8 App. Cas. 235, 31 W. R. Dig. 28, as to the effects of a winding-up order to a period anterior to the date of the actual order. In the case of *In re Ambition Investment Building Society*, 44 W. R. 141, upon a view of the prior authorities, it was held that a right of withdrawal under the rules came to an end when the society or its officers recognized that it must come to an end. In *Barnard* v. *Tomson* North, J., held that there were no materials for drawing a line earlier than the date of the instrument of dissolution. But in the present case it appears that at the alteration of the rules of 1889, and thenceforward, and at the date of the alteration in 1891 it was known to the officers and members of the society that the society was insolvent and that liquidation was inevitable.

It appears to me that as from the earlier date I have mentioned such of the existing rules as on the true construction of all the rules of the society were intended to operate so long only as the continuance of the society was contemplated ceased to have operation, and I consider that it follows by parity of reason that no rule could be passed altering the rights of the members of the society so as necessarily to affect their rights *inter se* in respect of liability, or in respect of distribution of assets, to the injury of some of such members for the benefit or advantage of others, even though it might be a rule properly made by a society not in contemplation of liquidation. I think, moreover, that in like manner it was incompetent to pass a rule conferring a power upon the directors, which, if exercised, must necessarily have a similar operation. On the other hand, I see no reason for holding that the right to alter rules was gone altogether, and I think that it was competent to make rules for facilitating the realization of the assets of the society, so long as such rules were *bonâ fide* passed for that purpose, and did not necessarily affect the rights of members in the way mentioned. I ought to say that there is no question in the present case as to the possibility of affecting the rights of outside creditors. A rule passed with the object and intention of facilitating realization, of avoiding the expense of a sale by auction, and of enabling the society to get rid of burdensome obligations, appears to me to be exactly the kind of rule which may be legitimately passed by a building society known to be insolvent as auxiliary to existing rules. Such a rule is not *per se* invalid, although in individual instances the exercise of the power conferred by it may be. Such a rule may, I think, be passed so long as it does not involve an alteration of the constitutional rights of members *inter se* or the rights of creditors. It is, however, obvious that if such rule is

so exercised as to give unfair or undue advantage to individuals such exercise will constitute a breach of trust. It appears to me that the rule of October, 1891, was such a rule as I have referred to, and was not *per se* invalid inasmuch as it might be exercised so as to be advantageous to all members alike. I will assume as an illustration that an unadvanced member, who, under ordinary circumstances, would be entitled to withdraw and who would on withdrawal have been entitled to £1,000, has, by reason of the stoppage of the company's business, become entitled only in distribution of assets to his share *pari passu* with others (say, for example, a probable £500).

The society is in possession of a property standing in their books as worth £1,000, but in fact very much depreciated in value. The amount advanced on it is irrecoverable. It is only saleable to a member of the public by auction for £800, if saleable at all. If the society can sell to an unadvanced member for the £1,000, which stands in the books as the amount of his shares, they are no longer liable to pay him £500 in the distribution; they have secured a purchaser, and have saved the expense of an auction, possibly the expense of an abortive auction, and have arrived a stage nearer to the final distribution of assets. The purchasing member has, perhaps, made a good purchase, as he has got property which at one time was valued at £1,000, although no longer marketable at that price, but which may perhaps recover in value in course of time, in exchange for something equivalent to a right to payment of £500, but the society has gained also in the respects I have mentioned. I think each transaction must stand or fall on its own merits. If the directors can be shown under the rule to have favoured one shareholder at the expense of others, they have misused the power entrusted to them, and *a fortiori* if they have favoured a member of their own body, but in the absence of evidence proving a breach of duty towards the general body of shareholders they cannot be made liable. [His lordship proceeded to consider the claims against the different defendants in respect of the sales, and after dealing with them, continued:] The only remaining point is in reference to payment of interest on the C shares, but I think that such payment was in accordance with the contract with members holding C shares, and that the payments were not made in any way to the detriment of other members.

The whole result of my judgment is that the plaintiff society has failed and that the defendants against whom relief is asked are entitled to be paid their costs by the liquidator. There may be proper accounts taken in the cases I have referred to as to the indebtedness of individuals, subsequent costs being reserved.

Action dismissed.

Solicitors, *Lumley & Lumley; Avery & Wolverson; Howard & Shelton; Essex, Bristow, & Co.*

Q. B. Div.
(Grantham and Lawrance, JJ.) June 13.

ST. MARGARET'S AND ST. JOHN'S VESTRIES *v.* HOSKINS. (*a.*)

Metropolis—New building—Drainage—Building for the use of volunteers—Metropolis Management Act, 1855 (18 & 19 *Vict.* c. 120), *s.* 75.

The appellants served a summons under section 75 *of the Metropolis Management Act,* 1855, *upon the respondent, a builder, alleging that he had neglected to comply with their order that the lowest floor of a building in course of construction to be used as an armoury, storehouse, and drill hall by the 2nd Volunteer Battalion of Royal Fusiliers, and vested in their commanding officer, should be kept at such a level as would allow it to be drained into the public sewers.*

The magistrate dismissed the summons on the ground that the premises were exempted from the provisions of the Act as being property vested in a servant of the Crown to be used exclusively for Crown purposes.

Held, on appeal, that the building was not exempt because it was intended for volunteer purposes, and that the matter must be remitted to the magistrate.

Special case stated by a Metropolitan police magistrate upon a summons taken out on behalf of the appellants—the united vestries of the two parishes—complaining that the respondent, F. C. Hoskins, a builder, did on the 1st of March, 1899, at 13, Tufton-street, neglect to comply with the order of the vestries ordering that the lowest floor of the building in course of construction be kept at such a level as would allow it to be drained into the public sewer.

The magistrate held that as the premises were to be used exclusively for volunteer purposes the provisions of the Act did not apply to them and dismissed the summons.

The vestries appealed.

W. O. Danckwerts, for the appellants.—Volunteer buildings do not belong to the Crown and must therefore comply with the Acts relating to ordinary buildings for the proper drainage of the Metropolis. The exemption in favour of Crown property in section 241 of the Metropolis Management Act, 1855, and section 116 of the Amendment Act of 1862 do not apply.

H. Avory, in support of the decision of the magistrate, cited *Jay* v. *Hammond*, 6 W. R. 41, 27 L. J. M. C. 25, and *Pearson* v. *Holborn Assessment Committee*, [1893] 1 Q. B. 389, 41 W. R. Dig. 165, and contended that unless expressly referred to the Crown was never bound by an Act of Parliament. These premises were in the same category as barracks, and the vestries had no power to dictate to the War Office how barracks should be put up. The building plans had received the sanction of the War Office. Since the decision in *Pearson* v. *Holborn Assessment Committee*, volunteers were recognized as being as much servants of the Crown as the militia. In that case it was held that premises occupied by a volunteer corps for the purposes of the service of the corps and being reasonably necessary for such service were occupied by servants of the Crown for the purposes of the Crown and therefore were exempted from rates. These premises were vested in Colonel Keller, the commanding officer of the battalion of volunteers for which they were being constructed, and were to be used only as a drill-hall, armoury, and storehouse for the corps. It was, therefore, a building vested in a servant of the Crown to be used exclusively for the purposes of the Crown.

GRANTHAM, J.—I regret that I cannot see my way in this case to decide in favour of the respondent, for it appears pretty certain from the facts found by the magistrate that this is one of those cases where vestries have interfered with a building without having any good cause for doing so. It appears that the basement or cellar of this building will be at a lower level than the main sewer, and of course it cannot be drained into the sewer if at any future time it should be found necessary to drain it from

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

any cause whatever; but the magistrate said he did not see why this basement should require to be drained, and we have heard nothing to lead us to think that in this case he was wrong in the conclusion of fact he came to. At the same time that is not the point we have to decide. Mr. Avory contended that property for the use of volunteers was analogous to property belonging to the militia or the regular army as being her Majesty's property in right of the Crown. That contention is one which it appears to me cannot be supported, for how can it be said that this building and similar buildings, which in many cases are erected by private subscriptions, can be the property of the Crown? It is true that it is used for military purposes, but no case has been adduced to show that property used for military purposes only is necessarily Crown property. On this narrow ground the matter must go back to the magistrate, but for the reason I mentioned I should be very sorry if he should think it necessary under the circumstances to interfere.

LAWRANCE, J.—I have considerable doubt as to this case. At the same time I am not prepared to hold that all property belonging to volunteers must in every case be regarded *ipse facto* as property belonging to her Majesty in right of the Crown. I agree, therefore, that this case should go back to the magistrate.

Appeal allowed.

Solicitor for the appellants, *Percy Gates.*

Solicitors for the respondent, *Mackrel & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J.) } May 10, 17.

ATTORNEY-GENERAL v. CARLTON BANK (LIMITED). (a.)

Revenue—Stamps—Receipts—Penalties—Entries of sums in book — Payment of sums—Entries initialled by person receiving money—Liability of entries to stamp duty as receipts—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 101, 103.

A bank, which was a limited company carrying on a moneylending business, engaged a solicitor under an agreement which made him an officer of the bank, for the purpose of carrying on the legal business of the bank and collecting debts due from customers. When the solicitor recovered sums of money for the bank he wrote down the amount in a book kept by him for that purpose, and he then took the money, with the book, to the bank and handed the amount over to one of the officers of the bank, who, in the margin opposite the amount paid, generally wrote the word "Received," with the amount and the date, and sometimes simply put his initials with the date, and in one case wrote the word "Entered," with the amount and initials.

Held, that these entries were all receipts within the meaning of section 101 *of the Stamp Act,* 1891; *that there was no distinction in the form of the receipts, and that all the entries in respect of £2 or upwards required to be stamped as receipts; and that the bank were liable in penalties, under section* 103, *for the act of its officers in not stamping them.*

Further consideration in an information by the Attorney-General claiming forty-eight penalties of £10 each from the defendants for not affixing stamps to certain receipts for sums of £2 and upwards.

The case was tried before the Lord Chief Justice and a jury on the 27th of March, when, upon the findings of the jury, it was reserved for further consideration.

The facts and questions raised appear fully in the considered judgment of the learned judge.

The Stamp Act, 1891 (54 & 55 Vict. c. 39), provides under the heading "Receipts," section 101 (1): "For the purposes of this Act the expression 'receipt' includes any note, memorandum, or writing, whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person."

Section 103: "If any person—(1) gives a receipt liable to duty and not duly stamped . . . he shall incur a fine of ten pounds."

Sir R. Finlay, S.G., and *Danckwerts,* for the Crown.

Arthur O'Connor, Q.C., W. Graham, and *Holloway,* for the defendants.

Cur. adv. vult.

May 17.—Lord RUSSELL OF KILLOWEN, C.J.—This is a case in which the Crown by information seek to recover a number of penalties against the defendants, the Carlton Bank, upon the ground that the bank issued or were responsible for the issuing of certain receipts, which required stamps, unstamped. The facts are these: The defendants are a limited company carrying on apparently the business principally of a money-lending bank, and they had in their employment under a peculiar kind of agreement the person who gave information in this case to the Inland Revenue, one George S. Coxwell. The agreement, which was dated the 20th of August, 1895, purported to appoint Coxwell the solicitor of the bank, to be an officer of the bank, the appointment to continue until determined by notice, as provided, by the bank, with a provision that he is to cease to be an officer of the bank in case of grave misconduct. The bank was to pay him a salary of £100 per annum, with certain provisions for increase, and to pay the rent of his office, cash for court fees and disbursements, and provide all books and stationery; the solicitor was to take the necessary steps to recover the debts due to the bank and to advise the bank; he was entitled to be paid certain travelling allowances while engaged in the business of the bank; the bank was to be entitled to his whole time, with a proviso that if not interfering with the business of the bank, he may, subject to their pleasure in the matter, attend to the business of other persons. I do not think that there is anything else in the agreement that is important. The course of business between Mr. Coxwell, as appointed solicitor and an officer of the bank, appears to have been this: When instructed he sued for and from time to time recovered amounts of money for the bank, and he seems to have kept his account with the bank in this form. The accounts as produced here are contained in two books, the first of which in order of date is headed thus: "Statement of moneys received by G. S. Coxwell from customers of the Carlton Bank and handed over to the bank." The course of business was this: When he received moneys on account of the bank it was his duty—a duty which he appears more or less regularly to have discharged—to pay over that money to the bank—that is to say, of course, to an officer of the bank, and the officer of the bank to whom he paid the money, sometimes the secretary of the bank

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

and sometimes the cashier of the bank, having received the money initialled the amount and put a date evidencing the date on which he received the money. Sometimes that form was varied by having the word "received" added, and in one or two cases the word "entered" was used. So the matter goes on through the first book and is carried on into the continuation book, which book is entitled by Coxwell "Cash received book," and then a date is given for its commencement, and the words "G. S. Coxwell, 99, London-wall"—that being the office at which Coxwell carried on his business and not on the premises of the bank—that is to say, not in the place where the business of the bank was carried on. The contention on the part of the Crown was that each of these records—to use a neutral phrase—of the reception of these moneys by the officer of the bank constituted a receipt within the meaning of the Stamp Act, 1891, and required a stamp where the amount so recorded or acknowledged as received amounted to £2 or upwards. The only remaining thing necessary to state is that the jury found, in answer to questions put to them, these facts. When first asked a question as to whether what the representatives did was acting for the bank within the ordinary scope of their authority as agents of the bank, their answer was: "We are of opinion that these people"—meaning, I presume, the cashier and secretary—"did it as individuals to protect themselves against each other, and not to protect the bank"; and later, as they had not answered whether they did this in the ordinary course of business, they answered thus: "Yes; we are agreed that they were given"—that is these acknowledgments—"in the ordinary course of business as between one servant and another." These constitute all the facts of the case, and it was agreed that I should have power to draw any inference of fact not inconsistent with the findings of the jury to which I have adverted. Upon this state of facts three questions seem to me to arise. First, are these entries or any of them receipts within the meaning of section 101 of the Stamp Act of 1891? If they are receipts they require a stamp. That would seem to be the first important question. Next, if they or any of them are receipts and so require a stamp, are the defendants, the bank, liable to the penalty fixed by section 103 of the Act? That would seem to be the second question. The third and remaining question is, is any proper distinction to be drawn between the different instances, or do they all fall within the same category? I will say a word about each of these questions in the order in which I have stated them. First, are the entries or any of them receipts? That must turn upon what is the true construction of the statute itself, which provides—I omit immaterial words—that receipt includes any writing whereby any money amounting to £2 or upwards is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or part of a debt of £2 or upwards is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person. I need not point out that those are words of the most wide and comprehensive kind. To apply the facts here to that provision, first, it is clear, as it seems to me, that these entries were intended to be and in fact were an acknowledgment by an officer of the bank, who had authority to receive for the bank, that he had in fact received the money in question from the solicitor, and that the officer of the bank receiving had so received for the bank. In other words it would follow that the entries in that book when initialled by the officer of the bank constituted an acquittance *pro tanto* to the solicitor in respect of the money he paid—that is to say, the solicitor having received the money and being under a liability to account for that money, and indeed if he was a servant of the bank in the strict sense of the word being liable to prosecution if he embezzled the money and did not properly account for it, the entries in these books constituted an answer to any demand made upon him in respect of such money. Such entries entitled him to say, "Here is the evidence under the hand of your own officer, who was entitled to receive the money, that I have in point of fact discharged myself of that obligation." Can I say that that is not a receipt within the meaning of these comprehensive words? Can I say that it is not a receipt within both clauses of that section 101—namely, can I say that it is not a writing acknowledging or expressing the receipt or payment of £2 or upwards? Or can I say that it is not a writing whereby a debt or part of a debt is acknowledged to have been paid? It seems to me after careful consideration, and I confess, beginning with the impression that this was not a transaction which the Legislature probably contemplated as requiring a stamp, I have felt myself obliged by the force of the language of this section to come to the conclusion that these are receipts within the meaning of that section. Something was said during the argument on both sides as to there being special canons of construction applicable to these Revenue Acts. I confess I do not accept that argument at all. I see no reason why there should be any special canons of construction in respect of any particular Acts of Parliament. The duty of the court in all cases, whether relating to taxation or to any other subject, is to give effect to the view of the Legislature as that view is to be gathered from the language that has been employed, having regard to the context in connection with which it is employed. That is a canon of universal application and I am not aware that there is any true authority for saying that a taxing statute is to be differently construed from any other. Of course it is incumbent on those who invoke its authority to make out to the satisfaction of the tribunal, and for that tribunal to be satisfied, that the will of Parliament enforcing the tax has been expressed, but if the court arrives at that conclusion that its will has been expressed in a particular direction the court must give effect to it. Let me test the view I am expressing in this matter by this illustration. If in this case instead of being in the service of the bank under a more or less exceptional agreement, Coxwell had been a solicitor employed as solicitors usually are, to do the business of the bank, and having recovered moneys for the bank he had to hand these moneys over and take an acknowledgment in writing. It would be beyond argument that in such a case the acknowledgment in writing must be stamped. Is there anything in the circumstances of that case which in principle differentiates the present from it? Of course there are differences between the position of an independent solicitor and the position of Coxwell in this case. For instance, the independent solicitor, once he received money from the bank would be absolute debtor to the bank and would be bound in all events or whatever happened to account to the bank for every penny that he received, and, on the other hand, he could not be treated as the servant of the bank so as to be punished by prosecution for embezzlement if he appropriated the money to his own use. In the present case probably—it is not necessary to decide it—Coxwell might be held to be properly regarded as the servant of the bank, so that he would be liable to be prosecuted for embezzlement

if he did not account for the money, and also he would not, in my judgment as at present advised, be absolutely the debtor to the bank in the same sense in which the independent solicitor would be, because if he were to be regarded as the servant of the bank and he received the money for the bank, and without any neglect on his part the money had been lost or stolen, it seems to me he would not have been liable in respect of such loss occurring without any default upon his part; but these are the only differences. It does not seem to me that they are differences which distinguish the two cases in principle, having regard to the application of the statute in question. I am inclined to think that the case of the carter and the case of the various clerks—referred to during the argument—using multiform invoices in shops are distinguishable from the present case, and for this main reason, that in those cases the entries are in the course of business for the mere regulating of book-keeping, and are not regarded as documents of acquittance handed over to the person who pays. For instance, in the case of the carter the book is the book of the company or his employer, and remains in the possession of the employer except for the purpose of deliveries and receipt of money for which it may be handed temporarily to the carter, but he does not take that book and it is not given to him as an acquittance or acknowledgment. So in the case of the multiform invoices in shops where the money passes or may pass through several hands, and there may be an initialling of the receipt in the same way, although the documents are undoubtedly to regularize the accounts, and are necessary to be referred to to show how this or that employé has dealt with the money, they are not treated as receipts given to that person within the meaning of the Act. When we look at the language of the Act, I think the distinction I am here drawing is not technical, but is a real one, because the words of the earlier part of the clause are "a receipt whereby any money is acknowledged or expressed"—that is, to somebody—"to have been received or deposited or paid, or whereby any debt or demand," and so on, "is acknowledged to have been settled, satisfied, or discharged." Then in the penalty clause, section 103, "If any person gives a receipt"—that means, if he hands over a receipt as acquittance or discharge to a particular person—then he shall be liable to the penalty. Here it is clear that this was given to Coxwell and was kept by him as evidence of the payment, in other words as a receipt which he is able to produce. The headings of the book bear out that view, and the fact that the book is kept by him and returned to him and is not in the custody of the bank at all or the officers of the bank, except during the moment of initialling, also supports that view. I therefore come to the conclusion that these are receipts, or some of them are, within the meaning of the Act, and require stamps. The next question is, Is the bank liable? It is clear that under section 103 the person, which of course includes, under the Interpretation Act of 1889, corporations, who is liable is the person who gives the receipt, and therefore of course it follows that in order that the bank should be made liable it must be their receipt. But they are a limited company and their receipt can only be given by the officers of the bank, by persons representing the bank acting within the scope of their authority as such officers of the bank. I have already intimated that these men who received the money had the bank's authority to receive it. When they received it, it was practically a payment to and a reception by the bank. Now what is the effect, in considering this question, which ought properly to be given to the findings of the jury? Their findings are these: First, "We are of opinion that these people did it as individuals to protect themselves against each other, and not to protect the bank." It may be that that was the motive with which that was done by those representing the bank, but that by no means concludes the question. The question is, What in fact did they do? What they did was this: Being officers of the bank entitled to receive the money, they gave in ordinary course these acknowledgments which I have already intimated in my opinion were receipts within the meaning of the Act. The further finding of the jury was, "We are agreed that they were given in the ordinary course of business as between one servant and another"—that is, that they were given for the regularizing of the accounts as between the servants. That may be their motive, but they did these acts as representing the bank, and having power to bind the bank by the acts which they so did, and they did this in the ordinary course of business. It does not seem to me, therefore, that there is anything in these findings of the jury inconsistent with the inference that the officers of the bank did this with the knowledge and authority of the bank; but when it is remembered that the persons who did these things were the cashier and the secretary of the bank, the inference which seems to me proper to be drawn is that it was done with the knowledge and authority of the bank. If any other view were to be taken it would open a very wide door to fraud, and it would defeat the objects of the Legislature in imposing this tax if it were to be said that although these things were done in the ordinary course of business and were within the authority of the cashier and secretary to do, and although they had the effect of giving effectual acquittances to the person to whom they were given on receipt of the money, the bank might turn round and say that it was a matter merely between these officers of the bank and not a transaction to which the bank was in any real sense a party. I think the bank was a party, and must be taken in my judgment to have concurred in what was done.

The only remaining question is, Is there any distinction to be drawn between these cases, or do they all fall within the same category? In my judgment they all fall within the same category. Apart altogether from authority I think the language of the statute itself makes it clear that no formal words are required. I recur again to those words "receipt includes any note or writing whereby any money amounting to two pounds or upwards is acknowledged or expressed to have been received or paid, or whereby any debt or demand . . . is acknowledged to have been settled or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person." It seems to me that those words cover the present case, and no particular or formal words are necessary to constitute these documents receipts if they signify or import acknowledgment within the meaning of the Act. It seems to me they import acknowledgment within the meaning of section 101 whether the document is merely initialled, or whether there are initials plus the word "entered," or initials plus the word "received." I therefore think there is no proper distinction to be drawn between these cases.

The result will be that there will be judgment for the Crown, and I hope that this is a case in which the Inland Revenue authorities will be well advised not to press for the whole of these penalties, as I think it was a case in which those acting for the bank in the circumstances of this case may well honestly have supposed that they were violating no provision of the law in doing what they did. I think in such

circumstances the Inland Revenue ought to be advised not to exact the full measure of the penalties to which in point of law and according to my judgment they are entitled.

Judgment for the Crown for £480, being a penalty of £10 on each of the forty-eight counts.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitor for the defendants, *S. J. Debenham.*

Q. B. Div. (Wright and Bruce, JJ.) } Feb. 27; March 29.

HARFORD *v.* LYNSKEY. (*a.*)

Municipal corporation—Election—Nomination—Candidate—Right to petition—Disqualification existing at date of nomination—Municipal Corporations Act, 1882 (45 & 46 *Vict.* c. 50), *ss.* 77, 88.

The petitioner and the respondent were duly nominated as candidates for election to the office of councillor for a ward of a municipal borough. The petitionsr was, at the time of his nomination, interested in a contract with the corporation of the borough. At the hearing of objections to nomination papers the respondent objected to the petitioner's nomination on the ground that his interest in such contract disqualified him (under section 12 (1) (c) *of the Municipal Corporations Act,* 1882) *for election. The mayor allowed the objection, and the respondent, being the only other candidate, was declared to be elected as on an uncontested election. On a petition being presented by the petitioner against the return of the respondent, it was admitted, on the authority of* Pritchard *v.* Mayor, &c., of Bangor, 37 *W. R.* 103, 13 *App. Cas.* 241, *that the mayor had no jurisdiction to entertain the objection, but it was contended that the petitioner, being disqualified at the date of the nomination, was not entitled as a candidate (within the meaning of sections* 77 *and* 88 *of the Act) to present a petition.*

Held, that, although the petitioner was disqualified for nomination as well as for election, yet, having been nominated in proper form, he was a "candidate" and entitled to present the petition.

Monks *v.* Jackson, 1 *C. P. D.* 683, 25 *W. R. Dig.* 110, *distinguished.*

Special case stated for the opinion of the court in the matter of an election petition touching an election for the office of councillor for the South Scotland Ward of the City of Liverpool.

The case was stated by a barrister agreed upon by the parties pursuant to an order of Bruce, J.

The City of Liverpool is a city to which the Municipal Corporations Act, 1882, applies, and is divided into twenty-eight wards, one of which is called the South Scotland Ward. This ward is represented in the city council by three councillors, and one of such councillors goes out of office on the 1st of November in each year.

On the 18th of October, 1898, the town clerk of the said city duly published notice in the words of Form H. in Part II. of Schedule VIII. of the Municipal Corportions Act, 1882, that the last day for the delivery of nomination papers for the nomination of candidates at the then ensuing election for the said ward was the 24th of October, 1898; that candidates must be duly qualified for the office to which they were nominated; and that the lord mayor would attend at the Town Hall on the 25th day of October to hear and decide objections to nomination papers.

On the 24th of October a nomination paper was duly delivered at the town clerk's office by which the petitioner being a person enrolled and entitled to be enrolled as a burgess was nominated as a candidate for the said office. Such nomination paper was in all respects in accordance with the rules contained in Part II. of Schedule III. of the said Act.

The respondent and one Patrick Kelly were also duly nominated as candidates for the said office, but Kelly afterwards duly withdrew his said nomination, and thereupon ceased to be a candidate at the election. At the hearing, on the 25th of October, 1898, by the lord mayor of objections to nomination papers the respondent handed in an objection to the nomination paper of the petitioner on the ground "that he is now a contractor to and with the Liverpool Corporation, and is directly interested in contracts with the said corporation for the supply of police uniform requisites. One of such contracts is dated the 5th of November, 1896, and continues to run until the 31st of December, 1898." The petitioner was heard in answer to the objection, and thereupon explained that there had been only one contract such as referred to in the objection, and that he had assigned all interest in that contract to one William Drew, and contended that the question of his alleged disqualification did not affect his nomination and could only affect his election in the event of his being elected. Notwithstanding this contention the Lord Mayor allowed the said objection.

The petitioner and his partner in a firm of F. J. Harford & Co. had entered into a written contract with the corporation of the date and running for the period mentioned in the respondent's objection for the supply of certain articles of clothing for the police. The contract contained a prohibition against assigning or transferring the contract without the consent of the corporation. On the 23rd and 24th of October, 1898 (before the delivery of the petitioner's nomination paper as aforesaid) the said firm made verbal arrangements with the said William Drew to take over and carry out in all respects the said contract, and on the 24th of October notice in writing thereof was given to the said town clerk by the said firm and by Drew. Such arrangements were made without the consent of the corporation.

On the 27th of October there was a meeting of the council at which the petitioner intended to apply for the consent of the said corporation to the assignment by the said firm of all their interest under the said contract to the said Drew. The petitioner abandoned such intention after and in consequence of the said decision of the said lord mayor. No such application was in fact made at that meeting by the petitioner or the said Drew. Such consent of the said corporation was given subsequently to the 1st of November, 1898.

On the 1st of November, 1898, an election was held to fill ordinary vacancies in the office of councillor for the different wards of the said city, and on that day the respondent was declared to be elected as being the only person validly nominated for the said South Scotland Ward.

On the 14th of November, 1898, the petitioner duly presented a petition praying that it might be determined that the respondent was not duly elected.

The questions for the opinion of the court were:

1. Whether, upon the facts above stated, the petitioner was a candidate at the above election and was duly nominated and entitled to present this petition.

2. Whether, upon the facts above stated, the lord mayor was right in allowing the said objection.

Macmorran, Q.C. (*S. H. Day* with him), for the petitioner.—As to the second question, it is clear that

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

the lord mayor had no jurisdiction to entertain the objection: it was not an objection to the nomination paper, and it is only such objections, and not objections relating to the qualifications of candidates, that are to be determined by the mayor: Municipal Corporations Act, 1882, s. 55, and third schedule, Part II., rule 9; *Howes* v. *Turner*, 1 C. P. D. 670, 24 W. R. Dig. 103; *Pritchard* v. *Mayor, &c., of Bangor*, 37 W. R. 103, 13 App. Cas. 241. The petitioner is entitled to present this petition: a petition may be presented by "a person alleging himself to have been a candidate at the election" (Municipal Corporations Act, 1882, s. 88 (1)); and candidate means "a person elected or having been nominated or having declared himself a candidate for election" (*ib.* s. 77); the petitioner is within the two last descriptions, and, although disqualified at the time of the nomination, he might have got rid of the disqualification in the interval between nomination and election.

Robson, Q.C. (*Coward* with him), for the respondent.—We do not dispute that the mayor had no jurisdiction to entertain this objection. The petitioner was not a candidate within the meaning of section 88 (1), and he is not entitled to petition. To be a candidate a person must be qualified to be elected. The form of notice of election (Form H. in the eighth schedule to the Act) states that "candidates must be duly qualified for the office to which they are nominated." The petitioner was at the time of nomination disqualified under section 12 (1) (*c*) by reason of his interest in a contract with the corporation. His wrongful act in putting himself forward as a candidate when he was disqualified cannot give him a right to petition which he would not otherwise possess. *Monks* v. *Jackson*, 1 C. P. D. 683, supports the view that an election cannot be questioned on the petition of a person whose candidature was not regular.

Macmorran, Q.C., in reply.—In *Monks* v. *Jackson* there had been no valid nomination at all: here the petitioner was duly nominated and his disqualification was temporary only, and might have been removed before the day of election. If it were not so removed his opponents could have given notice to the voters of the disqualification, and the votes given for him would be thrown away; and if he was elected they could petition on the ground of his disqualification (section 87 (1) (*c*)). In the *Bristol case* (Simeon on Elections, pp. 47, 51), it was held, in the case of a parliamentary election, that a qualification acquired during the poll itself was sufficient.

Cur. adv. vult.

March 29.—The judgment of the court (WRIGHT and BRUCE, JJ.) was delivered by

WRIGHT, J.—On the 24th of October, 1898, the petitioner and the respondent were nominated in proper form for election to the office of councillor for a ward in the city of Liverpool. The respondent objected to the petitioner's nomination on the ground that the petitioner was then interested in contracts with the corporation, and was therefore disqualified by section 12 of the Municipal Corporations Act, 1882, which enacts that "a person shall be disqualified for being elected and for being a councillor" if and while he is so interested. The lord mayor allowed the objection, and thereupon the respondent became the only person standing nominated, and on the 1st of November he was declared by the returning officer elected as upon an uncontested nomination. The petitioner admits that at the time of his nomination he was interested in contracts with the corporation, but he contends that he could and would have got rid of his disqualification before the day fixed for the poll, and was therefore not disqualified for nomination; and he contends that at any rate the lord mayor was wrong in entertaining the objection, and the returning officer wrong in declaring the respondent elected as upon an uncontested election. It is now admitted that, having regard to the case of *Pritchard* v. *Mayor, &c., of Bangor*, the lord mayor must be taken to have had no power to entertain an objection of this kind, and although the returning officer was bound to act on the lord mayor's allowance of the objection, and was bound to declare the respondent elected as upon an uncontested nomination, yet it seems clear that the election and the declaration of it were voidable on petition, if it is shown on petition that the lord mayor rejected a nomination which he had no power to reject; and the petition, if it had been brought by voters, must have succeeded to the extent of unseating the respondent and rendering a fresh election necessary. We have to determine whether the same consequence ought not to follow upon the petition of the excluded candidate; and this involves, or may involve, the determination of two questions—the first, whether this petitioner was disqualified for nomination; and the second, whether, if so disqualified, he can maintain this petition, as voters could have done, so far as to unseat the respondent, who had been wrongly declared elected.

With respect to the first question we have not been able to find any authority in point. No case of the kind seems to have occurred under the Municipal Corporations Acts; and the cases of parliamentary elections to which we have been referred, or which are collated in Hatsell's Precedents, Sir Thomas Erskine May's Parliamentary Practice, and the old editions of Rogers on Elections, do not throw any light on the matter. They are mostly cases where the disqualification was not for election, but for sitting or voting. In the absence of any guide we think it safest to hold that, in cases of elections under the Municipal Corporations Acts, a person who at the time of nomination is disqualified for election in the manner in which this petitioner was disqualified, is disqualified also for nomination. The nomination is for this purpose an essential part of the election, and if there are no competitors it of itself constitutes the election by virtue of the express words of section 56. A different construction might produce much confusion. On the nomination day no one could know whether the persons nominated will at the poll be effective candidates or not. It is true that in the case put the disqualification may be removed before the election is completed, but what is to be the effect, if the disqualification continues until the poll begins, or until the middle of the polling day, or till the close of the poll? Will votes given before the removal of the disqualification be valid? If not, how is the number of them to be ascertained? It seems to us unreasonable to hold that the Act means to leave the matter in such a state of uncertainty; and for these reasons we think that this petitioner was disqualified for nomination or election. It is not necessary to say whether the same conclusion would follow if the disqualification were such as must necessarily cease at a time between nomination and poll, as, for instance, if a person were nominated on the last day of his minority for a poll to take place on a future day.

On the second question there is not less difficulty. The 88th section of the Act provides that "an election petition may be presented either by four or more persons, who voted or had a right to vote at the election, or by a person alleging himself to have been a candidate at the election." By the 77th section the word "candidate" is for the purposes of Part IV. of the Act (in which both these

sections are included), interpreted as follows: "'Candidate' means a person elected, or having been nominated, or having declared himself a candidate, for election." By Schedule VIII., Form H, the notice of election which is to be given by the town clerk under section 54 is to state that "candidates must be duly qualified for the office to which they are nominated." The question which we have now to decide depends primarily on the construction of section 88. The words "a person alleging himself to have been a candidate" cannot, of course, mean that a mere allegation without any colour of foundation in fact would suffice. Such a merely false allegation would be properly dealt with in a summary way. But the words used seem designed to express something wider than absolutely valid candidature, and they are at any rate consistent with the view that any person who was in fact a candidate may present and maintain a petition, just as persons who voted in fact may do whether or not they had a right to vote. Nor does there seem to be any sufficient reason why words should be limited even to persons who have been in fact nominated in due form. It is quite possible that an intended nomination of a person may have fallen through or have been prevented in such a way that the election of another person may have been invalid, as, for instance, if the town clerk refused to supply a nomination paper, or if, by design or negligence, he, in exercising his important duty under Schedule III., Part II., rule 6, filled up a nomination paper so imperfectly as to avoid the nomination, or if, as in *Howes* v. *Turner*, he issued a bad notice of election, and in any such case it can hardly have been intended to deprive the aggrieved person of the right to petition. Such a construction is, further, the only one which will fit the interpretation of "candidate" in section 77. Possibly that interpretation was inserted for a different purpose—namely, to define the limits of time within which a person should be affected by the enactments relating to corrupt or illegal practices, but there is nothing which expressly limits section 77 to that purpose, and there seems to be no reason why it should not be applied to section 88, as *primâ facie* it ought to to be. And if this is the proper construction of section 88, either as taken by itself or as interpreted by section 77, it does not seem to be affected by the form of notice in Schedule VIII., Form H, which is not intended as a definition of a candidate or as of itself an enactment of any kind, but is a mere notice calling attention to the enactments of the statute; and if literally construed it is irrelevant, because it refers not to disqualification, but to qualification, and here the petitioner was qualified under section 11, though he was disqualified under section 12. But then it is said that, assuming the *primâ facie* meaning of section 88 to be in favour of the petitioner, such a construction ought to be rejected because it may produce inconvenient or unreasonable consequences. For instance, in the present case a person who was disqualified for election will unseat a person who, if the election had proceeded, either would have been validly elected or, if defeated, could on petition have unseated the present petitioner. Such an argument, *ab inconveniente*, ought not to be allowed to override the proper construction of the language of the Act unless the inconvenience is clear and great. The same result would have followed if voters had been the petitioners. An election petition is not simply a matter between the parties, but is of public concern, and if the election had proceeded as it ought to have done the respondent might not have been elected, and although in that case he could have unseated the petitioner he might not have been able to claim the seat. Nor is the argument *ab inconveniente* all in favour of the respondent. If his contention is right a petition may be brought by a person who is believed by himself and by everyone else not to be disqualified, and who was properly nominated, and yet after a long trial it may turn out that he was not qualified to be a candidate or was disqualified, and therefore, if the respondent's contention is right, it would seem that the petition must abate, no matter what transactions of public concern may be involved, and no other petition could in most cases be brought. For these reasons, if the matter were entirely clear of authority, we should be of opinion that this petitioner, having been in fact a candidate duly nominated in point of form, is entitled to maintain this petition.

But it is contended that the case of *Monks* v. *Jackson*, decided in 1876, on the repealed Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), and the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), is inconsistent with this view. There the returning officer had allowed an objection to the petitioner's nomination on the ground that his nominators were not duly qualified, and the petition sought to unseat the respondent on the ground that that objection was unfounded and ought to have been disallowed. The respondent contested the petitioner's right to petition on the ground that the petitioner himself had not in fact been nominated in due form. The petitioner in effect replied that this point had been raised at the nomination and disallowed by the returning officer, and that by the express terms of the Act of 1875, s. 1 (3), that disallowance was final. A case was stated, and it was held by Lord Coleridge, C.J., and by Archibald, J., that the petitioners had not been effectively nominated in point of form; and that notwithstanding the express terms of the Act of 1875, s. 1 (3), this was fatal to the petitioners' right to petition. During the argument, Archibald, J., is reported to have said: "The petitioners must show that they were entitled to be candidates"; and Lord Coleridge, C.J., to have said: "If, upon the face of the case, it appears that there is a fatal objection to your being petitioners, are we not to decide upon that matter?" In giving judgment dismissing the petition, Lord Coleridge said: "The case shows on the face of it that the petitioners were not duly nominated as candidates, and had no right to go to the poll, and that if they had been elected their election must have been set aside. . . . It appearing on the face of the case that the petitioners were not duly nominated, there is no ground for questioning the election of the respondents"; and Archibald, J., said: "The petitioners are shown not to be qualified to appear to question the validity of the election." We are unable to discover any material difference between the language of the Acts on which *Monks* v. *Jackson* was decided, and the language of the Act of 1882, on which this case depends, and although the considerations which have led us to a conclusion in favour of the present petitioner's right to maintain his petition were not presented to the court in *Monks* v. *Jackson*, we ought to follow the decision in that case if it can be supported since the *Bangor case* (see per Lord Herschell, 13 App. Cas., at p. 257), and if it is in point. We think, though not without doubt, that it is not in point. The decision was that the petitioner had not been nominated in fact, and therefore was not qualified to petition. Here the petitioner was duly nominated in fact. His nomination was in form regular, and he was, therefore, a candidate, and in our opinion qualified to maintain this petition—not, of course, for the purpose of claiming the seat, but for the purpose of showing that there was no valid election, as any of the persons who voted at the election might have done, whether they had a right to vote or not. Our decision does not involve the proposition that in every case a person whose

nomination has been rejected on the ground of disqualification or want of qualification can maintain a petition. We do not understand it to be laid down in the *Bangor case* that a nomination cannot ever be rejected except for informality in the form or presentation of it. If the nomination paper is on the face of it a mere abuse of the right of nomination, or an obvious unreality, as, for instance, if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection.

Judgment for the petitioner.

Solicitors for the petitioner, *Pritchard & Sons*, for *Collins, Robinson, & Driffield*, Liverpool.

Solicitors for the respondent, *Sharpe, Parker, Pritchards, & Barham.*

House of Lords.

From C. A. (England). Feb. 16.

Midland Railway v. Loseby and Another. (a.)

Railway—Traffic—Arbitration—Charges—Reasonableness—Midland Railway Order Confirmation Act, 1891, *s.* 5.

By section 5 of the Midland Railway Order Confirmation Act, 1891, *the railway company were empowered to charge a reasonable sum for certain additional services rendered to a trader at his request or for his convenience, and "any difference" arising thereunder was to be determined by an arbitrator appointed by the Board of Trade.*

Held, that all matters material and incidental to such a difference are within the competence of the arbitrator, whose decision is final.

London and North-Western Railway *v.* Donellan, [1898] 2 *Q. B.* 7, 46 *W. R. Dig.* 147, *approved.*

Decision of the Court of Appeal *affirmed.*

This was an appeal from an order of the Court of Appeal (A. L. Smith and Chitty, L.JJ.) in the matter of an arbitration between the appellant company and the respondents.

Under section 5 of the Midland Railway Order Confirmation Act, 1891, "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that where before any service is rendered to a trader he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience."

The 4th sub-section provides: "The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandize as carriers thereof or the consignor or consignee to give or take delivery thereof; or, in cases in which the merchandize is consigned to an address other than the terminal station, beyond a reasonable period from the time when notice has been delivered at such address that the merchandize has arrived at the terminal station for delivery; and services rendered in connection with such use and occupation."

In January, 1895, the appellant company gave to the respondents notice by a circular letter that, as great and continued delays had taken place in discharging loaded coal and coke wagons, involving the appellants in serious expense and impeding the working of the appellants' sidings, yards, and stations, advice would be given daily to the respondents of the arrival of any wagons consigned to them, and that four days would be allowed to the respondents to unload each wagon, exclusive of the day of arrival, and that in the event of any wagon not being unloaded within that period the respondents would, on and from the 1st of March following, be required to pay siding or standage rent at the rate of 6d. per day or part of a day for every wagon not so unloaded and remaining on the appellants' premises. The respondents objected to the charge as unreasonable, and the Board of Trade appointed Major-General C. S. Hutchinson as arbitrator, who, considering his powers limited, and rejecting evidence as to whether the period of four days was reasonable, by his award dated the 28th of February, 1898, directed that 6d. should be paid for the first day, 4½d. for the second day, and 3d. for the third and each succeeding day.

The appellants took out a summons to enforce the award.

The matter was referred back to the arbitrator by the Court of Appeal.

Cripps, Q.C., and *W. J. Noble*, for the appellants.

Lawson Walton Q.C. (*Willes Chitty* and *Gilchrist Alexander* with him), for the respondents.

Lord Macnaghten.—This appeal is an appeal in substance, though not in form, from a decision in the case of the *London and North-Western Railway Co.* v. *Donellan*. I do not think you will have any hesitation in affirming the decision in this case and agreeing with the decision which was arrived at by A. L. Smith, L.J., and by that admirable judge whose lamented death has deprived the bench of England of a very great lawyer and of one of its chiefest ornaments.

Notwithstanding the very ingenious argument that we have heard from counsel for the appellants, I think the case is really a very simple one. The provisional order which was confirmed by the Act of Parliament authorizes the company to make charges—reasonable charges—in respect of certain specified services; and then the section goes on to say: "Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." I cannot imagine wider words than those. "Any difference"—of course, it must arise under the section—is to be referred to the arbitrator, and by him is to be determined. I understand that to mean "finally determined"—determined once for all; and I think, in determining it, it is open to the arbitrator to investigate and to determine any question which is incidental to that which is referred to him, which he must determine in order to determine finally the point in difference. I agree entirely with what A. L. Smith, L.J., said—namely, that the duty of the arbitrator "is to adjudicate upon the whole matter once and for all, and that it is not the true reading of the sections to say that a court of law is to be invoked as regards some matters, and that the arbitrator is to be called in with regard to others." I also agree with what Chitty, L.J., said: "It appears to me that all the matters which are material for the decision of a difference arising under the section, whatever the

(a.) Reported by C. H. Grafton, Esq., Barrister-at-Law.

difference may be, are within the competence of an arbitrator appointed by the Board of Trade to decide." I think it would be very much to be regretted if some of these questions were referred to one tribunal and some to another. For my own part, I think if that is the real meaning of the section it would have been very much better if Parliament had not interfered at all. I think the expense and delay of dealing with the matter piecemeal, as counsel for the appellants proposed, would be something to be regretted. I do not think it is necessary to go minutely into the sections. That duty has been performed very fully and very ably by A. L. Smith, L.J. I will simply move your lordships that this appeal be dismissed.

Lord MORRIS.—I am of the same opinion, and I confess, except for the difference of opinion entertained by judges for whom one has very great respect, the case would appear to me to be rather a plain one. Section 5 enables the company to charge for services *ultra* their tonnage rates, and whenever any difference shall arise under this section the matter is to be determined by an arbitrator selected by the Board of Trade. When we come to sub-section 4 of that section we find that the company are entitled to charge for the use and occupation of their premises for a period *ultra* the time at which the consignee ought reasonably to have taken delivery; that is the period fixed for which the company are entitled to charge. The period fixed for which they are entitled to recover is the time *ultra* the period at which the consignee should take delivery. That is left general, and at the conclusion of this argument—I have repeatedly put the question, and I have not been satisfied with any answer I have heard—I fail to know how any human being can enter upon that inquiry until he has first fixed upon the *terminus a quo* from which he is to start. What is to be his starting-point? It is given in those general terms in the section; those general terms must be reduced to a certainty. By whom? By the arbitrator before whom the case is pending on the application of the company who applied for the appointment of the arbitrator, and upon their demand for a charge *ultra* that to which alone they would apparently be ordinarily entitled—namely, their tonnage rate. It is said that that must be decided by some court of law. How could it be decided by a court of law? If the company brought an action in a court of law, they would bring an action not to decide the time—that would be an element—but to decide how much they were to get, and the whole thing would be decided by the court of law—namely, the time, and, as following from the time, the amount which the company should recover. But in this case, as the matter is brought by the railway company themselves before the arbitrator, it is essential, as it appears to me, that he must first decide what time he is to start from in order to arrive at a conclusion as to what sum the trader is to pay to the company. It appears to me that that is the starting-point, and that he must decide that, and that it is quite competent for him to decide it. That is what the section of the Act of Parliament, in my opinion, very plainly says; and in addition to that, if one were to use *a priori* arguments about it, I would say it would be the most excellent solution, that an arbitrator—a man of eminence and experience in such matters—would be a much more competent tribunal, and the Legislature would have acted wisely in trusting it to him rather than to a catch jury, at the trial before a judge and jury.

I am clearly of opinion that the judgment of the Appeal Court should be affirmed.

Lord SHAND.—I do not suppose that there is any difficulty on the part of any of your lordships in affirming the decision which has been now appealed against. For my part, I should regret very much if any other decision were pronounced on this question, because I think nothing would be more lamentable in the conduct of business of this kind than that it should be found, when a trader had a dispute with regard to matters of this description with a railway company, that he had to go to the courts of law—ultimately to the Supreme Court, it may be—to settle some one point in the matter, and that he had to go to an arbitrator to settle another part of the dispute between the parties. I do not think that the statute can be read so as to lead to what I call that lamentable result. The Act provides that the company shall be entitled to a reasonable sum "by way of addition to the tonnage rate" for the use or occupation of their premises, or it may be for the detention of their trucks, "beyond a period" which is "reasonably necessary" for the trader who is using that accommodation or using those trucks. Then the same section provides that the question is to go to arbitration, and "any difference arising under this section" is to be settled by the arbitrator. The point which the arbitrator has to settle is what is "a reasonable sum" for the service rendered, the use of the accommodation, or the use of the trucks.

The railway company maintain that these words, "reasonable sum," are to be taken in a very limited sense, as meaning merely this: that the arbitrator is to ascertain the rate per day which the company is to receive, but that the arbitrator has no power to make any inquiry as to the number of days that he is to take into view. According to the argument, the railway company tell him that number of days and he must accept that from them, and, if a dispute is to arise upon that, that question must go to a court of law.

I think that this provision as to arbitration includes, as my noble and learned friend now on the woolsack has said, the question and all that is incidental to the trial of that question. I do not think it is reasonable to say that the arbitrator is not entitled to take the matter of time into consideration for the purpose of the award he is to give. In this case it so happens that the company have issued a circular stating that after four days they are to make that charge. Supposing there had been no such intimation made, is the arbitrator simply to take the statement of the company—you shall assess upon one day, two days, or twenty days? It appears to me it is essential to his reaching a "reasonable sum" that he should take the element of time into consideration. The company may, as has been put by Mr. Lawson Walton in the argument, have made arrangements that they were to deliver at intervals, and the trader may have an answer that the number of days for these deliveries at intervals have not been allowed him; or it may be that while it was intimated to him that the goods had arrived, there may have been obstructions in the way which prevented the trader getting at his goods, or failure to provide the facilities which he ought to have for his goods. All those things must enter into the question of what is the "reasonable sum" to be given by the arbitrator; and it appears to me it would be most unreasonable to read that word "reasonable" in any other sense than that it should include the sum which should be given day by day, taking into consideration the element of time which I think must be before the arbitrator in order to do justice between the parties. Mr. Cripps pressed upon your lordships that a difficulty might arise, because on this view the arbitrator in some cases might have to decide a question of title; a question might be raised as to whose property the trucks were, or as to whether the

land upon which the particular siding was belonged to the company or to a coterminous proprietor. It must be kept in view, however, that an arbitrator with reference to such a question is determining no matter of title for any permanent purpose, or with a view to settle the rights of parties in all time coming. He is deciding, merely with reference to the comparatively small matter, what is to be done in regard to this particular claim for demurrage, or whatever it may be. For that purpose I think it is a great convenience that he should determine that matter of fact, and to that limited effect. If the company are being prejudiced by a series of decisions of that kind, they have it in their power in another proceeding in court to raise the question as to title, and to get a decision upon it finally; and of course that would be binding upon any arbitrator afterwards, if any question as to the use of that particular siding should arise.

I have no difficulty in agreeing with your lordships, and with the judgment of the court from which this appeal has been taken, and I think that the appeal therefore should be dismissed.

Lord DAVEY.—I concur, and I may say I am so entirely satisfied with the reasons given by the learned judges in the Court of Appeal that I do not think it is necessary for me to add anything.

Lord JAMES OF HEREFORD.—I concur.

Lord LUDLOW.—If there had not been so many different opinions delivered by so many different judges, I should not have thought it necessary to say a single word in this case; but I do desire to say that I entirely agree with the decision of the Court of Appeal, and I only wish to add this observation, that it seems to me perfectly impossible for any arbitrator to determine the reasonableness of the charge without at the same time taking into consideration the reasonableness in respect of the limit of time allowed that is to elapse before the charge is to attach. It seems to me perfectly impossible that that can be done. I quite agree with the opinions that have been delivered, and I think the judgment of the Court of Appeal is quite right.

Appeal dismissed.

Solicitors for appellants, *Beale & Co.*

Solicitors for respondents, *Jacques & Co.*, for *George Turnbull*, Bradford.

Court of Appeal.

From Q. B. Div.
(Earl of Halsbury, L.C., and A. L. Smith and Vaughan Williams, L.JJ.) July 17.

HOLLIDAY *v.* NATIONAL TELEPHONE CO. (LIMITED). (*a.*)

Negligence — Principal and agent — Contractor—Dangerous work on highway—Liability of principal for negligence of contractor.

The defendants were engaged in laying down wires in tubes under the pavement of a street. After the wires were laid the connections between the tubes were made by a plumber under a contract with the defendants, whereby he agreed to do the work to the satisfaction of the foreman in charge at a fixed sum per connection, the plumber to supply the necessary men and materials. The soldering material used for making the connections was melted in an iron pot on the foot pavement, and it was necessary, for the purposes of the work, to obtain a flare from a benzoline lamp, which was done by applying heat to the lamp. To obtain the flare the plumber's man plunged the lamp into the molten solder (this being a usual, proper, and necessary operation with a lamp in good order), when, in consequence of the safety-valve being out of order, the lamp exploded, and the molten solder flew up and injured the plaintiff, who was passing by. The evidence was conflicting as to whether one of the defendants' men was assisting the plumber's man in the work.

In an action in the county court to recover damages for the negligence of the plumber's man in plunging a defective lamp into the metal, the judge found that the defendants had in substance the control of and supervised the work which the plumber did; that the plumber was in the position of a servant; and that the defendants were liable.

Held, that the judgment of the county court judge must be affirmed, because there was evidence that the work was being jointly executed by the defendants and the plumber, and that, therefore, the defendants were liable for the negligence of the plumber's man; and, further, assuming that the plumber was an independent contractor, that the defendants were executing on a highway works likely to cause danger to the public unless precautions were taken, and were, therefore, liable for the negligence of the contractor's workman in the execution of the works, such negligence not being a casual or collateral act of negligence.

Decision of the Divisional Court (*ante, p.* 203, [1899] 1 *Q. B.* 221) *reversed.*

Appeal by the plaintiff from the judgment of the Divisional Court (Wills and Lawrance, JJ.) reversing the judgment of the Deputy Judge of the City of London Court (Mr. Pitt Lewis, Q.C.), reported *ante*, p. 203; [1899] 1 Q. B. 221.

The action was brought to recover damages for personal injuries.

It appeared that the defendants were lawfully laying down telephone wires in a street called The Pavement, at Clapham, and for that purpose they had broken up the pavement of the street, and it was admitted that they had obtained the requisite consents of the vestry to their doing so. They had laid down a number of tubes into which they inserted bundles of telephone wires. The tubes were then socketed together and the joints made tight with rings of lead, and solder was then run into the interstices. The soldering material was melted in an iron pot, which, with the fire underneath it, was on the foot-pavement. The joints of the tubes being below the surface of the ground, it was necessary either for light or for heat (it did not appear for which) to get a flare from a benzoline lamp. To get the vapour necessary to give the flare heat had to be applied to the lamp, and as heated benzoline vapour is highly elastic and may be explosive if unduly confined the lamp was furnished with a safety-valve to prevent undue pressure on the interior. The lamp on the occasion in question was out of order, and the safety-valve would not work, and it was admitted that the workman, Alfred Highmore, who was using it, ought to have known this, and he was negligent in using it as he did. Wanting to heat it quickly, he dipped the lamp into the molten metal, when the lamp exploded, and the molten metal flew up and injured the plaintiff, who was passing by. There was no canvas or other protection round the place where Highmore was working. The lamp and the pot of molten metal belonged to George Highmore. Upon this particular section of the work the defendants had themselves dug the trench, laid the pipes, threaded the bundles of cables through them, and filled in afterwards. In order to make the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

connections at the joints the defendants left the trench open at those points along the line of piping where the connections were to be made, and they employed one George Highmore, a plumber, to make the connections, the terms of his employment being contained in a document, dated the 24th of November, 1896, with a printed heading, "G. Highmore, Plumber, Zincworker, Hot Water, and Sanitary Engineer," and by it Highmore agreed to make the connections at the joints of the pipes "to the satisfaction of the foreman in charge of the work for the sum of 12s. per connection, bends included." After the connections were made the holes left open for that purpose were filled in by the defendants. The evidence showed that Highmore had at least two men in his employment, and that at the time of the accident he had got employment elsewhere and sent his brother, Alfred Highmore, to do the work; and that the defendants' local manager kept the whole work of laying the cables under his constant supervision. The course of business was for the defendants to send to George Highmore when they wanted the connecting to be done, and he came or sent a man, with whom a second man generally came. On the occasion in question the brother came alone to do the work. There was a conflict of evidence whether one of the defendants' men was in the hole with Highmore assisting him in the work. If the connections were not made to the satisfaction of the foreman the work would have to be done over again.

The deputy judge, who tried the case without a jury, found that George Highmore was not an independent contractor; that the defendants had, in substance, the control of the work, and they practically supervised the work which Highmore did, and that Highmore was in the position of their servant; that it was a usual and proper thing to plunge the lamp into the molten metal in order to heat it, if the lamp was in proper condition, and that it was necessary for the work to do so; and that the defendants were liable for Highmore's negligence, and he gave judgment for the plaintiff for an agreed sum of £25. The Divisional Court reversed this judgment and entered judgment for the defendants upon the ground that George Highmore was an independent contractor, and that the negligent act of Alfred Highmore was a casual or collateral act of negligence for which the defendants were not liable.

Bowen Rowlands, Q.C., and *H. C. Davenport*, for the plaintiff.—There was evidence before the deputy county court judge that George Highmore was in the position of a servant acting under the control of the defendants, and was not an independent contractor, and his finding to that effect cannot be disturbed. There was, also, evidence that the defendants and Highmore were jointly engaged in doing the work, and they are both liable for the negligence of one of their servants causing injury to a third person. There was evidence that one of the defendants' men was assisting the man who was soldering the pipe joints. Further, the defendants were executing work on a public highway which would cause danger to passers by unless proper precautions were taken. Plunging a benzoline lamp into molten metal on a highway was likely to cause danger to passers by. The deputy county court judge has found that that is a usual and proper thing to do, and is necessary for the work. The defendants were under duty to take reasonable precautions to protect the public. They cannot, by delegating that part of the work which involves that operation to an independent contractor, avoid liability for not having taken precautions to protect the public from injury: *Hughes* v. *Percival*, 31 W. R. 725, 8 App. Cas. 443; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48; *Penny* v. *Wimbledon District Council*, *ante*, p. 565, [1899] 2 Q. B. 72. The act of negligence complained of here was not a casual or collateral act of negligence, as in *Reedie* v. *London and North-Western Railway Co.*, 4 Ex. Ch. 244. The Divisional Court were therefore wrong.

Mattinson, Q.C., and *Lawless*, for the defendants.—George Highmore was an independent contractor and not a servant of the defendants. He employed his own men and had his own tools for doing the work—the lamp that caused the accident belonging to him. It did not make him the less an independent contractor that he had to do the work at the times fixed by the defendants, and to their satisfaction. This latter is always the case with a builder who has to do the work to the satisfaction of the building owner's architect. Nor was this the case of a joint operation carried out by the defendants and Highmore. The work which Highmore was employed to do was a skilled job distinct from that carried out by the defendants. In regard to the contention that Highmore, assuming he was an independent contractor, was employed to carry out dangerous work, there is no evidence in support of that. There was no danger in plunging the lamp into the molten metal unless the lamp was out of order. The defendants could not foresee that the contractor's man would use a lamp with a defective safety-valve. It was a mere casual or collateral piece of negligence, for which the defendants cannot be held responsible.

EARL OF HALSBURY, L.C.—In my opinion the judgment of the Divisional Court is erroneous and must be reversed, and the judgment of the deputy county court judge restored. It seems to me to be clear upon the evidence that there are two distinct grounds upon which the decision of the deputy county court judge can be supported. There was evidence to show that the work was being done jointly by the defendants and the plumber, and the deputy county court judge upon the evidence was justified in treating them both as liable for the negligent act in question done in the joint execution of the works.

The other ground upon which I think that the plaintiff is entitled to succeed is that the defendants were interfering with a public highway, the interference being authorized by the local authority. The defendants were executing certain works on a highway, and whether they were executing those works by themselves or by a contractor, they had a duty imposed upon them to take reasonable care that the public should be protected from injury arising from the negligence of one acting for them in the execution of the works. In the present case pipes had to be soldered, and the deputy county court judge found, in effect, that it was a usual and proper thing, and necessary for the work, to have the molten metal at the spot ready for use on the instant, and that it was customary to plunge the benzoline lamp into the molten metal in order to get a flare, and I assume that the defendants were familiar with this, because they themselves did part of the works. If the lamp was perfect, the operation of plunging it into the molten metal would be harmless. If, however, the safety valve became stopped up, in the ordinary course of things the lamp must explode. Therefore a performance was going on which in the ordinary course of things might produce an explosion. Can it be said that the defendant company, which authorized this to be done, whether they delegated the work to a contractor or not, were under no obligation to protect passers by from receiving injuries from this performance? In my opinion there was such an obligation upon the defendants, and the appeal must

be allowed, and the judgment of the county court judge must be restored.

A. L. SMITH, L.J.—I am of the same opinion. I also think that upon the evidence this work may be looked upon as the joint work of the defendants and of the plumber. There is also the other ground. The defendants were executing works on a highway which were clearly of such a nature that they were likely, unless precautions were taken, to cause danger to the public using the highway. To use molten metal in the way in which it was used here was a likely source of danger to passers by. The defendants delegated dangerous work to a contractor named Highmore, and Highmore's servant did what, if the lamp had been in proper order, would have been a usual and necessary thing to do—he plunged the lamp into the molten metal, and the safety valve being out of order the lamp exploded and the molten metal was scattered about and struck the plaintiff and injured him. The plaintiff brought an action to recover damages for personal injuries caused by the negligence of the man who was doing the work. The defendants set up the defence that the man whose negligent act caused the injuries was in the employment of the plumber, who was an independent contractor, and that therefore they were not liable. Speaking for myself, I think that after the decision of the House of Lords in *Hughes* v. *Percival*, 31 W. R. 725; 8 App. Cas. 443, and of the Privy Council in *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48, if a person executes on a highway work likely to cause danger to passers by, if proper precautions are not taken, he can hardly ever now escape liability by saying that he employed an independent contractor to do the work, because a duty is imposed upon the person who has undertaken to execute the work to see that the person who actually does the work, whether he is an independent contractor or not, takes reasonable precautions to protect the public from danger. I only wish to add one other word. I cannot agree with the Divisional Court that the negligence here was a casual or collateral act of negligence.

VAUGHAN WILLIAMS, L.J., agreed.

Appeal allowed.

Solicitors for the plaintiff, *Gibbs, White, & Strong.*

Solicitor for the defendant, *W. E. L. Gaine.*

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — July 4.

TWICKENHAM URBAN DISTRICT COUNCIL v. MUNTON. (a.)

Local government—Street—Plans, &c.—Amendment—Adjournment—Jurisdiction of justices—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

When justices are asked to amend the plans, &c., submitted under the Private Street Works Act, 1892, *by a local authority, they have, under section* 8, *jurisdiction to do so without expressly amending the original resolution of the local authority, and also without directing further notices to be given to persons affected who have had notice of the original scheme and have not given notice of objection. An order made in such circumstances, declaring the local authority entitled to a charge on the property of such persons for their proportion of the expenses, is therefore valid.*

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Semble, *though section* 6 *gives the justices a discretion in such cases as to adjourning and directing further notices to be served, it is desirable, in cases of importance, that an adjournment should take place, and that notice should be given to persons affected who are not before the court.*

Decision of Stirling, J. (ante, *p.* 328), *affirmed.*

Appeal against a decision of Stirling, J. (*ante*, p. 328, where the facts are sufficiently stated).

R. Cunningham Glen, for the defendant, who appealed, referred to the material sections of the Private Street Works Act, 1892; *Whitchurch* v. *Fulham District Board of Works*, 14 W. R. 277, L. R. 1 Q. B., 233; *Cooper* v. *Wandsworth District Board of Works*, 11 W. R. 646, 14 C. B. N. S. 180; *Hopkins* v. *Smethwick Local Board*, 38 W. R. 499, 24 Q. B. D. 712; and *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214.

Macmorran, Q.C., and *The Hon. Frank Russell*, for the plaintiffs, were not called upon.

LINDLEY, M.R.—I am unable to take the view which has been contended for on behalf of the appellant, though I cannot help thinking that it would have been much better if the justices had thought fit to adjourn in order to give notice to all persons who might be affected by the order which they were about to make. The real question we have to consider is as to their jurisdiction to make the order without so adjourning and giving notice. For my part, I feel very great difficulty in getting over the construction of the section which I will read presently. I need not go through the other sections in detail, though it is well in dealing with this matter to keep them in mind. I agree entirely with Stirling, J., in the construction he puts on that part of section 8 which says that "the court may quash in whole, or in part, or may amend, the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given." In this particular case a resolution had been passed to make up the whole road. The present appellant, the defendant in the action, approved of that, and therefore did not object. That was what he wanted. Somebody else, however, sent in an objection. The case then came before the justices, and the justices amended the plans, &c., in such a way as to alter the scheme from a making up of the whole road into a making up of only that portion of the road which was a private road. That was done by the justices under the power contained in section 8, which I have just read; and I have not the slightest doubt myself that they were acting within the power which the legislature has conferred upon them. I do not think the language of section 8, sub-section 1, admits of any other construction. The justices had, I think, ample power to do what they did. There were present before them the Urban Authority of Twickenham on the one side, and the objector on the other, and the justices had ample power to amend the resolution.

So far, I think there is no doubt at all. But then comes this language, which seems to me rather more difficult to deal with. "The court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given." Now, it is the question of the practical application of that power that gives rise to the difficulty in this case. It appears to me that that language, "the court may also, if it thinks fit," do what I have read, gives them a discretion, and puts

them in the position of having to decide in each particular case whether it is necessary or proper to adjourn and order notice to be given to persons not before the court. If they think the occasion is one in which they ought to adjourn, and direct notice to be given to certain persons, then of course they ought to act accordingly. But if they look into the matter, and having done so, think it is a small matter, and does not require that any further notices should be given, they are the judges of whether an adjournment should take place, or further notices should be given. To construe the Act otherwise would be to deprive them of the power of deciding such a matter, and it would come to this, that if they were making any alteration at all in the "resolution, plans, sections, estimates, and provisional apportionments, or any of them" (except, perhaps, a merely clerical alteration), they must adjourn for the purpose of giving notices to persons who may be affected. That, certainly, is not what the Act says. The legislature has, it seems to me, entrusted to the court (that is, to the justices) a power to say whether the order or the amendment they are making is of such a character as to make it proper that an adjournment should take place, and notice should be given. I regret that here the justices did not take the opposite view; but I cannot help thinking that what we are asked to do would have the effect of rendering inoperative the statutory provisions which I have read. The appeal, therefore, must be dismissed.

JEUNE, P.—I agree with the Master of the Rolls. My sympathy is entirely with the appellant. I think, indeed, that a plausible argument might be presented on that side. It might be said with great plausibility that, though it is quite true the court may quash part or the whole of the resolutions, &c., yet that is subject to the general principle that a court cannot possibly act without hearing those who may be affected by their order, and that if they do so act their decision is *ultra vires* and wrong. It might plausibly be contended that the subsequent words are not intended to cut down or abrogate that principle, and that therefore the court was really unable to do what it has here done. That, as I have said, is a plausible argument. But I cannot give effect to it without putting upon section 8 a construction which I think it will not bear. I think the true construction is this: As the court was intended to have power to alter the scheme, there might be cases in which other persons might be affected, and it would be impossible for everybody who might conceivably be affected to be brought before the court. The Act, therefore, intended that very matter, of who should be served with notice, should be left to the justices. It may well be that the Act intended to give to the justices a discretion as to whether to adjourn and have further notices served. Therefore the whole scope of the enactment seems to have been not to cut down the provisions of section 8, and to confer a discretion as to who is to be heard. That there is no obligation, no duty, to hear anybody, I do not say; but I think the justices were within their right in doing what they did. I think as the Master of the Rolls thinks, that it is a great pity they did not come to a different conclusion; but I think, for the reasons he has given, that the judgment of Stirling, J., is right.

ROMER, L.J.—I agree in thinking that Stirling, J., is right in this case, and I do not desire to add anything to what has been said.

Appeal dismissed.

Solicitors, *Munton & Morris; Ruston, Clark, & Ruston.*

From Chan. Div. (Lindley, M.R., Jeune, P., and Rigby, L.J.) — June 28, 29.

COWEN *v.* TRUEFITT (*a.*).

Landlord and tenant—Lease—Construction—Mistake— Falsa demonstratio—*Rectification.*

The doctrine of falsa demonstratio *is only applied where a description intelligible as a whole is rendered unintelligible by a part, so that by eliminating the part the whole is rendered intelligible.*

By an underlease rooms on the second floor of Nos. 13 *and* 14, *Old Bond-street were demised to the plaintiff, "together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages of No.* 13 *to and from the demised rooms." There was a staircase in No.* 14, *but in No.* 13 *there was only a lift, and no staircase.*

Held, that as the rejection of the words "of No. 13" *would not leave a description applicable to the staircase in No.* 14, *the doctrine of* falsa demonstratio *did not apply; but that it was the intention of the parties that the plaintiff should have access over the staircase in No.* 14, *and that the underlease should be rectified accordingly.*

Decision of Romer, J., *ante* p. 29, *affirmed on this ground.*

This was an appeal from a decision of Romer, J. (reported *ante*, p. 29).

The facts may be shortly stated as follows: The plaintiff carried on the business of ladies' tea-rooms and a ladies' club. The defendant was owner for a term of years of the premises 13 and 14, Old Bond-street, and by an underlease of the 24th of December, 1895, four rooms on the second floor of Nos. 13 and 14, and one room on the third floor of No. 14, "together with free ingress and egress for the lessee, her servants and customers through the staircase and passages of No. 13 aforesaid, to and from the premises hereby demised on the second floor of the said premises, Nos. 13 and 14 aforesaid." There was no staircase in No. 13 leading directly to the demised premises, the only staircase which gave such access having been pulled down when the lift was made in 1893. There was a staircase in No. 14, which was entered through the defendants' shop. The defendant declined to allow the plaintiff to use this staircase except in the case of fire or other emergency, and insisted that she and her customers must gain access to the demised premises by means of the lift in No. 13. It was admitted that the reference to the staircase in the underlease was not in accordance with the facts, and had been inserted in this form by mistake.

The plaintiff asked for a declaration that she was entitled on the true construction of the underlease to a right of access to the demised premises by the staircase in No. 14.

Romer, J., held that the words "of No. 13" might be rejected as as *falsa demonstratio*, and that a right of access over the staircase in No. 14 passed to the plaintiff by the underlease.

The defendant appealed.

Levett, Q.C., and *J. R. Brooke*, for the appellant.—There is no instance where the doctrine of *falsa demonstratio* has been applied, except where the misdescription has come at the end. What the learned judge has really done is to rectify the deed.

They referred to *Wrotesley* v. *Adams*, 1 Plowd. 191; Sheppard's Touchstone, pt. 2, p. 247; *Doe d. Smith* v. *Galloway*, 5 B. & Ad. 43.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The respondent in person.

Levett, Q.C., replied. (RIGBY, L.J., refered to *Chamberlaine* v. *Turner*, Cro. Chas. 129).

June 29.—LINDLEY, M.R., referred to the facts and the evidence of the parties as to what was agreed about the plaintiff's use of the back staircase, and continued: The real agreement I have no doubt was that the plaintiff was to have the use of the lift and also the staircase more or less. It was not thought at the time that that would be a matter of importance, but now that the plaintiff's business has developed and become larger, her use of the staircase is a nuisance.

[His lordship then referred to the provisions of the lease and referred to the mistake in the plan which had caused the blunder in the lease, and continued:] There being this blunder, what is to be done? It is said that by a mode of construction we could come to the conclusion that as the right of passage through No. 13 is inapplicable to the building as it actually existed, it must follow, according to the doctrine of *falsa demonstratio*, that it must be applied to the staircase of No. 14. I do not know that the doctrine is applicable where the court can see what it is that the parties really did mean by the document in question.

I must, however, protest against the way in which the doctrine was stated by counsel for the appellant, that the maxim *falsa demonstratio non nocet* only applies where there is some incorrect description at the end of the sentence. That is wittling it away and making it ridiculous. It is a misapprehension. I do not know that the principle can be better put than it is in Jarman on Wills (5th ed., vol. 1, p. 742), where it is said the rule means "that where the description is made up of more than of part, and one part is true but the other false, then, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise." The characteristic of cases within the rule is that the description so far as it is false applies to no subject at all, and so far as it is true applies to one only. Thus in *Day* v. *Trig*, 1 P. Wms. 286, where one devised all his freehold houses in Aldersgate-street, London, having, in fact, only leasehold houses there, it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass.

To limit that doctrine in the way that counsel suggested is to deprive it of half its merit. It is a rule of good sense. If the language is clear, but does not fit because of some words which have been inserted, if you can reject the part that makes it inapplicable you do reject it. I should therefore have some difficulty in coming to the conclusion that the plaintiff was entitled to the use of this staircase on the construction of the lease. But on the question of rectification I see no difficulty whatever. On the evidence I think the learned judge was quite right when once the fact is ascertained that it was intended that the plaintiff should have access to her rooms by a staircase, and it is found that there is only a staircase in one house. The judge was right, but the order should be amended by adding the word "back" before "staircase," as everyone agrees that it was the back staircase she was to use. With that addition to the order the appeal will be dismissed with costs.

SIR F. JEUNE.—I agree with the judgment that has been delivered. For some time I thought that the doctrine of *falsa demonstratio* might be applied here. The learned judge below proposed to apply it by striking out the words "No. 13" as being a mere *falsa demonstratio*, but I do not think that the principle applies. I doubt whether the words "staircase and passages" are a sufficiently clear description of a back staircase, for there are two staircases in No. 14, a back and a front. I think if the principle is to be applied at all, the words "No. 13" would have to be struck out all through, also as regards the passages of No. 13; but when one considers that, as the Master of the Rolls has pointed out, the real mistake was that it was supposed that there was a staircase in No. 13, I think one sees that it is not really a case of *falsa demonstratio* at all, but the clear words of the lease apply to something which is non existent, so that the principle cannot be invoked in aid of the construction of this lease. I agree, however, that the doctrine is not to be cut down as was suggested by counsel for the appellant by saying that it is to be limited to cases where the false part of the description follows the true. That is perfectly senseless, and would cut down what is a rational and useful canon of construction. Leaving that aside, there is no difficulty in rectifying the lease. To my mind it is clear that it was owing to a mistake of all parties that these words were inserted. It was intended that the plaintiff should have the use of the back stairs without limit. The extent of her use was left to the good sense and proper feeling of the plaintiff. No doubt the defendant thought that it would not be much used, and in conversation something to that effect was said, but the real intention was that there should be egress and ingress by these stairs to No. 13. Under these circumstances there is no difficulty in rectifying the lease as the Master of the Rolls suggested, so as to show that the ingress and egress is to be by the back stairs.

RIGBY, L.J.—I entirely agree as to *falsa demonstratio*; one can see plainly what the lease means on its construction. It means that the plaintiff is to have access by the stairs which have been referred to. [His lordship referred to the mistake in the plan, and commented on the fact that none of the persons who knew the premises, and who must have known that no staircase existed in No. 13, corrected the plan. He observed that the mistake was on both sides, and continued:] I will only add on this part of the case that I altogether reject the argument, as my learned brothers have done, that in applying the doctrine of *falsa demonstratio* it is material in what part of the sentence the *falsa demonstratio* is found. That would be reducing a very useful rule to a mere technicality, whereas it is in fact a very substantial question. [His lordship then referred to the evidence on the question of rectification, and agreed to the order being made in the form indicated by the Master of the Rolls.]

Appeal dismissed.

Solicitor for the appellant, *W. H. Herbert.*

Solicitor for the plaintiff, *W. Hilton Perkin.*

From Chan. Div. (Lindley, M.R., Jeune, P., and Rigby, L.J.) — June 28.

FRIARY, HOLROYD, & CO. v. SINGLETON. (*a.*)

Landlord and tenant—Lease—Option to purchase freehold—Equitable assignee—Waiver of notice of exercise of option.

Held, by Romer, J. (ante, *p.* 93), *that an equitable assignee of the legal owner of a lease is not an "assign"*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

within the meaning of a covenant therein giving a right of pre-emption of the freehold to the lessee, his executors, administrators, or "assigns"; and, therefore, that the plaintiff, as such assignee, was not entitled in equity, as against the lessor or his assigns, to enforce such right of pre-emption.

Cox *v.* Bishop, 5 *W. R.* 437, 8 *De G. M. & G.* 815, *followed.*

Walsh *v.* Lonsdale, 31 *W. R.* 109, 21 *Ch. D.* 9, *distinguished.*

Held, on appeal, that, upon the facts, the defendant (an assignee of the lessor) had waived his right to receive notice of the plaintiff's option to purchase the freehold, and, therefore, was precluded from taking the objection that the plaintiff was not entitled to exercise the right of pre-emption.

Decision of Romer, J. (ante, *p.* 93), *reversed.*

High Court of Justice.

Chan. Div. North, J. — May 10, 11.

STOKE PARISH COUNCIL *v.* PRICE. (*a.*)

Local government—Parish council—Right to sue—Main roads—Local Government Act, 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 8, 11, 25.

A parish council cannot sue for an obstruction to a well situate on a main road, from which the inhabitants claim to take water, as main roads are vested in the district council under section 25 *of the Local Government Act,* 1894, *and if the right is a public one, the Attorney-General must be joined as plaintiff.*

Action by the Parish Council of Stoke, in the county of Kent, claiming a declaration that the inhabitants of Stoke were entitled to the use of a certain spring or well, and for an injunction to restrain the defendant from blocking up the plaintiffs' pump and from interfering and blocking up the stream.

The council by their statement of claim asserted that by section 8, sub-section 1 (*e*), of the Local Government Act, 1894, it had power to utilize any spring or well in the parish, and that on the main road from Upper Stoke to Middle Stoke there was a spring or well, and that either by (1) a lost grant, (2) enjoyment from time immemorial, or (3) enjoyment for twenty years the inhabitants of Stoke were entitled to the use of such spring or well. The defendant by his defence denied the alleged user of the stream or well, and said that there was prior to 1894 a depression in his land in which water collected, but that in that year he had filled up the depression. In 1895 the plaintiff council wrongfully made a hole in the defendant's land, and in 1897 put up a pump, and that the defendant removed part of the pump and filled it up with cement in order to assert his right. The defendant further pleaded that the claim made by the parish council was for a public right, and that an action only lay at the suit of the Attorney-General, and counterclaimed for a declaration that the parish council had no right to maintain a pump upon his land.

Morton Smith, for the defendant, having taken the objection that the plaintiffs had no right to sue without joining the Attorney-General,

Buckmaster, for the plaintiffs, argued that a right to take water was a *profit à prendre* not an easement (*Manning* v. *Wasdale*, 5 Ad. & E. 758; *Race* v. *Ward*, 3 W. R. 240, 4 E. & B. 702), and that a well situate on private land was a public well: *Smith* v. *Archibald*, 5 App. Cas. 489, 28 W. R. Dig. 136. Under section 8, sub-section 1 (*e*), of the Local Government Act, 1894, the plaintiffs have power to utilize the well, and that implies power to sue for an obstruction, and the parish council must be able to sue on behalf of the inhabitants.

Morton Smith.—What is claimed here is a public right, and the plaintiffs have no right to sue on behalf of the public; the Attorney-General must make such a claim: *Vestry of Bermondsey* v. *Brown*. 14 W. R. 213, L. R. 1 Eq. 204; *Wallasey Local Board* v. *Gracey*, 36 Ch. D. 593; *Tottenham District Council* v. *Williamson & Sons*, 44 W. R. 676, [1896] 2 Q. B. 353. The well is not vested in the parish council, even on its own showing. Main roads are vested in the county council, and this is a main road. Section 25 of the Local Government Act, 1894, vests in the district council all duties under the Public Health Act formerly vested in the guardians. The remedy of the plaintiffs would be to appeal to the county council under section 16 of the Act of 1894. The parish council is a body with limited powers and cannot incur expenses beyond threepence in the pound without the sanction of a parish meeting, or more than sixpence in the pound without the approval of the county council: section 11 of the Act of 1894.

Buckmaster, in reply.—The plaintiffs are not asserting a public right, but only a right on behalf of the inhabitants of the parish to take water. *Vestry of Bermondsey* v. *Brown* does not apply, as a parish may have a right to take water although it cannot have a right of way. They claim a right for a limited body of persons and not a right for the public. The cases where the Attorney-General has had to be a party have all been cases of a public nuisance; here the plaintiffs have suffered special damage to their pump.

Cabell, amicus curiæ, referred to *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494.

Morton Smith, having elected not to press his counterclaim,

NORTH, J., said: If the defendant had persisted in his counterclaim I must have heard the evidence, but as it is I think that the preliminary objection is good. I cannot see that the parish council has the right it claims under the Local Government Act, 1894. The parish council might have acquired the right by payment of a small sum, thirty shillings being the amount asked, but it did not think fit to do so. I cannot see that the Act confers upon it any right to sue on behalf of a number of persons. The case of the parish council is that the well is part of a strip of land forming part of the highway. If its case is right, the soil is vested in the district council under the Act of 1894, by which additional powers are given to parish councils. The parish council under that section can use the well so as not to interfere with any corporation or person, but I see nothing giving it the right to sue the owner of the well. It has been held that section 107 of the Public Health Act, 1875, which is in much wider terms, does not give power to take proceedings without making the Attorney-General a party. *Wallasey Local Board* v. *Gracey* and *Tottenham District Council* v. *Williamson & Son* were much stronger cases than the present. I am assuming that the facts are as stated by the plaintiffs. The action will be dismissed with costs; the counterclaim will be dismissed without costs.

Solicitors, *Lewis & Birdseye*, for *Basset & Boucher*, Rochester; *Dollman & Pritchard*, for *Haywood & Smith*, Rochester.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

Chan. Div. }
Stirling, J. } March 24; May 17.

In re LACY.

ROYAL THEATRICAL FUND ASSOCIATION *v.* KYDD. (*a.*)

Limitation, Statutes of—Will—Charitable gift—Freeholds and leaseholds—Charitable Uses Act, 1735 (9 *Geo.* 2, *c.* 36)—*Charge of annuities—No trust for payment—Executor—Possession by executor—Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57)—*Executors Act,* 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 40)—*Law of Property Amendment Act,* 1860 (23 *&* 24 *Vict. c.* 38), *s.* 13.

The Royal Theatrical Fund Association is a charity. Spiller *v.* Maude, 13 *W. R.* 69, 32 *Ch. D.* 158n, *approved.*

An executor is not regarded as an express trustee of residue undisposed of by the will.

A testator, who died in 1873, *gave real and impure personal property to the trustees of the Royal General Theatrical Fund, charged with certain annuities, and appointed an executor, who entered into possession and received the income of the property on behalf of the trustees of the fund for nearly twenty years.*

Held, that the claims of the heir and next-of-kin were barred.

Salter *v.* Cavanagh, 1 *Dr. & Wal.* 668, *and* Patrick *v.* Simpson, 24 *Q. B. D.* 128, 38 W. R. Dig. 113, *distinguished.*

Originating summons.

Thomas Hailes Lacy, who formerly carried on business as a theatrical bookseller at 89, Strand, by his will dated the 28th of April, 1873, made the following bequest: "I bequeath all my property of every description, excepting only the legacies hereafter named, to the trustees of the Royal General Theatrical Fund, of which I am now a director, the capital and total sum of which property is to be preserved intact under the name of 'The Lacy Bequest,' but the interest, profits, and rentals of which, is to be the property of the said Royal General Theatrical Fund, to be used and disposed of according to the rules of the said fund for its benefit and continuance; but, should the said Royal General Theatrical Fund be dissolved or seriously diverted from its present charitable purpose, then the said capital sum and property forming the 'Lacy Bequest' aforesaid shall become the property of the trustees of the Charing Cross Hospital, the interest and produce to be used by them for the good of the said hospital, the principal remaining intact as before stated; and, in the event of the dissolution or removal to a distance of the said Charing Cross Hospital, the above-named 'Lacy Bequest' is to revert to the public hospital nearest to 89, Strand, under the same conditions, advantages, and liabilities as above stated, and subject to being forfeited by a similar cause of removal or dissolution in favour of any other hospital that may exist being the nearest to 89, Strand, as aforesaid."

The will also contained an account of the items which constituted what was described as "property left for the above-named 'Lacy Bequest' chargeable to the hereinafter bequests, legacies, and annuities," and included both freehold and leasehold estates. The testator appointed Mr. Samuel Kydd, of 7, Serjeant's-inn, Fleet-street, to be one of his executors, and bequeathed to him, as a compensation for the trouble thus entailed, £250. He then appointed another executor, and bequeathed to him £100 and such manuscripts as might be desirable to enable him to complete a proposed publication, and after expressing a desire that the money standing to his account with his bankers should be used for the liquidation of any lawful claims against him, he proceeded as follows: "That all the above is to be as aforesaid the property in trust for the aforesaid Royal General Theatrical Fund and to be subject to the following legacies, bequests, and gifts." He then gave some pecuniary legacies and annuities, and concluded, "the last two annuities to be a charge upon my freehold premises 11 and 13, Garrick-street."

The testator died the 1st of August, 1873, and his will was proved on the 30th of August, 1873, by Samuel Kydd alone, the other executor named having renounced probate.

The testator had been married and had issue one child only—namely, a son Thomas Lacy, who survived him and consequently became his heir-at-law and sole next-of-kin.

Thomas Lacy, who was of sound mind at the time of his father's death, died in a lunatic asylum at Prestwich, Lancashire, on the 5th of July, 1895, without leaving issue and without having made any claim to any part of the property devised by his father's will.

On the 2nd of December, 1875, Samuel Kydd executed a document under seal by which he agreed among other things, that no part of the property, funds or income of the estate belonged to him, and admitted that the whole of the funds, shares, and moneys then at Coutts' Bank standing in the books of the bank in his name were solely the property of the trustees of the fund.

Samuel Kydd entered into possession of the freehold and leasehold estates of the testator. He granted leases and entered into agreements for leases of them, describing himself on some of these documents as acting for and on behalf of the trustees of the Royal Theatrical Fund, and on others as trustee of the Lacy Bequest under the will of Thomas Lacy. He received all the income of the real and personal estate of the testator, and after paying all outgoings (including the annuities given by the will) paid the surplus into Messrs. Coutts' Bank to an account entitled "Mr. Samuel Kydd." He from time to time drew sums out of the bank and invested them in his own name. In July, 1891, Kydd, with the acquiescence of the trustees of the Royal Theatrical Fund, transferred these investments and the balance at the bankers' into the name of himself and Mr. Leopold de Rothschild; and subsequently the income of the testator's real and personal estate was dealt with in a way similar to that pursued when Samuel Kydd acted alone.

Samuel Kydd died on the 21st of December, 1892. After his death the income of the real and personal estate of the testator and of the investments was received by Mr. Hughes, the clerk of Mr. Kydd, and paid into Coutts' Bank to the account of "Samuel Kydd, deceased, and Leopold de Rothschild."

The summons was taken out by the Royal General Theatrical Fund Association and its present trustees against the legal personal representatives of Samuel Kydd, Mr. Leopold de Rothschild, and the Charing Cross Hospital, for the determination, among other things, of the questions whether the plaintiffs were devisees and residuary legatees of the testator's real and personal estate (subject to the two annuities therein mentioned) absolutely unconditionally with gifts over, and a declaration of the plaintiff's rights accordingly, and how the testator's real and personal estate might be dealt with.

On the 26th of February, 1896, an order was made directing that inquiries should be made as to the heir-at-law and next-of-kin of the testator, and that the rest of the summons should stand over. Certificates were made by the Master to the effect that

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

Thomas Lacy was the testator's heir-at-law and sole next-of-kin at the time of the testator's death, but it had not been ascertained in whom his interest had become vested. Jonathan Potter had, however, become his legal personal representative, and had been appointed to represent his heir-at-law for the purpose of the determination of the question arising on the summons.

The summons was now argued on the questions whether the bequest to the plaintiffs failed under the Charitable Uses Act, 1735, and if so whether the claims of the heir-at-law and next-of-kin of the testator were now barred by the operation of the Statutes of Limitations.

Swinfen Eady, Q.C., Upjohn, Q.C., and *De Witt*, for the plaintiffs.—The Royal General Theatrical Fund is not a charity. *Pease* v. *Pattinson*, 34 W. R. 361, 32 Ch. D. 154, and *Spiller* v. *Maude*, 13 W. R. 69, 32 Ch. D. 158n (the latter of which refers to the association), must be read in conjunction with *Cunnack* v. *Edwards*, 45 W. R. 99, [1896] 2 Ch. 679, in which Lord Halsbury, C., expressed the opinion that in some of the cases the decisions as to what is a charity are extravagant. *Cunnack* v. *Edwards* was distinguished in *In re Buck, Bruty* v. *Mackey*, 45 W. R. 106, [1896] 2 Ch. 727. If the association is a charity the plaintiffs have an absolute title under the Statutes of Limitations.

Beale, Q.C., and *Darlington*, for the legal personal representative of T. Lacy, also appointed to represent the heir-at-law.—The fund is a charity; the testator speaks of it as such in his will, and if it were not there would be a perpetuity. The possession by Kydd will not satisfy the Statute of Limitations, for he was a constructive trustee for the heir-at-law. There was concealed fraud, or mistake, which is the same thing for the purposes of the statute.

They referred to *Patrick* v. *Simpson*, 24 Q. B. D. 128; *Salter* v. *Cavanagh*, 1 Dr. & Wal. 668; *Lyell* v. *Kennedy*, 38 W. R. 353, 14 App. Cas. 437; *Reed* v. *Feem*, 14 W. R. 704; *Brooksbank* v. *Smith*, 2 Y. & Coll. Ex. 58; *Lawrance* v. *Lord Norreys*, 38 W. R. 753, 15 App. Cas. 210; *M'Carthy* v. *Decaix*, 2 Russ. & M. 614.

Jenkins, Q.C., and *A. Underhill*, for the legal personal representatives of Samuel Kydd, referred to *Churcher* v. *Martin*, 37 W. R. 682, 42 Ch.D. 312.

Butcher, Q.C., and *Austen Cartmell*, for the Charing Cross Hospital.

John Henderson, for L. de Rothschild.

Swinfen Eady, Q.C., in reply.—After twelve years' adverse possession of land the right is barred as well as the remedy. There is no trust for payment of the annuities, but only a charge.

He referred to *Willis* v. *Earl Howe*, 29 W. R. 70; *In re Johnson, Sly* v. *Blake*, 33 W. R. 502, 29 Ch. D. 964.

STIRLING, J., after stating the facts, continued: The first point is whether the Royal General Theatrical Fund is or is not a charity. This was considered in *Spiller* v. *Maude* by Sir George Jessel, M.R., who held that the Association was a charity, and with that opinion I agree. I do not consider that *Spiller* v. *Maude* was overruled or intended to be overruled by *Cunnack* v. *Edwards*. That being so, the devise and bequest of the testator's property in favour of the charity fails as offending against the provisions of 9 Geo. 2, c. 36, so far as that property consisted of realty or impure personalty; and fails, not only as regards the beneficial interest given to the charity, but as to the legal estate given to the trustees, unless the will creates trusts not of a charitable nature which it is their duty to execute: see *Doe d. Burdett* v. *Wrighte*, 2 B. & Ald. 710; *Churcher* v. *Martin* compared with *Doe d. Chidgey* v. *Harris*, 16 M. & W. 517; and *Young* v. *Grove*, 4 C. B. 668.

It has, therefore, to be considered whether the trusts imposed by the will on the trustees of the plaintiff association are purely charitable; or whether they are trustees for the payment of the legacies and annuities subject to which the property is devised. In my opinion the latter is the correct view. I think that the trustees of the plaintiff association were meant to take the property of the testator charged with the legacies and annuities, but that the words of the will do not create a trust for the payment of them. The case appears to me to fall within the principle of such decisions as *Cunningham* v. *Foot*, 26 W. R. 858, 3 App. Cas. 974, and *In re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491, 40 W. R. Dig. 128.

Although the gift fails, the plaintiffs nevertheless contend that they have acquired a title thereto under the Statutes of Limitations. Such title is claimed through the acts of Mr. Samuel Kydd, and it was contended on behalf of those claiming under Thomas Lacy that he had so conducted himself towards Thomas Lacy that the plaintiffs could not derive any benefit from his acts. I am unable to see upon the evidence that Mr. Kydd was under or took upon himself any duty or obligation towards Thomas Lacy which he failed to discharge, or that he was guilty of such misrepresentation or concealment as to constitute a concealed fraud: and in my opinion this contention is not well founded.

I proceed now to consider whether the claim, first, of the heir-at-law of the testator to the freeholds, and secondly, of the testator's next-of-kin to the leaseholds is barred by the statutes.

First, as to the freeholds. In these Mr. Samuel Kydd took no estate or interest whatever under or by virtue of the will. He, however, entered into and continued in possession and receipt of the rents and profits for more than twenty years to the exclusion of the heir-at-law, and thereby acquired, as it seems to me, a legal title, whether absolute or as agent for the trustees appears immaterial to be considered, for in any event the title of the heir is barred. This is in accordance with the decision in *Churcher* v. *Martin*.

Secondly, as to the leaseholds. These, as regards the possession and receipt of the rents and profits, stand in the same position as the freeholds, but the legal aspect is different in this, that the leaseholds vested in Samuel Kydd as executor. It was contended that the document of the 2nd of December, 1875, was evidence of an assent by him to the bequest of the leaseholds to the plaintiffs the trustees; but the Charitable Uses Act, 1735 (9 Geo. 2, c. 36,) prohibits the giving, granting, aliening, limiting, transferring, assigning, or appointing of any hereditaments in trust for or for the benefit of any charitable uses otherwise than by deed perfected in the manner prescribed, and any assent given by the executors contrary to this prohibition would, as it seems to me, be ineffectual to pass the legal title to the legatees or divest it from the executor. The question then arises whether under those circumstances the executor is to be regarded as an express trustee for the next-of-kin. Now, it was held by the Court of Appeal in *In re Rowe, Jacobs* v. *Hind*, 58 L. J. Ch. 703, 37 W. R. Dig. 4; and again in *In re Davis, Evans* v. *Moore*, 39 W. R. 627, [1891] 3 Ch. 119, that the claim of a residuary legatee against him was taken out of the operation of 37 & 38 Vict. c. 57, s. 8. In the latter case the present Master of the Rolls says: "An executor was always in a loose sense a trustee for creditors and legatees since he held the personal estate for their benefit and not for his own; but since a trust

does not take a case out of the statute, an executor cannot be deprived of the benefit of the statute by showing that he is a trustee; it is necessary to make out that he is an express trustee." Since the passing of the Executors Act, 1830 (11 Geo. 4, c. 30), the right of an executor to the residue of his testator's estate is governed by the enactment therein contained, and as is pointed out by Sir G. Jessel, M.R., in *In re Stewart, Stewart* v. *Stewart*, 29 W. R. 275, 15 Ch. D. 539 (see p. 544, 554), the preamble contains an accurate statement of the law as it previously stood. According to that preamble, the executor of a testator who died without making an express disposition of residue became at law entitled to such residue, and courts of equity so far followed the law as to hold such executors to be entitled to retain such residue for their own use unless it appeared to be the testator's intention to exclude them from the beneficial interest therein, in which case they were held to be trustees for the persons or person entitled to such estate under the Statute of Distributions if the testator had died intestate. It was enacted, "That where any person shall die after the 1st day of September next after the passing of this Act, having by his or her will or any codicil or codicils thereto appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto that the person or persons so appointed executor or executors was or were intended to take such residue beneficially." I do not think that the trusteeship created by this Act was intended to be different in its nature from that which existed previously under the rule established in courts of equity, and if prior to the Act executors were not held to be express trustees I do not think they ought to be now so held. There is no express decision on the points, but the cases appear to me to show that (in the absence of special circumstances) executors were not regarded as express trustees.

Take, for example, the case of *Bennet* v. *Batchelor*, 1 Ves. Jun. 63, where the testator gave his residuary estate to a legatee who died in his lifetime and appointed executors. It was held that the executors were trustees for the next-of-kin, but Lord Thurlow, C., speaks at the commencement of his judgment of the executors being turned into trustees *by implication*. I may point out that if the residuary legatee had survived, then, according to *In re Rowe* and *In re Davis*, the executors would not have been express trustees for him; it would be strange if they were express trustees for the next-of-kin.

Again, in *Dacre* v. *Patrickson*, 8 W. R. 597, 647, 1 Dr. & Sm. 182, 185, Kindersley, V.C., says: "Strictly speaking, a trustee cannot have a trust imposed upon him *virtute officii* as executor. If a trust is imposed upon him it is in another character—namely, that of trustee, whose duty it is to carry out the trust. *Qua* executor, he cannot have a trust imposed upon him by the will. The only trust of which he is capable as executor is the trust created by the law for the next-of-kin." The opinion of the Vice-Chancellor therefore seems to have been that they were trustees by implication of law. That of Sir G. Jessel seems to have been the same (15 Ch. D. 544), though he expresses himself less positively than was usual with him when dealing with a question of law. I have found no case in which it has been laid down that an executor who under such circumstances does not take the beneficial interest in the residue is an express trustee.

In the present case no trusts are expressly imposed on the executor by the will, but (independently of the statute) he would be excluded from the beneficial interest in the residue, not merely by the circumstance of that residue being given to another, but also by that of a legacy being given to him as a compensation for his trouble: see *White* v. *Evans*, 4 Ves. 21. In my opinion Samuel Kydd was not an express trustee for the next-of-kin of the testator. Consequently the title of the next-of-kin is barred by the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13: see *Willis* v. *Earl Howe; In re Johnson, Sly* v. *Blake*. The cases of *Salter* v. *Cavanagh* and *Patrick* v. *Simpson*, which were relied on by the next-of-kin, do not appear to me to govern the present. Both related to devises of real estate, and in neither did anything depend on the law applicable to executors.

I come to the conclusion, therefore, that neither the heir-at-law nor the next-of-kin are now entitled to claim the property in question.

Solicitors, *Lumley & Lumley; Field, Roscoe, & Co.*, for *Field & Sons*, Leamington; *M. & B. Braund; Fladgate & Co.; Dawes & Sons.*

Q. B. Div. (Bigham, J.) March 1, 7; April 17.

MARNEY v. SCOTT. (a.)

Negligence — Ship — Charter-party — Unsafe ladder — Accident to stevedore's labourer — Liability of charterer.

A charterer of a vessel who contracts with a master stevedore to load her whilst in dock is under an implied duty to use all reasonable care to ascertain that the vessel and her appliances are reasonably fit and safe for the work which the stevedore and his men are to perform.

The defendant chartered a vessel under a charter-party, which provided that the vessel was in every way fit for service, and was to be so maintained by the owners. In an action by a stevedore's labourer to recover damages from the charterer for injury caused to the labourer by the slipping of a ladder improperly left unfastened by the owners of the vessel when she was placed at the charterer's disposal for loading,

Held, that, inasmuch as the plaintiff was on the ship in the course of fulfilling the contract in which he (or his master) and the defendant both had an interest, the defendant (the charterer) was liable to him in damages, since the slightest examination would have shown that the ladder was unsafe; and the defendant had had an opportunity to make a cursory examination of the ship, but admittedly had not done so.

Action by dock labourer to recover damages for personal injuries alleged to have been caused by the negligence of the defendant.

The action was heard on the 1st of March, and the jury returned a verdict for the plaintiff, with £220, the agreed damages.

On the 7th of March, the jury having been discharged, the case came on for further consideration on points of law, and on the 17th of April judgment was given.

The facts were as follows: The defendant J. R. Scott was the charterer of the steamer *Senator*. By charter-party dated the 4th of April, 1898, *The Senator* was chartered by the defendant for a voyage from London to Goole, as ordered by the charterer. The charter-party contained conditions to the effect

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

that the vessel, being then in every way fitted for the proposed voyage, and to be so maintained by owners, should be placed under the direction of the charterer to be by him employed for the conveyance of goods and passengers between the two ports, the cargo to be laden and discharged in any dock or wharf the charterer might order as customary in the above-mentioned ports; "the said steamer is for the sole use of the said charterers and for their benefit for one voyage, commencing in London, vessel docking about noon, Tuesday, the 5th inst., at which date the vessel is to be at the disposal of the charterer." "The charterer guarantees to complete the vessel's loading by noon on Wednesday next, so that the steamer can leave the dock by the 1.44 p.m. tide that day, or pay a penalty of £30."

The Senator entered the dock about noon on the 5th of April, and for the purpose of loading her the defendant made a contract with a master stevedore named White, and White engaged the plaintiff and other men to assist him to load the vessel. The work of loading began on the 5th of April, within two hours of the time after the vessel was placed at the defendant's disposal. The defendant went on board *The Senator* in dock before the loading began, but he made no inspection to see that the tackle and other appliances were safe. In order to carry out his orders the plaintiff had to get into the hold, and as he was attempting to pass down by an iron ladder, the upright supports of which should have been fastened both at the upper and lower ends, the ladder slipped und fell in consequence of not being properly secured, and the plaintiff received by the fall the injuries he sought compensation for.

Cyril Dodd, Q.C., and *Watson Moyses*, for the plaintiff.—It is admitted that the ladder was unsafe, also that it caused the plaintiff to fall. The not securing of the ladder amounted to negligence on the part of the defendant or one of his servants. The defendant admits that he went on board the vessel after she came into dock and before the work of loading began. He had reasonable opportunity, therefore, of inspecting the vessel. There was a duty cast upon the defendant to exercise reasonable care to ascertain whether the appliances used in loading the vessel were safe and fitted for the work to be done.

The following cases were cited during the argument: *Francis* v. *Cockrell*, 18 W. R. 668, L. R. 5 Q. B. 501; *Holmes* v. *North-Eastern Railway*, 17 W. R. 800, L. R. 4 Ex. 254; *Indermaur* v. *Dames*, 15 W. R. 434, L. R. 1 C. P. 274; *Caledonian Railway Co.* v. *Mulholland*, 46 W. R. 236, 14 Times L. R. 41.

Rufus Isaacs, Q.C., and *Lennard*, for the defendant.—We submit that the defendant being merely the charterer of this vessel cannot be held responsible for any defect in the fitting up of the vessel, which he had no reason to expect existed, and we rely on the condition in the charter-party that the owners were to maintain the ship in the same state as she was when chartered—*i.e.*, "staunch and strong and in every way fitted for the voyage and service." The rights of the plaintiff are founded on tort, not contract, and we say as the defective ladder was not provided or put up by the defendant or his servants that there is no evidence that there has been any want of reasonable care on his part by the exercise of which this accident might have been prevented. By the terms of the charter-party the master and crew were the servants of the owners of the vessel, and not the servants of the charterer, and the owners were bound by the charter-party contract to keep the vessel in every way "fitted for the voyage and service."

April 17.—BIGHAM, J., read his considered judgment, in the course of which he said: I find as a fact that the plaintiff's injuries were due to the unsafe and improper condition of the ladder, and that the plaintiff was not guilty of any contributory negligence. In order to establish his case the plaintiff had to establish that there was a duty or obligation owed by the defendant to him, and that the injuries complained of arose by reason of a breach of that duty or obligation. On behalf of the plaintiff it was contended that although the defendant did not employ him to work for him, he nevertheless must be taken to have invited him to come on board the vessel to work, and to have impliedly promised that if he did so the vessel and its appliances should be in a fit state for the purposes to which they were to be put, and therefore that the defendant was liable on contract. The defendant, on the other hand, submitted that the plaintiff's right depended only upon tort. In my opinion the question whether the defendant's liability arose out of contract or out of tort is immaterial, for the measure of liability would be the same in each case. What, then, is the measure of liability? A man who intends that others should come upon property in his occupation for purposes of work or business in which he himself is interested owes a duty to those who do so, to use reasonable care to see that the property and appliances upon it, which it is intended should be used in the work, are fit for the purposes to which they are to be put, and he does not discharge his duty by merely contracting with competent people to do the work for him. If the parties with whom he contracted failed to use reasonable care, and damage resulted, the occupier still remained liable. That seems to me the true effect of the cases cited. The effect of the authorities is correctly and clearly stated in Pollock on Torts (5th ed.) at pp. 477, 478, and at p. 482. [His lordship read passages from the pages referred to.] The question is how to apply the rule to the facts of the present case. I do not think that the mere fact that the defective state of the ladder was patent, as I think it was, in the sense that a slight examination would have detected it, and that defendant did nothing to remedy it, is sufficient to fix the defendant with a breach of duty. He must have had a reasonable opportunity of ascertaining that a defect existed. The circumstances must have been such that, though he did not know of the condition of the ladder, he ought to have known of it, and if he ought to have known of it and might either have remedied it or warned the plaintiff of the damage, and did neither, and hurt resulted to the plaintiff, then, and then only, could that want of reasonable care be implied to him which would make him liable. I am not prepared to say that a man in the position of the defendant was bound before he allowed the work of loading a vessel to begin to have the vessel surveyed from stem to stern for the purpose of ascertaining that every little appliance that might come into use was in perfect order. Business would be impossible if such a duty were cast upon him, and it would be beyond the scope of reasonable care. But I cannot help thinking that when a vessel comes into a port after a voyage, though it was only a coasting voyage, and though the vessel was in ballast, some slight attention ought to be devoted to the condition of the tackle and appliances which the stevedore's labourers were to use in the work of loading the vessel. What the attention ought to be must depend on the circumstances of each particular case. In the present case it seems to me that the defendant ought to have made some examination of the ladders going down into the hold. The slightest examination would have shown him that the ladder was in such a condition as to really make it a trap, and taking that view I must hold that the

defendant was guilty of a breach of the duty which the law imposed on him. As to the point that the defendant was not the occupier of the vessel within the meaning of the authorities, there is nothing in that point. The vessel had been placed at the defendant's disposal, and was in his occupation for the purpose of loading, and it was by his invitation that the plaintiff went on board. That made him, for the purposes of the case, the occupier. For these reasons there must be judgment for the plaintiff with £220 damages, the agreed sum, with costs.

Leave to appeal.

Solicitors for the plaintiff, *Lovett & Liddle.*

Solicitors for the defendant, *Downing, Bolam, & Co.*

(1901) 2 Ch. 471.

Q. B. Div. (Phillimore, J.) Feb. 1.

CADDICK *v.* HIGHTON AND OTHERS. (*a.*)

Friendly society—Policy—Assignment by deed—Validity—Nomination—Death of nominee during lifetime of nominator—Claim by executor—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-section* 3.

G. effected a policy on her life for £100 *with the defendant friendly society, and assigned all her interest under the same by deed to one J. C., who paid the premiums to the society as they became due. The society refused to treat the assignment as valid, and G. thereupon duly filled up a nomination form and nominated the same J. C. as the person to receive the policy-moneys at her death.*

J. C. predeceased G., and the premiums were, during the life of G., paid by C. as the executor of J. C., under the belief that the policy-moneys would become payable under the deed to the estate of the deceased. In an action by C. to recover the policy-moneys upon G.'s death,

Held, that, although a policy granted under the Friendly Societies Acts was not assignable by deed, and therefore that C. could not recover as assignee, yet that he was entitled to the policy-moneys as the executor of the person who had been duly nominated by the assured, since a nomination under section 15, *sub-section* 3, *of the Friendly Societies Act,* 1875, *if unrevoked, created a vested interest in the nominee.*

This was an action brought by Edward Caddick, who sued as executor of his late brother Joseph Caddick against the trustees of the Liverpool Victoria Legal Friendly Society to recover £100 on a policy of insurance effected in 1881 with the defendants on the life of one Mary Gorton.

The facts were as follows: On the 12th of November, 1881, Mary Gorton effected a policy on her life for £100 with the defendants at a monthly premium of 15s. 6d. By this policy the society promised to pay, on the death of the assured, her next-of-kin or "legal nominee" the amount of the policy. By deed dated the 25th of April, 1887, Mary Gorton, as beneficial owner, absolutely assigned the policy to Joseph Caddick. Notice of the assignment was given to the defendants, who refused to recognize it, being of opinion that if Mary Gorton desired the amount to be paid at her death to Joseph Caddick she must fill up the usual nomination form. Accordingly Mary Gorton, on the 8th of July, 1887, filled up a form issued for that purpose in accordance with the Friendly Societies Acts and in it she nominated the same Joseph Caddick as the person entitled to receive at her death the amount of the policy. Joseph Caddick died in March, 1891, in the lifetime of the assured after which date the plaintiff, as executor of Joseph Caddick, paid the premiums as they became due on the policy down to Mary Gorton's death in November, 1896. Upon the death of Joseph Caddick, the plaintiff was called upon by the collector of the society, who said he had heard of Joseph Caddick's death and had come to the plaintiff as his executor for the premiums then due. From that time till the death of the assured the collector regularly called for, and the plaintiff (in the belief that the policy-moneys were due to Joseph Caddick's estate under the assignment) regularly paid and got receipts for the premiums. The plaintiff claimed the policy-money against the trustees of the society on the ground that policies under the Friendly Societies Acts came under the general law of policies of assurance, and were assignable by deed under the Policy of Assurance Act, 1867, and that the plaintiff was entitled (1) as assignee; (2) if not so entitled, that he was entitled under the nomination; or (3) as to the whole or as to the amount paid in premiums under an estoppel raised by the society having demanded and accepted premiums for so long, on the footing that Joseph Caddick or his estate was entitled to the fund.

Montague Lush and *Ernest Jelf*, for the plaintiff.—The plaintiff is entitled to recover because the original assignment by Mary Gorton to the late Joseph Caddick was valid, at any rate there is no authority that can be cited against us, for the point whether a policy granted under the Friendly Societies Acts is assignable by deed has never yet been decided by any court. Even if such a policy cannot be assigned in the ordinary way by deed by reason of the special provisions contained in the Friendly Societies Acts, we say that the plaintiff is yet entitled to recover as executor, because the rights of a nominee do not lapse at his death, and if Joseph Caddick had survived Mary Gorton he could have claimed as nominee. The defendants, by taking the premiums from the executor, are estopped from disputing the plaintiff's claim; and in any event the plaintiff is entitled to recover the premiums which he has paid as money paid without consideration.

H. H. Asquith, Q.C., and *F. Broadbridge*, for the society.—By section 15 of the Friendly Societies Act, 1875, and by sections 56 and 57 of the subsequent Act of 1896 these policies are not assignable otherwise than by nomination under the Acts: *Bennett* v. *Slater*, *ante* p. 82, [1899] 1 Q. B. 45. A nomination under the Acts has the effect of an appointment under a power to appoint by will, and therefore, as the nominee died in the lifetime of the nominator, the nomination lapsed. Moreover, a person who claims as nominee must show the society that he is the person mentioned in the nomination paper. As to the question of estoppel the collector had no authority to bind the society, which has done nothing to prevent them from denying that under the policy the plaintiff was entitled to the whole amount assured. If the premiums which the plaintiff had paid were directed to be returned, as money paid without consideration, then, although the society would have to pay the whole of the sum assured to the next-of-kin, it would lose the value of the premiums since the death of Joseph Caddick, which otherwise Mary Gorton would have paid.

Montague Lush, in reply, cited *Attorney-General* v. *Abdy*, 1 H. & C., at p. 300, 11 W. R. C. L. Dig. 151; and *In re Phillips*, 31 W. R. 511, 23 Ch. D. 235. A nomination had the same effect as an appointment by deed. The assured during her lifetime nor by will did nothing to revoke the appointment. The plaintiff

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(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

therefore, had such an interest in the fund as entitled him to maintain this action.

PHILLIMORE, J.—This case raises an important question effecting the rights of persons who were the nominees and holders of policies effected with friendly societies, and the first point I have to consider is whether policies of assurance under the Friendly Societies Acts are or are not assignable by deed. It was urged by the defendants that they were not, because these societies were established for the purpose of encouraging thrift among the poorer classes, and it was said that the object of the Legislature would be defeated if such policies were made marketable securities, and people were allowed to raise money upon them. I think that the intention of the Legislature to be gathered from the above sections was that these policies should not be assignable except in the manner laid down in the statutes, and if I am right in thinking that the Legislature from motives of public policy intended that these policies should not otherwise be alienable, then it follows that as assignee the plaintiff cannot recover from the defendants who succeed in that part of their defence.

I fail to see any reason, however, for holding that the estate of a nominee of a policy should be deprived of the benefit intended to be conferred by the nominator simply because the nominee died during the lifetime of the nominator, for, speaking generally, the legal personal representative of a nominee is entitled to stand in the position of the nominee. Then comes the question, Has anything occurred that has deprived the executor of his right to stand in the position of the nominee and to obtain the amount of the policy from the society? I think the plaintiff is right in his contention that the nomination unrevoked created a vested interest in the nominee, and that he, as the executor of such nominee, is entitled to judgment. This decision makes it unnecessary for me to decide the third point. Had I been called upon to do so, I am inclined to think that the plaintiff would have been entitled to a lien on the policy for the amount of the premiums paid by him, but not to the whole fund. However, as I before said, I decide this case on the second ground relied on by the plaintiff, and I direct judgment to be entered for him, with costs, for the amount claimed in the writ.

Judgment for the plaintiff. Leave to appeal granted.

Solicitors for the plaintiff, *Needham, Tyer, & Barrow*, for *Edward Caddick*, West Bromwich.

Solicitor for the society, *Japeth Tickle.*

Prob. Div. & Adm. Div. Admiralty. } April 11.

"THE KATE." (a.)

Ship—Collision—Damage—Registrar and merchants—Vessel totally lost in collision—Loss of beneficial charter-party.

The owners of a vessel totally lost in consequence of a collision with another vessel when bound in ballast on a voyage to take in cargo under a charter-party already entered into can, if such other vessel is proved, in an action of damage instituted against her, to have been to blame for the collision, recover against her damages for the loss of any profits which, but for the collision, they would have gained by carrying out the charter-party.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

This was an action of damage instituted on behalf of the owners of the Norwegian barque *Chrysolite* against the Austrian steamship *Kate*, and her owners intervening as defendants. By consent of the plaintiffs and defendants the damages proceeded for in the action were referred to the registrar assisted by merchants to assess the amount thereof on the basis of an agreement come to between the plaintiffs and defendants—namely, that the defendants should pay 90 per cent. thereof.

The reference came on to be heard on the 6th of February last, and the registrar reported that there was due to the plaintiffs in respect of their claim the sums and interest stated in the following schedule:—

SCHEDULE.

	Claimed. £	s.	d.	Allowed. £	s.	d.
1. Value of the *Chrysolite*	1,500	0	0	1,000	0	0
Less proceeds of sale	375	14	0	375	14	0
	1,124	6	0	624	6	0
2. Loss of charter... ...	504	5	0	470	0	0
3. Loss of provisions and stores	40	10	2	20	0	0
4. Expenses at Southampton	27	13	10	21	0	0
5. Towage	17	0	0	17	0	0
6. Master's expenses ...	9	10	0	0	0	0
ditto ...	1	0	0	1	0	0
7. Surveyor	9	17	0	9	17	0
8. Sending crew home to Norway	24	14	2	24	14	2
9. Agency	21	0	0	0	0	0
13. Owner's telegrams and expenses	5	5	0	5	5	0
	1,785	1	2	1,193	2	2
Deduct 10 per cent., in accordance with terms agreed to	178	10	0	119	6	2
	£1,606	11	2	£1,073	16	0

With interest on £1,073 16s. at 4 per cent. per annum from the 1st of October, 1898, to the 25th of January, 1899, when £765 was paid by defendants to plaintiffs, and on the balance—viz., £308 16s. from the 26th of January, 1899. The registrar in his report further stated: "There is, I think, no difference in principle between such a case and one in which the vessel is in ballast, but proceeding under charter to take in her cargo. In the case of *The Columbus*, 3 Wm. Rob. 158, a loss of profit in fishing was claimed, which is a different thing from a loss under a distinct engagement. Moreover, it is clear that Dr. Lushington's *dicta* in *The Columbus* are not in accord with what was said in *The Northumbria*, 18 W. R. 188, L. R. 3 A. & E. 6. Therefore, under the circumstances of the present case the plaintiffs are entitled to recover the freight lost. It is desirable to add that we have allowed the value of *The Chrysolite* as at the date when she would have accomplished the voyage to Havre, and not her value at the date of collision with a charter which it was admitted was a valuable one.

(Signed) E. S. ROSCOE,
Assistant Registrar."

Against the report of the registrar the defendants appealed, on the ground that the report allowed the sum of £470 in respect of the claim for loss of charter, and £1,000 for the value of *The Chrysolite* at the date when she would have accomplished the voyage to Havre, whereas the defendants contend that the vessel having in law been totally

lost the plaintiffs can only recover the value of the vessel at the time of her loss, and that such value did not exceed the sum of £800.

The appeal was heard by consent on motion before the President on the 20th of March last.

Aspinall, Q.C., and *Stubbs*, for the appellants, in support of the motion.—The ruling of the House of Lords in the case of *The Argentino*, 14 App. Cas. 519, 38 W. R. Dig. 62, on which the respondents will rely, is only applicable to a case of partial loss, as that case was, and the practice in Admiralty has always been, where there has been a total loss of a vessel in ballast by reason of collision, to allow the market value of the vessel lost, but nothing in respect of any profits which but for the collision the vessel might perhaps have earned. If the profits of one voyage after the collision were allowed, why not the profits for any number of voyages? The damages claimed for loss of charter here are too remote and speculative and have always been so considered: *The Columbus; The Clyde*, Swa. 23; *The City of Rome*, Shipping Gazette for May 12, 1887. The value of *The Chrysolite*, as found by the registrar, is too high. Her value at the time of the collision without regard to her engagements ought to have been given, and that was only £800. There was no evidence given of her value at any other time.

They also referred to *The British Columbia Saw Mill Co.* v. *Nettleship*, L. R. 3 C. P. 499; Mayne on Damages (5th ed.), p. 409.

F. Laing, for the respondents, the owners of *The Chrysolite, contra.*—The registrar was right in allowing the amount he did in respect of the loss of the beneficial charter in this case. The rule of *restitutio in integrum* which prevails in all actions of damage would not be satisfied if the plaintiffs were to be deprived of what has thus been awarded in respect of the profits it is probable they would have realized by performing the charter. In the case of *The Columbus*, and those following it, the damages claimed were only disallowed because such damages were too remote and speculative; but it is clear since the decisions in *The Argentino, The Consett*, 5 P. D. 229, and *The Star of India*, 25 W. R. 377, 1 P. D. 466, that the loss of a beneficial charter is so far a certainty that in a case of partial loss such damages may be recoverable; and if that is the case, why should the rule be different in case of total loss? The damages claimed on this head are really equivalent to freight lost by reason of the collision (*The Northumbria*), and on that ground are clearly recoverable. The registrar has considered the evidence given as to the value of *The Chrysolite*, and has come to a right conclusion on that evidence.

Cur. adv. vult.

April 11.—JEUNE, P.—The facts which give rise to the questions I have to decide are as follows: On the 21st of June, 1898, a collision occurred in the English Channel between the Norwegian barque *Chrysolite* and the Austrian steamship *Kate*. *The Chrysolite* sustained such injury that she was treated as a constructive total loss. The result of proceedings taken in this court by the owners of *The Chrysolite* to recover the damages arising out of the collision was that, on the basis of an agreement come to between the owners of the two vessels, a decree was made that the owners of *The Kate* should pay 90 per cent. of the damages sustained by *The Chrysolite*. *The Chrysolite* was, at the time of the collision, on a voyage from London to Miramichi under a charter-party, in accordance with which she was to proceed to Miramichi and there load a cargo of timber for Havre.

The plaintiffs, as part of the damages proceeded for, claimed the loss of freight which would have been earned had *The Chrysolite* reached Miramichi, taken in her cargo, and delivered it at Havre. The learned registrar, assisted by merchants, has, in his calculation of the damages, allowed £1,000 as the value of *The Chrysolite* at the date when she would have accomplished the voyage to Havre, and has also allowed £470 for loss of charter—that is to say, for loss of the profit which would have been realized under the charter-party had *The Chrysolite* accomplished her voyage to Havre. The defendants, the owners of *The Kate*, dispute the right in law of the plaintiffs to recover this sum of £470 or any part thereof, and they also, upon the evidence, challenge the value put upon *The Chrysolite*.

The first question is one of law, and it is contended on behalf of the defendants that the matter is governed by a rule of law and practice prevailing in the Court of Admiralty. Apart from such special rule it would have appeared to me clear that in some way or other the principles upon which damages are assessed would require account to be taken of the profitable character of the charter-party under which the ship was at the time of her loss. The general principle which governs the assessment of damages is of course *restitutio in integrum* qualified by the condition that the damage sought to be recovered must not be too remote—that is to say, must be the natural consequence, and not merely a consequence traceable in fact to the wrongful act. It may be nothing more than a question of statement of figures whether the owner of a vessel lost when under a profitable charter-party is recouped this loss by receiving her value at the conclusion of her voyage plus the profits of the charter-party, or by receiving her value at the time of collision, such value being enhanced by the fact that the ship at the time was under a profitable charter-party. But unless in one or other of these ways the owner gets the benefit of the profitable engagement of his ship, he obviously fails to realise a *restitutio in integrum*.

But it is said that there is a rule of law which prevents account being taken of freight or profit of that nature, if the ship be a total loss. The leading authority relied on in support of this proposition is *The Columbus*, 3 Wm. Rob. 158, decided in 1849. That was a case in which in a collision off Dungeness a smack was sunk, and her owner claimed not only the value of his vessel, but further sums—first, for wages, which it was said he would have earned as master of the smack, and, secondly, for profits which it was supposed the smack would have made after the time of the collision. Both these further claims were rejected by Dr. Lushington. The learned judge, I think, recognised that even in the case before him the principle of *restitutio in integrum* was hardly carried out if the claims in dispute were rejected, but he based his decision on the rules and practice of the court. I draw this conclusion from the following passage in the judgment:

"It has been argued on his behalf that the principle upon which this court proceeds in all matters of this kind is a *restitutio in integrum*; in other words, the principle of replacing the party who has received the damage in the same position in which he would have been, provided the collision had not occurred. As a general proposition, undoubtedly the principle in question is correctly stated; and not only in this court, but in all other courts, I apprehend, the general rule of law is, that where an injury is committed by one individual to another, either by himself or his servant, for whose acts the law makes him responsible, the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all courts have found it necessary to adopt certain rules for the

application of it; and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be to the precise amount of the loss or injury sustained. In many cases it will of necessity exceed, in others fall short of, the precise amount. To select an example amongst the cases which have occurred in this court, I may here mention the case of *The Gazelle*, which has been brought to the notice of the court, in which a larger sum was awarded than the actual loss sustained by the party suing in the cause. In respect to the question more immediately under consideration at the present moment, I do not recollect a case, and no case has been suggested to me, where a vessel has been considered as a total loss, and the full value of that vessel having been awarded by the registrar and merchants, any claim has been set up for compensation beyond the value of that vessel. When I first read the papers in this case, I looked with much care and attention to see whether any precedent could be found, whether any single instance had occurred in the numerous cases which have arisen . . . but I found none, and the learned counsel who has argued the case on behalf of Mr. Woodward does not appear to have been more successful in his researches."

It would appear also that the learned judge was impressed by the difficulty of estimating the damage on the possible loss of profits and the speculative character of such an assessment. He says (*The Columbus*, 3 Wm. Rob, p. 164): "The true rule of law in such a case would, I conceive, be this—namely, to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners, as a full indemnity to them for all that may have happened without entering for a moment into any other consideration. If the principle to the contrary, contended for by the owners of the smack in this case, were once admitted, I see no limit in its application to the difficulties which would be imposed upon the court. It would extend to almost endless ramifications, and in every case I might be called upon to determine not only the value of the ship, but the profits to be derived on the voyage in which she might be engaged, and indeed even to those of the return voyage, which might be said to have been defeated by the collision. Upon this consideration alone, I should not, I conceive, be justified in admitting this claim; but I am further borne out in so doing by the difference which exists between a total loss, and the case of a partial damage—namely, that in the latter case the amount of the additional injury in the loss of the freight is capable of being accurately calculated. It depends upon no contingency; it is, in point of fact, an absolute loss, and, as such, the owner of the ship upon whom it falls is justly entitled to compensation."

It appears to me that, except on the ground of the uncertain and speculative nature of the claim, which certainly was its character in the case before Dr. Lushington, it would be difficult, on principle, to exclude such a claim. It was conceded in the argument before Dr. Lushington, and held by him, that in the case of the partial loss of a vessel an allowance for demurrage may be given, in addition to the cost of repairing the physical damage inflicted; and in the cases of *The Consett*, 5 P. D. 229, and *The Star of India*, 1 P. D. 466, it was held by Sir Robert Phillimore that in the case of a partial loss the loss of a profitable charter-party formed a proper element of compensation. The case of *The Argentino* in the House of Lords is a conclusive authority that the loss of earnings in an employment contracted for is not too remote to constitute an element to be considered in the assessment of damages in the case of a partial loss.

It is, no doubt, a sound principle in the case of a total loss that, speaking generally, to give a sum which will replace the vessel, is to give all that justice demands. It may, in such case, be fairly enough assumed that the substituted vessel will in the future be as profitable to her owner as that which has perished would have been. But to carry this principle so far as to say that a vessel lost at the commencement of her voyage is compensated for by her value, without regard to her profits during the voyage, when the owner could not, in fact, replace his lost vessel and earn those profits, appears to me to press theory into conflict with facts. And, if I am right in thinking that what influenced Dr. Lushington was the uncertain and speculative character of the claim before him, such consideration certainly does not arise in a case like the present, where the claim is regulated by the terms of the charter-party in force at the time of the collision.

The case of *The Clyde*, Swa 23, was referred to before me as supporting the decision in *The Columbus*. It might be expected to do so, as it was also a decision of Dr. Lushington. The learned judge, in fact, reiterates and explains his previous decisions. All he says is: "There was another case came before the court where the vessel was totally lost and destroyed. A claim was made for consequential damage, but the court held it had no discretion in the matter. All the remedy it could give was that of putting on the vessel at the time she was lost a market price; whereas in case of partial loss there are other claims such as demurrage and so on, which are always compensated. Therefore, what we have had to look at is, what would the vessel have fetched in the market at the period of its destruction?"

It is to be observed that Dr. Lushington lays down that the value of the vessel to which, in the case of total loss, he confines the damages is to be taken at the time of the loss, and he does not, I should suppose, in the case of a vessel under a profitable charter at the time of loss, intend to exclude the fact of that charter from entering into the computation of the market price of the vessel. If this element of value be admitted, a *restitutio in integrum* might, no doubt, by this process be effected.

The decision in the case of *The City of Rome*, Shipping Gazette, May 12, 1887, p. 310, appears to me to be practically identical with that in *The Columbus*. The owner of a fishing vessel sunk in a collision claimed for the value of the fish which would have been caught between the date of the collision and the termination of the fishing season. The registrar held that the loss was too remote and speculative to be taken into consideration, and Sir James Hannen upheld that view. "I consider," he said, "that the matter is concluded by authority, that when there is a total loss the question of the value of things lost at that time is what is to be taken into account, without reference to what a vessel would have earned if she had gone on a longer or a shorter voyage than the one on which she was engaged at the time."

Here, as in the case of *The Columbus*, nothing appears to be decided which would exclude a claim for enhanced value of a vessel at the time of her loss by reason of a profitable engagement which had been secured for her.

I should feel the greatest difficulty in even appearing not to follow implicitly a decision of Dr. Lushington on a point which he considers to be decided by the practice of the Admiralty Court, were it not that there is a later decision in this court, and decisions also of registrars, which appear to me to be based on a different view of that practice. I refer first to the case of *The Northumbria*, L. R. 3 A. & E. 6,

decided by Sir Robert Phillimore in 1869. That was a case in which the owners of *The Northumbria* claimed to limit their liability in respect of damage occasioned by collision to a sum of £8 for each ton of her tonnage, and the question was whether her owners were liable also to pay interest on such amount from the date of the collision. It was held that they were. In his judgment Sir Robert Phillimore stated the practice of the Admiralty Court as follows: "The practice under the old law, which decreed a *restitutio in integrum* by the wrong-doer to the sufferer, was as follows: In the case of a vessel sunk with a cargo on board, the *restitutio in integrum* was effected by a calculation of the probable value of the ship at the end of her voyage, and of the freight which she would have earned, making at the same time certain deductions as to the expenses which the owners must have incurred in order to complete the voyage, such as the wages of the crew, &c., and also making a deduction for discount if the value found were paid before the probable end of the voyage. . . . In the event of the vessel sunk having no cargo, then interest upon the value of the ship from the day of the collision was given; the reason being that in the former case by giving freight you had really given the interest on the use of the vessel during the interval between the collision and her arrival in port; whereas, in the case of there being no cargo, there was no freight to represent the interest, and it was therefore expressly given. So that, in the first case, to have given interest as well as freight would have been to place the sufferer in a better position than he would have been but for the collision; and, in the second case, to have refused him interest would have been to place him in a worse position on account of the collision than he would otherwise have been; whereas the principle of *restitutio in integrum* is to replace the sufferer in the condition in which he was at the time when the wrong was done."

It is clear, therefore, that in the opinion of Sir Robert Phillimore the practice was that if a vessel totally lost had cargo on board, the freight which she would have earned was to be allowed, and the value of the ship calculated as at the end of her voyage; and, if she had no cargo on board, interest was given at the time of the collision. The difference between the views of the practice of the Court of Admiralty taken by Dr. Lushington and Sir Robert Phillimore, both, of course, very high authorities, is perhaps more apparent than real. Dr. Lushington indicates that the value of the vessel is to be taken at the time of the collision, which does not, as I have above suggested, exclude a fact such as the existence of a profitable charter from being allowed to enhance the value of the vessel at that time. Sir Robert Phillimore states that the value should be taken as at the end of the voyage, and therefore lets in freight or interest as an additional compensation. The result of the two calculations in figures should be practically indentical.

The present case, which is that of a vessel without cargo, but under charter, being totally lost, is not exactly that contemplated by Sir Robert Phillimore; but it appears to me to follow from his judgment that the value of the vessel may in such case be taken as at the end of her voyage, and something allowed in respect of the period between the time of collision and the end of the voyage. What is that something? If there be cargo on board, Sir Robert Phillimore says that the freight is to be allowed for, if no cargo be on board, then interest is to be allowed. But if the vessel be under charter it appears to me that a case arises in which the profits under the charter-party should take the place of interest, as more accurately representing the loss to the owner, and may fairly be considered to be the equivalent of freight when a cargo is on board. Indeed, I can see no distinction between the case of freight when a cargo is on board, and the present case of a charter-party, under which cargo is to be taken. The engagement under which, in both cases, the vessel is employed, equally removes the claim from the region of speculation, and in neither case can it be said to be too remote.

I think, therefore, that the proper measure of damage in this case is the value of the vessel at the end of her voyage, plus the profits lost under the charter-party, and this is what the learned registrar has allowed. There is, however, further authority on the practice of the Admiralty Court, to which so much weight was attached by Dr. Lushington. So far as can be judged from the instances collected in Pritchard's Admiralty Digest, claims similar to the present have for more than thirty years invariably been dealt with in the registry in the manner adopted by the learned registrar in the present case. There is an instance of a vessel run down and totally lost in the English Channel while on a voyage from Newcastle with a cargo of coals from Cadiz, whence she was to carry a cargo of salt to South America pursuant to a charter-party entered into before she left Newcastle, in which case it was held that the owners were entitled to net freight not only on the coal, but also on the salt cargo: *H.M.S. Fork*, Pritchard's Digest, p. 1761. No objection was taken to the report of the registrar. In another case no objection was raised to the decision of the registrar where a steamer on her way to Middlesborough in ballast, and chartered to carry a cargo of pig iron thence to Dantzic, and return with a cargo of oak staves to London, was sunk in a collision, and the freight for both voyages was allowed, less the probable cost of earning it: *The Breeze*, Pritchard's Admiralty Digest, p. 1762. There is another case decided by the registrar without objection, which is, I think, exactly in point. The plaintiffs, claiming for the total loss of their vessel on her outward voyage, were allowed the homeward freight which would in all probability have been earned under a charter-party in force if the collision had not occurred: *The Appendix*, Pritchard's Digest, p. 1761. I find on the other hand that when there was apparently no existing charter-party (*The Undine*, *Ibid*), and when the claim was in respect of a future voyage for which no preparation had been made (*The Kaikoura*, Pritchard's Digest, p. 1762), a claim for freight was disallowed; but it was disallowed in the first case for the reason, as expressly stated, that the claim was problematical, and in the second case in all probability for a similar reason.

It was also argued before me that the learned registrar did not calculate the value of the vessel at the end of her voyage, and even if he did that the value he placed on the vessel is exaggerated. To this the reply made seems to me conclusive. The learned registrar clearly did, and says that he did, take the value of the vessel at the end of her voyage, and I am satisfied that there was ample evidence before him to justify the figures at which he arrived. I think, therefore, that the report of the learned registrar is correct, and ought to be confirmed.

Solicitors for the plaintiffs, *Botterell & Roche*.

Solicitors for the defendants, *Stokes & Stokes*.

House of Lords.

From C. A. (England). } May 18.

HUNTER AND OTHERS v. ATTORNEY-GENERAL AND OTHERS. (a.)

Charity—Will—Gift to purchase advowsons—General charitable intention—Uncertainty.

A testator gave his pure personalty to special trustees upon trust to invest, and with power to apply the income or any portion of the capital (1) *in grants for or towards the purchase of advowsons or presentations;* (2) *in creating or contributing to the creation, improvement, or endowment of churches, chapels, or schools; or* (3) *in paying or contributing to the salaries or incomes of rectors, vicars, or incumbents, masters, or teachers, upon certain expressed conditions upholding certain religious doctrines, but not in terms applying to* (1).

Held, that there was not any general trust for charity binding the whole fund, and that, as the trustees, having a discretion, were not bound to apply the funds to purposes strictly charitable, and as the other purposes to which, in their discretion, they were stated to be applicable were too indefinite to constitute a trust, the whole gift was bad as a charitable gift and void.

Decision of the Court of Appeal (45 *W. R.* 610, [1897] 2 *Ch.* 105), *reversed.*

This was an appeal from an order of the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.), dated the 21st of May, 1897, and reported 45 W. R. 610, [1897] 2 Ch. 105, reversing a decision of Romer, J. (45 W. R. 344, [1897], 1 Ch. 518).

The testator, Edward Hunter, who died in July, 1896, by his will made in May, 1877, after various specific bequests, gave all his residuary estate to trustees on trust to convert, invest, and to pay the income of one moiety to his sister during her life, and the income of the other to his brother-in-law during his life, and subject thereto the testator directed that the whole of his estate should be transferred to special trustees to be held and applied by them upon the trusts and in manner following—that is to say, "The special trustees may retain or invest such part of my residuary estate as shall come to or devolve upon them in or upon any stocks, funds, shares, or securities which they may think proper and whether of the class hereinbefore prescribed by me or not, and they may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations or in creating or contributing to the erection, improvement, or endowment of churches, chapels, or schools or in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters, or teachers, but upon the following conditions: (1) That only such churches or chapels shall be subscribed or contributed to wherein the service shall in the opinion of the special trustees be conducted upon pure Protestant and Church of England principles, by which I mean the principles of the Church of England as held and inculcated by those of her divines, clergy, and members who are distinguished as Evangelical and loyal to the work and fruits of the Reformation, and as holding doctrines and principles free from all Popish or Roman Catholic tendency, and opposed thereto. (2) That only such schools shall be subscribed or contributed to wherein true Protestant and Church of England principles are distinctly taught and inculcated, with preference to those established for children of the poorer classes. (3) That only such masters and teachers receive grants who best show forth by their teaching and example true Protestant and Church of England principles. (4) That no payment shall be made directly or indirectly to or for the benefit of any rector, vicar, or incumbent unless upon condition that he shall, if not prohibited in law, at the principal Sunday morning service in his church, selecting a time and state of weather when the congregation is supposed to be greatest, read the Thirty-nine Articles of the Church of England, and which I recommend he should make the subject of his discourse from time to time. And upon further condition that he shall on the first Sunday of every month, at the chief morning service, preach a sermon on 'Love' from a text taken from the Gospel, Epistles, or Revelation of St. John. And I declare that if the special trustees shall find or consider that any rector, vicar, or incumbent, master, or teacher shall preach, teach, publish, inculcate, encourage, adopt, or follow any doctrines or practices which shall be contrary to or at variance with true Protestant and Church of England principles he or she shall be disqualified from receiving any benefit under this my will. And it being my wish that as much as possible of my residuary estate shall be applicable and available for administration by special trustees in manner aforesaid, I declare that all my debts, funeral and testamentary expenses, and the duty on all legacies under this my will or any codicil not payable by the legatees shall be raised and paid out of such parts of my residuary estate as are not legally applicable to charitable purposes to the exoneration of the residue thereof, and that no part of my residuary estate which shall be so legally applicable shall be invested or dealt with so as to make the same inapplicable or unavailable for those purposes." The testator further declared "that on the death of each of them, my said sister and brother-in-law, the moiety in which she or he shall have had a life interest as aforesaid, as shall not be legally applicable to charitable purposes, shall be held by my general trustees" for various nieces or such of them as should survive him in equal shares.

An originating summons was taken out for the determination of the questions—(*a*) Whether the objects of the residuary gift were of a charitable nature; (*b*) in the event of the failure of the charitable gift, whether there was a valid gift to testator's nieces or an intestacy. Romer, J., held that the whole gift was bad as a charitable gift, but the Court of Appeal took a different view, holding that there was a general charitable intention expressed and that the gift was a good charitable disposition.

Cozens-Hardy, Q.C., and *Levett, Q.C.* (*George Lawrence* with them), for the appellants.—No trust is declared of the advowsons when purchased. You can hold an advowson for a charity but there is no trust at all to carry the advowsons here. A trust of this kind cannot be a charity. The object being too indefinite, there is no trust: *Morice* v. *Durham* (*Bishop*), 9 Ves. 399, 10 *Ibid.* 522. A trust of this kind does not bring any further property into charity; it does not augment the sum total. A trust to purchase advowsons is not a charity. The option given is fatal: *Vezey* v. *Jamson*, 1 Sim. & St. 69; *James* v. *Allen*, 3 Mer. 17; *Ommanney* v. *Butcher*, Turn. & Russ. 260; *Williams* v. *Kershaw*, 5 Cl. & Fin. 111 (*n*); *Ellis* v. *Selby*, 1 My. & Cr. 286; and *In re Macduff*, 45 W. R. 154, [1896] 2 Ch. 451.

Sir R. E. Webster, A.G., and *Ingle Joyce* (*Dibdin* with them), for the respondent.—The general intent is charitable and the court will enforce it. [They referred to *In re St. Stephen, Coleman-street* 36 W. R.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

837, 39 Ch. D. 492; *Foley* v. *Attorney-General*, 7 Bro. P. C. 249; *Wilson* v. *Dennison*, Amb. 82; Augmentation of Benefices Act, 1863 (26 & 27 Vict. c. 120).] When you get an overriding intent the court finds out away: *In re Douglas, Obert* v. *Barrow*, 35 W. R. 740, 35 Ch. D. 472; *Sinnett* v. *Herbert*, 20 W. R. 270, L. R. 7 Ch. App. 232; *Pocock* v. *Attorney-General*, 25 W. R. 277, 3 Ch. D. 342.

W. C. Druce, for the respondent Hood.

Cozens-Hardy, Q.C., replied.

The House took time for consideration.

Earl of HALSBURY, L.C.—In this case it does not appear to be doubted that if Romer, J., was right in holding that the first purpose, which the testator in this case has described as being a purpose to which some part or all, according to the discretion of the trustees, may be applied, is not "charitable" in the sense in which that word is understood by the Court of Chancery, then the whole gift must fail. It is undoubtedly the law that where a bequest is made for charitable purposes and also for an indefinite purpose not charitable, and no apportionment is made by the will so that the whole might be applied for either purpose, the whole bequest is void, and I do not understand any of the judges of the Court of Appeal to question that doctrine, but in a manner I shall refer to presently each of the learned judges gives reasons tending to show that Romer, J., was wrong in saying that the first purpose in question was not a charitable gift.

Now, it will hardly be contended that, if the words stood alone, the purchase of advowsons and presentations is a charitable purpose, and it certainly cannot be said that the trustees appointed by the testator might not devote every farthing of the fund in their hands to that one purpose. It is equally clear that he has declared no trust in respect of the advowsons or presentations when purchased.

The process of reasoning by which the Court of Appeal has come to the conclusion that they have the right to read the testator's will as establishing a charitable trust on the words to which I have referred is this: They say that they are sufficiently satisfied of the testator's intention by referring to other parts of his will; and I so far agree that, judging of his religious views by what he has said in other parts of his will, I have no doubt whatever that his general intention was to aid the particular school of religious thought in the Church of England to which he was himself attached; but it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words and declare trusts which are not to be found in the will itself; that, to put it plainly, the testator's intention is to be judged by the general desire that he has expressed to have his money devoted to such a purpose. To create a trust by such a process of argument as that appears, to my mind, to be not interpreting the will, but making a will for the testator. The Master of the Rolls says, with the candour which always distinguishes that learned judge, "I do not say the words fit them, but you can see plainly enough what the testator is driving at."

Again, he says, "It is true that he" (the testator) "has not said in so many words that that part of his residuary estate which may be applied for the purpose of advowsons or presentations is to be held when obtained upon the particular trusts." Again, he says: "The court ought to look at the drift of the whole will; and looking at it from that point of view, although I quite feel it is difficult to fit the words in so as to make the conditions accurately applicable," and so on. Lopes, L.J., puts the argument in a more compendious but I think in a more obviously fallacious way when he says "What object could he" (the testator) "have in view when he directed these special trustees to spend large sums of money in buying advowsons or presentations, except to advance religion — that particular form of the Protestant religion to which he was himself attached." Rigby, L.J., says: "I will take a more general view of the will. What did the testator mean? He meant to carry out his object by means of churches and chapels and schools." He says: "Churches and chapels and schools—it is 'churches, chapels, or schools'—and through the instrumentality of rectors, vicars, and incumbents, and masters or teachers. From that it appears to me plain that he was intending as far as he could to devote his property capable of being applied to charitable purposes for the purpose of religion or education." I do not say that we have got quite through, but we are advanced. We find that by means of churches, chapels, or schools, and rectors, incumbents, or teachers, he was going to have this money made available. Now I venture to say that if you were to suppose that every one of the words which the lord justice has used was in the will itself, it would advance the lord justice's argument no whit further. The point is this: Whatever his general intention may be, the testator has not done it. I must not omit to notice what the Master of the Rolls put as the cardinal and crucial question. Suppose the trustees here had proceeded to appoint a ritualistic clergyman, would not the court restrain them? I admit that that is a plausible mode of putting the difficulty, but is it anything else than giving a startling illustration of what the consequences would be if the testator, notwithstanding his general intentions, had not made sufficient provision for giving effect to his intentions? Is it any more than again stating the very question your lordships have to decide—that which the Master of the Rolls has described as the crucial question? Is it not only another mode of putting the point which he has already dealt with, and—with all respect to him I venture to say—not successfully? And after all it is only what always happens when the testator forgets to give verbal expression to what may nevertheless be in his mind.

Admitting freely what each of the learned judges has said, I am unable to agree that such general intention not carried out by appropriate words in the will itself can give any court the right to place the words there for him—that is, as I have said, to make a will—not to interpret the will. You might as well argue that because you can discover that someone was the object of the testator's affection, you should invent a bequest for him, since he did not mean to die intestate, and he must therefore have meant to leave something to the object of his affection—that because you find general expressions in a will of affection and regard for certain persons, although there are no words in which provision is made for them, you are to interpret the will in such a way as in a large and general sense may be said to satisfy the wishes of the testator. The plain fact remains in this will that the testator has not declared the trust that the Court of Appeal have imagined for him, and no apt words have been found to fit or give effect to his supposed intention; and I think we are not justified in taking such a liberty of interpretation. That certainly would be a strange mode of construing a will, that because you cannot find what else he must have intended to be done with his money, except something of that nature, although it is

admitted that there are no words in the will to convey the intention which is suggested he had in his mind, you can invent provisions and impose conditions which the testator himself has not introduced. With the utmost respect for the learned judges of the Court of Appeal, I say that that would be admitting a latitude of interpretation and a looseness in the application of words in wills expressing the general intentions of the testator which, although in this particular case it might do no harm, would let in a mode of interpreting wills which would cast upon the court in almost every case of a defectively made will the necessity of making the will for the testator, not interpreting the words which he has actually used.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed, and the judgment of Romer, J., restored.

Lord WATSON.—I have had an opportunity of considering and I entirely concur in the terms of the judgment prepared by Lord Davey.

Lord SHAND.—After very careful consideration induced by the circumstance that the House is about to reverse the unanimous decision of the Court of Appeal, I agree in thinking that this House should revert to the judgment of Romer, J. That learned judge has held that while the testator, with reference to the first of the several purposes to which he has authorized the residue of his estate to be applied has stated that his trustees "may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations," yet there is no provision to be found in his will that the advowsons or presentations so purchased, or for or towards the purchase of which grants may be given, shall be affected by any charitable trust, or, indeed, by any definite trust whatever, and I concur in that view.

The testator has authorized his special trustees to apply the income or any portion of the capital of the residue of his estate in three different ways—first, in the purchase of advowsons or presentations; or, secondly, in the erection, improvement, or endowment of churches, chapels, or schools; or thirdly, in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters or teachers. There is no direction to apportion the funds and apply part to each of these purposes. The trustees might in their discretion apply the whole income and capital to any one of the three, and it follows that if it be held that one of the purposes is not charitable the deed is not effectual as a charitable bequest of the residue as a whole.

I agree with the learned Master of the Rolls that the words "but upon the following conditions," which immediately succeed the enumeration of the three trust purposes, taken grammatically, apply to all that has gone before; but so reading the will I can find no condition which has application to advowsons or presentations. These conditions, which make it clear as regards the second and third trust purposes, relating to churches, chapels, or schools, and to rectors, vicars, and teachers, have by the language used no application and no relation to advowsons or presentations. It is said in his lordship's judgment, "I do not say that the words fit them, but you can see plainly what the testator is driving at." With the utmost respect for the learned judge, I should say that is not enough. I see much in the provisions of the will relating to the endowment of churches or schools, and the contributions to the income of rectors or teachers, which leads me to think the testator intended to make similar provisions in regard to grants for the purchase of advowsons or presentations; but assuming he had that intention, he has, in my opinion, failed to express it, and I say so, of course, taking the will as a whole. The question is not one for speculative reasoning: "What do you think was the testator's intention?" but "What has he expressly or by implication (but by necessary implication where implication only is relied on) expressed by the terms used?"

On a sound construction of the will I am of opinion that the testator has not affixed any condition to the application of the residue or part of it in the purchase of advowsons or presentations which makes that an application to a charitable purpose, and as the whole of that residue might thus be applied to a purpose not charitable, I am of opinion that the appeal must be allowed.

Lord DAVEY.—The primary question in this case is the construction of the testator's will. Reading the will shortly, the testator gave his pure personalty to special trustees upon trust to invest, and with power to apply the income or any portion of the capital in—first, grants for or towards the purchase of advowsons or presentations; or secondly, in creating or contributing to the creation, improvement, or endowment of churches, chapels, or schools; or, thirdly, in paying or contributing to the salaries or incomes of rectors, vicars, or incumbents, masters or teachers, but upon certain conditions which I will discuss presently.

There is no doubt that the second and third purposes (which are not numbered in the will, but which I have numbered for convenience of reference) are in themselves charitable, assuming that schools are not schools of a private character; and there is equally little doubt that a trust for making grants for or towards the purchase of advowsons or presentations is not in itself a charitable purpose. The learned judges in the Court of Appeal have, however, thought that they could spell out of the words of the will a charitable purpose in connection with the advowsons or presentations expressed with sufficient definiteness for the court to give effect to it. What one ought to find is some trust imposed upon the holders of the advowson or presentation, when purchased, as to the manner in which the right of patronage is to be exercised. The mere purchase or contribution to the purchase of the property in an advowson or right of presentation is in truth a mere change of investment, and the charitable purpose must, in my opinion, be found in the use to be made of the property when purchased. I agree with Rigby, L.J., that we must take the whole will together, and see what, as a fair result, is the meaning of the testator, if by that phrase is understood the meaning of the words he has used. I agree, too, with the lord justice that the circumstance that the testator makes a separation between the portion of his property which he can by law devote to charity and that which he cannot, and that he appoints special trustees to administer the trusts of the former portion of his property, are matters for serious consideration. But I further agree with the lord justice that you are not, because he has done that, to do violence to the language of any part of the will, or to import words which you do not find there to make the purposes charitable because of those prefatory dispositions which the testator has made. You must construe the words of the will fairly, and if you can find a charitable purpose sufficiently clearly expressed the court will give effect to it. If you do not find any such definite expression you are not at liberty to supply it from more or less well-founded speculation of what the testator would probably have wished or intended if his attention had been drawn to the

omission. It may be that *voluit sed non dixit*. Now, apart from the expressed conditions, there is nothing except the prefatory disposition already referred to, and the direction to his general trustees, in case the special trustees named decline to act, to nominate persons who may be depended on to respect and fulfil the testator's wishes. There is no suggestion made of any secret trust. These words, therefore, mean his expressed wishes, and do not seem to me to carry the matter any further. I am doubtful whether evidence that the nominated trustees were in fact the then trustees of the well-known Simeon trust is admissible for the purposes of construing the will. It is not pretended that the trusts of the Simeon foundation are imported by implication into the will, and if so I do not see the relevance of the evidence. It shows, indeed, what appears from other parts of the will, that the testator was a man of strong Evangelical principles, but it does not assist the court to arrive at the trusts intended to be imposed upon the advowsons and rights of presentation to be purchased wholly or in part out of the testator's estate: see on this point *Doe d. Toone* v. *Copestake*, 6 East 328.

I turn now to the expressed conditions, and I assume for the purposes of this case that, if applicable to the first purpose, there would be a good charitable trust. The first is that only such churches or chapels shall be subscribed or contributed to wherein the service shall, in the opinion of the special trustees, be conducted in the particular manner prescribed. These words, it is admitted, do not in terms fit or apply to the purchase of advowsons. The learned judges have, however, endeavoured to apply the words to the first purpose. "I do not say that the words fit them," says the Master of the Rolls, "but you can see plainly enough what the testator is driving at. What are these advowsons or presentations to be bought for except for the purpose of advancing religion as he understands it? And he has told you plainly enough how he understands it in the words I have just read." With unfeigned respect for the Master of the Rolls' opinion, this seems to me to be making a will for the testator, and not interpreting the words he has used. In no intelligible sense can the purchase of advowsons be called subscribing or contributing to churches or chapels; and to apply these words to the first purpose seems to be doing violence to the language of the will. The words are directly and plainly applicable to the second purpose, and, in my opinion, to that only. The second and third conditions I need not dwell on, because they relate to schools and masters and teachers only. The fourth condition provides that no payment shall be made directly or indirectly to or for the benefit of any rector, vicar, or incumbent, except upon certain conditions; and this is followed by a declaration disqualifying any rector, &c., who shall preach or adopt or follow any doctrines or practices at variance with the testator's views of religion as stated. These provisions, again, are directly and properly applicable to the third purpose of the trust, and cannot be made to fit grants for the purchase of advowsons and presentations. Possibly, if the first purpose were the only purpose of the trust, the court would, however difficult it might be, endeavour to make the conditions fit that purpose. But where you have other purposes to which the conditions, according to the ordinary construction of the words, are properly and directly applicable, it would, in my opinion, be wrong to strain and do violence to the language to make them fit the first purpose.

I quite agree that advowsons may be made the subject of charitable trusts, as was decided by Kay, J., in *In re St. Stephen's, Coleman-street*. But I am unable to find that the testator has by his will annexed any trust either for a particular charitable purpose or for charitable purposes generally, or indeed any trust whatever, to the advowsons or rights of presentation which he empowers his special trustees to make grants for the purchase of. The Attorney-General pointed out that the advowsons and rights of presentation were not intended to be, or, at any rate, might not be, purchased or held by the trustees themselves. The testator therefore has left his special trustees free to make grants to other persons, whether trustees or not, in their discretion, or, if the purchasers be trustees, without any definition or limitation of the trusts upon which such persons are to hold the purchased property. The court is always properly desirous of upholding a testator's will, but after anxious consideration I am unable to say that the will discloses any trust as regards the first purpose which the court can either execute or control the execution of by the trustees.

What, then, is the law applicable to the case? There are two classes of authorities. On the one hand, there is a long series of cases extending from *Morice* v. *Durham* (*Bishop*), decided by Sir William Grant and Lord Eldon, to *In re Macduff*, decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them (such as "charitable or benevolent," or "charitable or philanthropic," or "charitable or pious" purposes), or where the description includes purposes which may or may not be charitable (such as "undertakings of public utility"), and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Vezey* v. *Jamson* the trust was to dispose of the residue in or towards such charitable or public purposes as the law of the land would admit, or to any persons as the trustees in their discretion should think fit, or as they should think would have been agreeable to him if living, and as the laws of the land did not prohibit. Sir John Leach said: "The testator has not fixed upon any part of this property a trust for a charitable use. I cannot, therefore, devote any part of it to charity. . . . The necessary consequence is, that the purposes of the trust being so general and undefined that they cannot be executed by this court, they must fail altogether, and the next-of-kin become entitled to the property."

On the other hand, it has been decided in cases such as *Attorney-General* v. *Doyley*, (1735) 4 Vin. Abr. 485, and *Salusbury* v. *Denton*, 5 W. R. 865, 3 K. & J. 529, that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail; but in default of apportionment by the trustees the court will divide the fund between the objects charitable and non-charitable equally.

I have come to the conclusion that the present case falls within the first class of cases. As Sir William Grant, M.R., says, in *Morice* v. *Durham* (*Bishop*), "The question is, not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it?" The answer to that question in the present case can only be that there is no such obligation. On the other hand, the other purposes to which conceivably the trustees may apply the whole fund in their discretion are not described with sufficient definiteness for the court to attach any trust upon them.

A third class of cases was relied on by the respondents, of which *Sinnett* v. *Herbert* and *In re Douglas Obert* v. *Barrow*, are examples, in which there is a general overriding trust for charitable purposes, but

some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the trust is good, and the court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable. But in my opinion those cases have no application to that before this House, because, as I have already said, I think that there is not here any general trust for charity binding the whole fund.

The result is that, in my opinion, the order of the Court of Appeal should be discharged, except so far as it relates to costs, and that of Romer, J., restored. The appellants here will have their costs out of the estate. The respondent, the executor, must also have his costs as between solicitor and client out of the estate.

Sir R. E. Webster, A.G., asked that his costs might be paid out of the estate.

Earl of HALSBURY, L.C., said: Considering that the Attorney-General was made a defendant, and in a public capacity as the guardian of a large charitable fund, as this was supposed to be, and that he had the judgment of the Court of Appeal which asserted that it was a charity, I think it would have been contrary to his duty, as Attorney-General, if he had not appeared in support of the judgment of the Court of Appeal which pronounced this to be a charity. I think the circumstance also that it is a very large estate ought not to be left out of account. For these reasons I am of opinion that he ought to have his costs, but I wish to guard myself against saying that it is to be established, as an absolute precedent, that in all such cases the Attorney-General ought to have his costs.

The other Lords concurred.

Order of the Court of Appeal appealed from reversed, except as to costs. Order of Romer, J., restored.

Solicitors for appellant, *Hollams, Sons, Coward, & Hawksley.*

Solicitor for Attorney-General, *Solicitor to the Treasury.*

Solicitors for the respondent, Hood, *West, King, Adams, & Co.*

Court of Appeal.

Appeal.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 14.

CHANDLER v. SMITH. (a.)

Master and servant—Employers' liability—Accident to workman—Disablement for two weeks from earning full wages—Payment of same wages after accident as before—Amount of compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 2 (a).

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the applicant was a foreman in the employment of the respondents, who were carpet manufacturers. His main work consisted in supervision, but he used also frequently to set up and adjust the machines. While adjusting a machine, he received an injury to his thumb, which had to be amputated. He returned to his work the next day, but after the accident he was unable to set up or adjust the machines, and his work was confined to supervision. He received the same wages after the accident as before.*

Held, that he was disabled for two weeks from "earning full wages at the work at which he was employed" within the meaning of section 1, *sub-section* 2 (a), *of the Workmen's Compensation Act,* 1897.

Held, also, that the proper course was to make a declaration of liability, and to adjourn the question of the amount and duration of compensation.

Appeal from a decision of the judge of the Derby County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was employed by the respondents, who were carpet manufacturers, as the foreman of their weaving department. His main work consisted in the general supervision of the hands engaged in the department, but he used also frequently to set up and adjust the machines and cut the cards for and set up the work upon the Jacquard frames. While adjusting a machine he received an injury to his thumb, which had to be amputated. He was able to return to his work on the next day, and he continued to work regularly at the respondents' factory, with the exception that during the next few weeks he attended daily at the hospital for about an hour to have his hand dressed. After the accident the applicant was unable to set up or adjust the machines, or to cut the cards for and set up the work upon the Jacquard frames, and another man was engaged by the respondents to do this work, the applicant's work being confined to the supervision of the department. His wages before the accident were £3 a week, and he continued to receive the same wages after the accident, the respondents having no intention of discharging him from their employment.

The county court judge found that the wages after the accident were paid, not as a matter of grace, but in performance of the contract of service, and that the applicant had not been disabled for a period of two weeks from "earning full wages at the work at which he was employed" within the meaning of section 1, sub-section 2 (*a*), of the Workmen's Compensation Act; and he held therefore that the applicant was not entitled to compensation.

Section 1, sub-section 2 (*a*), is as follows; "The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed."

The applicant appealed.

Parfitt, for the applicant.

Hextall, for the respondents.

Cur. adv. vult.

July 14.—A. L. SMITH, L.J., read the following judgment: The question is whether, when a workman by reason of an accident arising out of and in the course of his employment has had his right thumb cut off, and has thereby become a mutilated and injured man for life, he is prevented from obtaining compensation from his master under the Workmen's Compensation Act, 1897, by reason of sub-section 2 (*a*) of section 1 of that Act, which sub-section runs thus: "Provided that the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed." It was proved that the injured workman at the time of the accident was in the service of the respondent at a weekly wage of £3, that his duties consisted in part of adjusting machinery and in part of general supervision over the other

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

employees of his master, that in the course of this employment he met with the injury complained of, that for the two weeks after the accident he continued to give supervision, but was unable by reason of the loss of his thumb to adjust machinery, that he was absent from his work for short periods in order to have his injury dressed at the hospital, and that his master nevertheless continued to pay him the weekly wage of £3. The difficulty in this case arises from the finding of the learned county court judge, who has found that the wages for the week of the accident and for the following weeks were paid, not as matters of grace, but in the performance of the contract of service, and that the applicant had not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed. The meaning of sub-section 2 (*a*) of section 1 in my judgment is that, if the accident be of such a nature that the man is by law entitled during the two weeks immediately following the accident to recover full wages from his master at the work at which he was employed as before the accident, then such an accident is not to give rise to a claim by the workman against his master under the Act. The meaning of this sub-section is well exemplified by the maxim *De minimis non curat lex*. If the master out of feelings of compassion and generosity, as, happily, is often the case, continues to pay the full wages, though not under legal obligation to do so, that does not bring the case within the sub-section. We have ever held that a finding of fact of a county court judge binds us, and that it is only on a matter of law that there is an appeal. But if a learned county court judge decides a fact when there is no evidence upon which he could find it, this is a matter of law, for in such a case he has misdirected himself, and this is law. Now, where is the evidence that a man maimed and mutilated for life by the loss of his thumb is by law entitled to recover from his master the same wage as he could have recovered before he was so mutilated? And, indeed, the evidence in the present case is that the workman was disabled from performing part of the work for which he theretofore was entitled to receive £3 per week, and that he had also to absent himself from his work during portions of the time when he should otherwise have been working for his master to entitle him to earn the £3; and, moreover, the master had to employ another workman at an extra wage to do the work upon the machinery which the injured workman theretofore had to do. In my judgment there was no evidence that the workman could at law have exacted from his master the full wage to which he had been entitled before the accident, and, indeed, he could not have done so, and, consequently, there is no evidence that the payment of the full wage was not an act of grace of the master, as found by the learned judge. For these reasons I am of opinion that the appeal of the workman must be allowed with costs here and below, and I think that the case must go down to the learned county court judge to assess the amount of compensation to which the applicant is entitled; but, as my brethren think that the assessment of compensation should be postponed as mentioned by them, I will not disagree with them as to this.

RIGBY, L.J., read the following judgment: The only question arising on this appeal is whether the county court judge was right in holding this to be a case to which the Workmen's Compensation Act, 1897, does not apply, on the ground that the applicant was not disabled for a period of at least two weeks from earning full wages at the work at which he was employed. William Chandler, the applicant, had been for many years in the employ of Thomas Smith & Son as foreman of the weaving department. The terms on which he was employed are not in dispute. He had to mount or set up every machine in his department, and if anything went wrong he had to adjust it if the single fitter employed could not make the machine right. He also had to cut and put into the Jacquard machines all the pattern cards, and had the general supervision of the weavers. For all this work he received wages at £3 a week. On the 3rd of November, 1898, whilst adjusting a machine that was out of order, being, as is admitted work for which he was employed, he had his thumb lacerated and torn so that it had to be amputated, and it is admitted that he is now unable to set up or adjust a machine, or so quickly to cut the cards for and set up work on a Jacquard frame; that, consequently, his wage-earning power as such foreman as aforesaid in any factory where he might seek employment, should he leave the respondents' service, is materially decreased. He is, however, and from the date of the accident, with the exception of short absences for the necessary purpose of attending at the infirmary to have his wound dressed, always has been as capable of doing the work of superintending the weavers as he was before. Since the day of the accident the applicant has received for each and every week the amount of his full wages—namely, £3 a week. The respondents state that they have no intention of parting with the applicant, but they have had to employ an additional fitter to adjust the machines, and, when work requires to be set up on a Jacquard frame a certain weaver is taken from other work for the purpose. In this state of things the learned county court judge has found that the wages for the week of the accident and for the following weeks were paid not as matters of grace, but in performance of the contract of service. If this means that the employers were bound by the contract to go on paying him his full wages until notice was given determining the contract, it may be true, subject to the right to a deduction for any time during which he was absent from work—a deduction which the county court judge has fixed at 10s. for the first week and at 7s. for each of the following three weeks; but however this may be, I cannot agree with the learned judge that the applicant has not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed at the time of the accident. Ever since the date of the accident he has been absolutely disabled from doing a substantial part of the work which at the time of the accident he was employed to do, and the disability seems likely to be permanent. Clearly the employers were under no legal—whatever may have been the moral—obligation to retain him in their service at full wages under the altered circumstances. In my judgment the disability referred to in section 1, sub-section 2 (*a*), of the Act cannot depend upon the greater or smaller liberality of the employer; it must be a physical disability, and must depend upon the question whether the workman is capable of performing the work at which he was employed at the time of the accident as efficiently as he did before. In a case like the present, where a substantial part of the work cannot be done at all, the exception introduced by sub-section 2 (*a*) does not apply at all. I concur in the judgment about to be delivered by Vaughan Williams, L.J., as to the course that ought to be pursued.

VAUGHAN WILLIAMS, L.J., read the the following judgment: I agree in the result. It is contended in this case in answer to the claim for compensation that the injury sustained by the workman did not disable him for a period of two weeks from earning full wages

at the work at which he was employed; and further, that the applicant is entitled to no compensation because there has been no difference between the amount of his average weekly earnings before the accident and the average amount which he has been able to earn since the accident, even assuming that it can be truly said that there has been a period of partial incapacity for work.

Now, section 1, sub-section 2 (*a*), of the Workmen's Compensation Act, 1897, provides that the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed. The workman in the present case was employed at a wage of £3 a week in a weaving factory as a foreman. As such foreman he was required to supervise the work of the female machinists and to adjust and oil the machines in cases where the machinist required assistance. The result of the accident was that the workman lost his thumb, and can no longer do the whole of the work of adjusting and oiling the machines, but he can still do so much of his former work as consisted of supervising the work of the female machinists, and he has, ever since the accident, been continued as a foreman and has received £3 a week as before the accident.

Now the fact that the workman has been paid full wages as before the accident does not conclusively show that he has not been disabled from earning full wages at the work at which he was employed, because part of the wages which he has received may not have been earned by him, but may have been paid to him as an act of grace, notwithstanding the fact that the loss of his thumb might disable him from earning as much as £3 a week as the market value of his services as foreman, now that he has lost his thumb, the proof of this being that he could not earn so much if he had to go elsewhere to find employment as a foreman. The county court judge has found as a fact that the wages received by the workman ever since the accident were paid, not as matters of grace, but in performance of the contract of service.

The contract in the present case is a contract by the week, and the fact that the master chooses to re-engage the workman at the end of each week at the old wage is some evidence that the master considers the workman worth that wage, notwithstanding the loss of his thumb. This is a very different thing from the master refraining from making a deduction from the wages of a workman employed under a continuous contract for a year or other period exceeding two weeks, notwithstanding the partial incompetence of the workman to do the whole of his work as formerly by reason of the loss of a thumb resulting from accident.

The importance of this is that we are bound by the findings in fact of the county court judge, if there is any evidence to support them, and it seems difficult to me to say that the re-engagement at the end of each week is not some evidence that the master considered the workman to be worth the full wage of £3 a week, notwithstanding the loss of his thumb. In such a case I should hesitate to say that the re-engagement was no evidence that the man's services were worth the old wage, notwithstanding the fact that there was some of the work formerly done by the workman which by reason of the accident he was no longer able to do, but in the present case my hesitation is increased by the fact that the adjusting of the machinery does not seem on the evidence to be essential to the work of a foreman, although it happened to be included in the work habitually done by this particular foreman.

Assuming that this difficulty of the finding of the county court judge is got over, there still remains the difficulty that the county court judge by his judgment orders that the applicant do recover nothing from the respondents as compensation, that is, as compensation for the personal injury which is alleged to have resulted in the partial incapacity of the workman for work. Now Schedule I., clause 1 (*b*), gives, together with clause 2, the measure of compensation. Those clauses run thus: "Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity." Now this measure will give the workman nothing unless it can be truly said that there is a difference between the amount of the average weekly earnings of the workman before the accident and the amount which he is able to earn after the accident, regard being had to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity. I cannot see how any difference can be arrived at, having regard to the statutory definition of the measure, and I cannot say, therefore, that the judgment of the county court judge is wrong as far as it goes in awarding nothing to the applicant; but, having regard to the provision in section 1, sub-section 1, of the Act, that the employer shall be liable to pay compensation if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, and to the provision in section 1, sub-section 3, that the question of liability as well as the question of the amount or duration of compensation is to be settled by arbitration, it seems to me that the county court judge in this case might and should have made a declaration of liability and adjourned the question of the amount and duration of compensation. This seems to me to be in accordance with the spirit of the provision of clause 12 of Schedule I., which provides that the weekly payment may be reviewed at the request either of the employer or of the workman, and on such review the weekly payment may be ended, diminished, or increased. If you may review the award where the facts have been ascertained for certain, it seems only reasonable that you may postpone the fixing of the amount of compensation until facts are ascertained to which the measure is to be applied, and I prefer this course to that of awarding a weekly payment of a penny and then applying the provisions of clause 12 of Schedule I.

Appeal allowed.

Solicitors for the appellant, *Warriner & Co.*, for *J. T. Wykes*, Derby.

Solicitors for the respondents, *Hind & Robinson*, for *Wells & Hind*, Nottingham.

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) July 6.

WILLIAMS v. BIRMINGHAM BATTERY AND METAL CO. (a.)

Master and servant—Negligence—Common law liability of master—Defect in plant—Servant's knowledge of danger—Risk voluntarily incurred.

A workman in the employment of the defendants was killed by a fall while descending, in the course of his work, from an elevated tramway on the defendants' premises. In an action by his widow under Lord Campbell's Act, the jury found that the defendants did not exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks; that it was dangerous to descend from the tramway without the means of a ladder; that the deceased had the same means of knowing that it was dangerous as the defendants had; that he did know that it was dangerous; and that he had not been guilty of contributory negligence; and they assessed damages.

Held, that the plaintiff was entitled to judgment.

Appeal from the judgment of Darling, J., at the trial of an action with a jury.

The action was brought under Lord Campbell's Act by a widow to recover damages in respect of the death of her husband. The plaintiff's case was that the deceased, who was at the time of his death and had been for many years in the employment of the defendants, was killed by a fall while descending in the course of his work from an elevated tramway on the defendants' premises in consequence of the negligence of the defendants in not providing proper means and appliances for enabling their workmen to ascend to and descend from the tramway.

The learned judge left questions to the jury, which with the answers thereto were as follows: (1) Did the defendants exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks? No. (2) Was it dangerous to descend from the tramway without the means of a ladder? Yes. (3) Had the deceased the same means of knowing that this was dangerous as the defendants had? Yes. (4) Did the deceased know that it was dangerous? Yes. (5) Was the deceased guilty of contributory negligence? No. The jury assessed the damages at £130. Upon these findings the learned judge entered judgment for the defendants.

The plaintiff appealed on the ground that on the findings of the jury she was entitled to judgment.

Cecil Walsh, for the plaintiff.

Hugo Young, Q.C., and *Shakespeare*, for the defendants.

The following cases were cited in argument: *Smith* v. *Baker*, 40 W. R. 392, [1891] A. C. 325; *Yarmouth* v. *France*, 36 W. R. 281, 19 Q. B. D. 647; *Mellors* v. *Shaw*, 9 W. R. 748, 1 B. & S. 437; *Watling* v. *Oastler*, 19 W. R. 388, L. R. 6 Ex. 73; *Griffiths* v. *London and St. Katherine Docks Co.*, 33 W. R. 35, 13 Q. B. D. 259; *Skipp* v. *Eastern Counties Railway Co.*, 9 Exch. 223, 2 W. R. Dig. 192; *Woodley* v. *Metropolitan District Railway Co.*, 2 Ex. D. 384, 25 W. R. Dig. 155; *Thomas* v. *Quartermaine*, 35 W. R. 555, 18 Q. B. D. 685; *Membery* v. *Great Western Railway Co.*, 38 W. R. 145, 14 App. Cas. 179; *Seymour* v. *Maddox*, 16 Q. B. 326.

Cur. adv. vult.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

July 6.—A. L. SMITH, L.J., read the following judgment: This is an action at common law for damages brought by the widow of a deceased workman, by the aid of Lord Campbell's Act, against the masters of the deceased man for having been guilty of negligence whereby the workman lost his life, and the first two questions left to the jury by the learned judge were: Did the defendants exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks? And the answer was, No. Secondly, Was it dangerous to descend from the tramway without the means of a ladder? Answer, Yes. I will deal with the other questions left to the jury hereafter. This case was remarkably well argued before us on each side, and I believe almost every case bearing upon the liability of a master for injuries to his servant in the course of his employment and the applicability thereto of the maxim, *Volenti non fit injuria*, was brought out in review before us; but when the case is rightly apprehended the judgment may be comparatively short. In the first place, there can be no doubt as to the duty of a master to his man, and I will take a passage upon this subject from Lord Herschell's judgment in *Smith* v. *Baker* in the House of Lords. The noble lord says: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operation as not to subject those employed by him to unnecessary risk." This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man; and the first two findings of the jury in this case show that the defendants had not performed this duty, and had therefore been guilty of negligence towards the deceased, and it is not disputed that it was by reason of the absence of the ladder caused by this neglect of duty that the deceased man met with his death. In my opinion there was ample evidence to support the above findings, for it was proved that the absence of the ladder, which was the cause of the accident, had been well known to the defendants, and that they neglected to provide it, and hence the occasion of the man's death. This is not the case where a master has provided proper appliances and done his best to maintain them in a state of efficiency, in which case the man has no action against his master if the appliances became unsafe whereby the man has been injured, unless he avers and proves that the master knew of their having become unsafe, and that the man was ignorant of it: *Griffiths* v. *London and St. Katharine Docks*. When proper appliances have been supplied by a master to a man they may well become unsafe to the knowledge of the man and without the knowledge of the master, and so it is that each issue must in such a case be established by the man when he sues his master. This is the case of no proper appliances having been supplied by the master at all, so that the man might carry on his operation in such a way as not to be exposed to unnecessary risk. The case is similar to that of *Mellors* v. *Shaw*. If this case had stopped here it appears to me clear that there must have been judgment for the plaintiff, she having proved personal negligence in the defendants whereby the deceased man met with his death; and how do the defendants seek to get rid of this case so far successfully made and proved against them? They plead in their defence that "the alleged defect and want," *i.e.*, of a ladder, was known to the deceased, and also that he was guilty of contributory negligence. As regards this last defence, the jury have negatived it. But what as to the defence set up that "the

defect and want (of the ladder) was known to the plaintiff"? What defence is that to the proved personal negligence of the masters? The defendants have advisedly abstained from raising the defence of the deceased man having contracted or covenanted or undertaken to run the risk of the defect, *i.e.*, the want of the ladder, so as to raise the defence summarized by the maxim, *Volenti non fit injuria*. That the mere knowledge of the risk does not necessarily involve consent to undertake the risk has now beyond question been settled by the House of Lords. See the judgments in *Smith* v. *Baker*, and specially the judgment of Lord Halsbury, citing with approval Bowen and Lindley, L.JJ. The sole question which was asked of the jury as to this was, Had the deceased the same means of knowing that this was dangerous as the defendants had? Answer, Yes. Did the deceased know it was dangerous? Answer, Yes. How does this prove that he either contracted, or consented, or undertook to accept the risk? The defendants called no evidence. They did not even attempt to show what was the contract under which the deceased man served. Nor did they ask that any question as to whether the man had contracted to take the risk should be left to the jury. As Lord Watson said in *Smith* v. *Baker*, "When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence and appreciated or had the means of appreciating its danger. But, assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case." If the defence of *Volenti non fit injuria* was to be insisted upon, which the defendants not only in their pleadings, but also at the trial, did not raise, they must have obtained a finding of the jury upon it in their favour. They have not done so, and for the reasons above I think that the judgment entered by the learned judge for the defendants must be set aside, and judgment entered for the plaintiff for the £130 damages assessed by the jury in favour of the plaintiff, with costs here and below. My brother Vaughan Williams agrees with this judgment.

ROMER, L.J., read the following judgment: Many authorities bearing on the question we have to decide have been cited and discussed. I do not propose to review them. They appear to me to establish the following propositions as to the liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of a breach of that duty a servant suffers injury, the employer is *primâ facie* liable, and it is no sufficient answer to the *primâ facie* liability for the employer to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him.

I will now apply the above propositions to the case before us. The tramway, as left by the defendants, without ladders or other safe means for ascending to and descending from it, was clearly dangerous. The defendants in not providing these ladders or other safe means were, in my opinion, guilty of breach of duty to the workmen employed about the tramway. This is in substance what the jury have found by their answers to the two first questions left to them by the judge. That the workman Williams was injured by reason of the absence of the precautions above-mentioned which should have been taken by the defendants is clear. For that injury, then, the defendants are *primâ facie* liable. The question then is, have the defendants established a case to free themselves from the *primâ facie* liability? The only findings of the jury favourable to the defendants are that Williams had the same means of knowing the danger as the defendants, and did know the danger. These two findings are not sufficient to free the defendants from liability, unless they amount to a finding that Williams took upon himself the risk of working on the tramway in the absence of the ladders or other safe means of ascending and descending. It appears to me that such a conclusion cannot be drawn from these two findings of the jury. This being so, on the findings of the jury as a whole there shall be judgment for the plaintiff. No doubt there was evidence before the jury on which the defendants, if they had taken the point, might have asked the jury to hold that Williams had taken upon himself the risk. But no such finding was asked for by the defendants, and, indeed, I cannot see that the point as to Williams having taken upon himself the risks was at all taken by the defendants prior to this appeal. I presume they thought it hopeless to expect to succeed on the point. At any rate, they cannot now ask us to decide as a matter of fact that Williams had taken upon himself the risk, or call upon us to act as if a finding to that effect had been obtained from the jury. It appears to me, therefore, that the appeal should be allowed and judgment entered for the plaintiff for the ascertained amount of damage with costs here and below.

Appeal allowed.

Solicitors for the plaintiff, *Thomas White & Sons*, for *W. H. Egginton*, Birmingham.

Solicitors for the defendants, *Timbrell & Deighton*, for *Shakespeare & Co.*, Birmingham.

High Court of Justice.

Chan. Div.
Kekewich, J. } June 15, 16, 27.

SOUTH AFRICAN BREWERIES (LIMITED) *v.* KING. (*a.*)

Contract—Conflict of laws—English and South African law — Place of performance — Restriction against trading—Injunction—Intention.

Where a contract is entered into between parties residing in different countries, where different systems of law prevail, the law by which to determine the intrinsic validity and effect of the contract will be selected by the English courts on substantial considerations, the preference being given to the law of the country with which,

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

according to the intention of the parties, the transaction has the most real connection.

Where a British subject resident in Johannesburg entered into a contract with a company registered in England, but formed for the purpose of carrying on business "in the Transvaal, the colony of Natal, and elsewhere in South Africa," to serve the company in their business carried on "at Johannesburg and in the colony of Natal or elsewhere in South Africa," and thereby undertook not to engage in any similar business in South Africa within a period of ten years after the determination of the contract without the consent of the company.

Held, in an action by the company for an injunction to restrain the defendant from committing a breach of his undertaking, that the contract was governed by the law of the South African Republic, as being the law of the country with which, according to the intention of the parties, the transaction had the most real connection.

Action.

The question raised in this case was whether an English contract entered into in a foreign country between a British subject resident there and an English company having its registered office in England and carrying on business only in the foreign country, should be governed by the law of England or of the foreign country. The contract related to the business of the company.

The facts were as follows: By an agreement of the 14th of October, 1892, the Natal Brewery Syndicate (South-East Africa) (Limited)—an English company formed for the purpose of carrying on the business of brewers in the Transvaal, the colony of Natal, and elsewhere in South Africa—engaged the defendant, a brewer, then resident in England, to go out and serve in their brewery at Johannesburg upon the terms therein mentioned, the defendant undertaking not to engage in the business of a brewer in South Africa within five years from the determination of the agreement, except with the consent of the company, and also in the event of the company's business being transferred to another company to carry out the agreement with such other company.

The defendant went out to Johannesburg and remained in the service of the syndicate until the month of November, 1892, when the syndicate's business was transferred to another English company, the South African United Breweries (Limited). The defendant continued to serve the latter company on the terms of the above-mentioned agreement until the 11th of April, 1895, when, by an agreement of that date, and made between the company or its successors of the one part and the defendant of the other part, the defendant agreed to serve the company for five years "as brewer or otherwise in their business carried on at Johannesburg and in the colony of Natal, or elsewhere in South Africa," from the 1st of October, 1894, determinable by the company alone upon the terms therein contained, and the defendant thereby agreed "not to engage in any brewing business in South Africa within a period of ten years after the termination of his engagement by the company except with the consent in writing of the board of directors in London of the company." Upon the reconstruction of the last-named company in 1895, the plaintiff company, another English company, took over the whole of the undertaking and the defendant continued in their employ as brewer upon the terms of the agreement of the 11th of April, 1895. In March, 1897, the plaintiff company in exercise of their power in that behalf determined the defendant's service under the agreement. Thereupon, as was alleged, the defendant became interested in the formation of a company registered in Scotland as "The Durban Brewery Syndicate (Limited)" for the purpose of carrying on a brewery at Durban under the management of the defendant, without the consent of the plaintiff company. The plaintiff company then brought the present action for an injunction restraining the defendant from committing this alleged breach of his agreement of the 11th of April, 1895. At the trial of the action the question arose as to whether the agreement should be construed according to English law or the law of the South African Republic. The evidence and the further facts material to this report are set forth fully in the judgment.

Warrington, Q.C., and *Younger*, for the plaintiff company.—The contract of the 11th of April, 1895, is an English contract both as regards form and parties, and is intended to be governed by English law. It is a continuation of the prior contract of the 14th of October, 1892, which is in every respect an English contract, and the parties must have meant the later contract to be construed according to English law. *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202.

Buckmaster, for the defendant.—The contract of the 11th of April, 1895, was executed out of, and was to be performed out of the jurisdiction. The *locus contractus* and the *locus solutionis* being the same, there is a strong *primâ facie* case against the plaintiffs which they must rebut. It is a question of intention, and the circumstances indicate that the parties intended the contract to be governed by the law of South Africa. *Jacob & Co.* v. *Crédit Lyonnais*, 32 W. R. 761, 12 Q. B. D. 589, at p. 601; *In re Missouri Steamship Co.*, 37 W. R. 696, 42 Ch. D. 321, at p. 340.

Warrington, Q.C., in reply.—There is no law of South Africa. The *locus contractus* in the circumstances is more important than the *locus solutionis*.

He referred to Dicey's "Conflict of Laws," p. 568.

Cur. adv. vult.

June 27.—KEKEWICH, J.—The only question now to be decided is whether the meaning and effect of the contract of the 11th of April, 1895, ought to be governed by the law of England or by any other and what law. That question may otherwise be stated in the language of Fry, L.J., in *In re Missouri Steamship Co.*, 42 Ch. D., at p. 340: "Looking at the subject of this contract, the place where it was made, the contracting parties, and the thing to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract?" It is to be observed that this mode of stating the question is agreeable to other authorities on the point, and particularly the last of all on which the plaintiffs relied, *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202. I do not propose to recapitulate the facts at length, but some of them must be mentioned. The contract was made at Johannesburg, in the South African Republic, where the South African United Breweries (Limited), predecessors in the title of the plaintiffs, were carrying on business, and where the defendant was then residing, he being at that time in the employ of the South African United Breweries. The defendant thereby agreed to serve the South African United Breweries as brewer, or otherwise, in their business carried on at Johannesburg, and in the colony of Natal, or elsewhere in South Africa. Under this contract the defendant could of course have been required to serve anywhere "in South Africa" (whatever that may mean), but it is common ground that the original agreement of the 14th of October, 1892, made with still earlier predecessors in title of the plaintiffs, contemplated immediate employment at Johannesburg; that from the date of his arrival there he had been engaged as

brewer there and not elsewhere; and that on the 11th of April, 1895, it was intended that he should still remain there. In considering by what law the contracting parties intended—or rather, by which they may justly be presumed to have intended—to bind themselves, it is convenient first to inquire what the contract itself contemplated as the law which was to regulate the contract; and this I conclude to be the view of the present Lord Chancellor expressed in his judgment in the *Missouri Steamship Co. case*, from which I have borrowed the phrase just used. On page 336 he says that, in order to determine whether stipulations are enforceable or not, you must have regard to the law of the contract, "by which I mean law which the contract itself imports is to be the law governing the contract." I cannot but think that, if this were all, the contract ought to be governed by the law of the South African Republic, where the contract was executed, and where it was intended, though not exclusively, to be performed. That, however, is not all. Many other considerations require attention. Among other things, it is to be noticed that the successive employers of the defendant, including the plaintiffs, were English companies which may be, and often are, stated, though with some inaccuracy of language, to be resident or domiciled in England. The fact cannot be neglected, the residence of the contracting parties always being noticed, as an important element in the decision of such a question as arises here; but to attribute a large measure of weight to it in the present case would, I think, be to offend against a ruling of Bowen, L.J., in *Jacob & Co.* v. *Crédit Lyonnais*, 12 Q. B. D., at p. 601. He is dealing with the argument that the contract there under consideration, like that of the 11th of April, 1895, was partly to be performed in one place and partly in another, and he uses this language: "In such a case the only certain guide is to be found in applying sound ideas of business convenience and sense to the language of the contract itself with a view to discovering from it the true intention of the parties." It is not, in my opinion, according to sound ideas of business, convenience, or sense to say that a company having a registered office with directors and secretary in England, not, however, otherwise carrying on business here but carrying on business in South Africa, must be treated as resident in England for the purpose of ascertaining whether a contract entered into by them respecting their business in South Africa was intended to be good by English or South African law. It is to be observed that in *Hamlyn & Co.* v. *Talisker Distillery*, that contract was entered into between parties residing in different countries where different systems of law prevailed, and the point is noticed by the Lord Chancellor (Lord Herschell), who moved the judgment of the House of Lords, and by other learned lords who took part in the discussion; but there the different residences were real, and the parties carried on business where they resided. The form of the contract is, according to the authorities, a more serious matter. Mr. Warrington called my attention to Mr. Dicey's work on "Conflict of Laws." The learned author states, on p. 568 under sub-rule 2, the question falling for decision in all these cases, as defined by all the authorities, including *Hamlyn & Co.* v. *Talisker Distillery*, and proceeds to give four illustrations. In three out of the four illustrative cases the form of contract was noticed and was treated as, to some extent at least, influencing the decision; and this is, I think, entirely agreeable to general rules, it being the constant practice on the argument of the construction of contracts—as for instance a Scotch settlement dealing with property in England—to regard the form in which the contract is expressed. Here undoubtedly the form is English. It may reasonably be said that the expired contract of the 14th of October, 1892, was taken as a rough draft on which to frame the new contract of the 11th of April, 1895; but, apart from that, the latter contract is not merely in the English language, but follows familiar English forms, and is just such a one as would be entered into between a company carrying on business in England and a person intended to be employed by them. The plaintiffs are entitled to whatever benefit follows from this consideration. Their argument went further than that and urged that the contract of the 11th of April, 1895, was really a continuation of the former contract, and that, inasmuch as that must be regarded as an English contract, the same character must be attributed to the other. Admitted that the contract of the 14th of October, 1892, was an English contract, which it is unnecessary to determine, I doubt the consequences. That contract had expired, and the defendant, at the date of the contract of the 11th of April, 1895, was serving the South African United Breweries, and not under the expired contract, though, I gather, on similar terms as regards wages and the like, but under a temporary agreement abiding only until a new contract could be settled. This extension of the argument on the form of the contract I think fails. Turn now to what, in my mind, is a far more difficult question. It is said that the stipulation which the plaintiffs seek to enforce, though valid according to English law provided it be reasonably required for the protection of the plaintiffs (a point which has not yet been discussed), is invalid according to the South African law; and, therefore, if the latter law be held applicable, stipulations of the contract which the plaintiffs might and do regard as of its essence will fall to the ground, so that in the events which have happened the contract will not be enforceable. It has occurred to me that there may be some difficulty in completely dealing with this part of the case without knowing what is the South African law on the subject. The parties have been anxious to avoid the expense and delay incident to inquiries into the foreign law until the question by what law the contract ought to be governed has been decided, and I have desired to assist them as far as possible. The difficulty which I have noticed is not, I think, under the circumstances of this case insuperable; but it may appear to others so to be, and I have therefore uttered this note of warning. That the inability to enforce a contract according to our system of law will influence the court in determining whether the contract is to be governed by that law or by some other under which it is enforceable is beyond question. This is recognized in *Hamlyn & Co.* v. *Talisker Distillery*, and also, as I read the judgments, in *Jacob & Co.* v. *Crédit Lyonnais* and the *Missouri Steamship Co.* It seems commonsense to hold, if it can otherwise be reasonably done, that the plaintiffs intended their contract to prevail and be enforceable, and that stipulations into which they had solemnly entered should not be defeated by the application of one of two systems of law, when the other can, having regard to all the circumstances, be fairly taken to have been intended to govern the contract. The evidence reveals a strange state of facts peculiar to the present case. The defendant has sworn that, after having objected to the stipulation restricting his business engagements on the termination of the proposed contract, he consulted a lawyer in Johannesburg and was advised by him that such stipulation would not be enforced according to South African law; that he told Mr. Mead, the agent of the South African Breweries who signed the contract on their behalf, that he had received this advice, and that then he

signed the contract. I do not know whether Mr. Mead took advice or not, or whether he gave credit to the defendant's statement or not; nor, as already mentioned, do I know whether the advice given to the defendant was sound or otherwise; but the strange fact remains that both parties executed the contract knowing that there was a question open on this very point. It may be said, on the one hand, that the plaintiffs' predecessors must have intended to enter into a contract which could be enforced, and, on the other hand, that the defendant never intended to enter into a contract which could be enforced against him in this particular respect. The reasonable conclusion is that they intended to make and accept the stipulation for what it was worth; and I cannot bring myself to think that, under such circumstances, the judgment of the court on the question whether the contract should be governed by English or other law depends on the possibility or even probability that the restrictive stipulation can be enforced in one event but not in the other. If this be a sound view, the only point clearly in the plaintiffs' favour is that arising on the form of the contract. Ought that, having regard to all the circumstances, to be allowed to outweigh other considerations prevailing in the contrary direction? I have not thought it worth while closely to study any decided cases other than the three cited in argument, which not merely cover the whole ground, but refer to numerous authorities, some more or less bearing on the question under consideration. But I have consulted Mr. Westlake's book on Private International Law. At the date of the publication of the last edition (the third) *Hamlyn & Co.* v. *Talisker Distillery* had not been decided in the House of Lords, and with that before him the learned author may hereafter accept the intention of the parties as a more complete guide than apparently he has hitherto done; but in substance his general statement of the law agrees with that decision in that case and the previous authorities, as also with Mr. Dicey's statement, to which reference has already been made. This is what Mr. Westlake says in section 212, on p. 258: "It may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such." That seems to me to be as precise and accurate a statement as one can expect to find in any judgment or treatise, having regard to the necessarily infinite variety of facts which require consideration in cases of this character. Can it be doubted that the country with which the transaction here had the most real connection was South Africa, and particularly that part of South Africa which is comprised in the South African Republic? I have already pointed out that the contract was executed there and intended to be performed there; that the defendant, though an Englishman, had been and was residing in Johannesburg and intended it to be his place of business, and therefore of residence; and that although the other party to the contract was strictly an English company, yet it was there, and not in England, that their business had been and was intended to be carried on. And the stipulation in question has reference to South Africa and not to England, where the defendant is free to carry on business as he pleases. In my opinion the principles of the decided cases and the rules there laid down compel me to hold that this contract was not intended to be governed and is not governed by English law. Then comes the question by what law it ought to be governed. It was certainly intended to be performed, if and when circumstances so required, throughout South Africa, the limitation of which I am not called upon to define. It therefore falls within the class under which the contract may be said to be intended to be performed partly in one place and partly in another. I have found no authority for holding that it might at any time and for some purposes be governed by one law, and at another time and for other purposes by a different law. If bound to select one system of law as that governing the contract, I must select that with which, to repeat Mr. Westlake's phrase, "the transaction has the most real connection," and that is undoubtedly the South African Republic, which for this purpose at least must be treated as an independent sovereign State, just as according to the Constitution of the United States of America the State of Massachusetts was in the *Missouri Steamship case*. I hold the contract to be governed by South African law. The result is that the further trial must be adjourned in order to give the parties the opportunity, until now conveniently deferred, of producing evidence respecting that law. There must be a declaration that the contract is governed by the law of the South African Republic.

Solicitors, *Loughborough, Gedge, Nisbet, & Drew; H. G. Campion & Co.*

Chan. Div.
Cozens-Hardy, J. } July 8, 22.

In re MADDOCK.
BUTT *v.* WRIGHT. (*a.*)

Practice—Costs—Taxation—Employment of two counsel—Trustee—Hostile attack—Severance of defence.

A hostile attack being made in a creditor's administration action against one of two trustees and defendants, the attacked trustee was allowed to appear separately, and, the attack having substantially failed, was given his costs as between solicitor and client. The plaintiff had employed two counsel.

Held, that the attacked trustee was to be allowed his costs of employment of two counsel.

Summons.

This was a summons to review taxation of costs in a creditor's action commenced in the Liverpool Registry to administer the estate of Mary Ann Maddock. The defendants were the executors and trustees of her will, and the question was as to the right of one of the trustees, Wright, to have his costs of the employment of two counsel at the hearing on further consideration. Wright was a member of the firm of solicitors who acted for the executors and trustees. There was a clause in the will authorising the solicitor-trustee to act and be paid in the ordinary way, but that direction was inoperative as against creditors, the benefit taken by the solicitor or his firm being in the nature of a legacy.

The action, although begun as a simple creditor's administration action, was by arrangement turned into a more complicated proceeding, raising the question of the validity of certain voluntary settlements of which the defendants were also trustees. The plaintiffs, by minutes submitted before further consideration, sought to take away the conduct of the sale of the unsold property from the defendants, and to obtain an order of a hostile nature against the defendant Wright alone in respect of a sum of £2,400, which in the executorship accounts had been treated as

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

expenses of executorship, and which represented sums paid to his firm for costs. The matter came on for further consideration in January, 1899, before Byrne, J., who gave the plaintiffs the conduct of the sales, but not on the ground of misconduct on the part of the defendants, to whom he gave their costs as between solicitor and client. He also directed that in taxing the costs of the defendants in respect of their appearances on further consideration, the district registrar was to allow a separate set of costs to each defendant. With regard to the £2,400 the court drew no distinction between the defendants, but directed the bills to be taxed or moderated, and the registrar was, without prejudice to any question, to distinguish between profit costs and other costs, charges, and disbursements.

The registrar, in taxing the costs of the action, allowed the present plaintiff (there had been an order of revivor) the costs of the two counsel, but refused to allow the defendant Wright the costs of more than one counsel. The defendant Wright took objection to this on the grounds that the plaintiff had been allowed a leader; that the registrar had been informed of the counsel whom the defendant was going to brief, and of his fees, and had made a note of the facts in his minute book, and that there had been a large amount of argument in court. The registrar stated in answer: "5. The fact that the plaintiff has been allowed the fees of two counsel does not seem to me to be material. The plaintiff is a creditor administering the estate on behalf of the creditors. The persons beneficially interested in the estate, other than the plaintiff, appeared by one counsel only, as did Mr. Hall, one of the defendants who appeared separately, and was allowed by the judge his costs of doing so. The two counsel therefore appeared for Mr. Wright alone, and inasmuch as he is only one of two trustees not beneficially interested, I do not, in the exercise of my discretion, consider he was justified in putting the estate to the expense of two counsel. The argument in court, so far as the trustees were concerned, referred mostly to their own costs and the conduct of the sale, which was given by the judge to the plaintiff."

The defendants thereupon took out the present summons.

Astbury, Q.C., and *MacConkey*, for the applicants.

F. M. Preston, for the respondents.

Cur. adv. vult.

July 22.—COZENS-HARDY, J.—I think that it is evident that there was a serious matter of litigation between the plaintiffs and the defendant Wright, involving a liability forthwith to pay into court a very considerable sum of money. This question was in substance decided against the plaintiffs, and in favour of Wright. The registrar has refused to allow him the costs of more than one counsel.

That it is competent for the court to over-rule the decision of the taxing master in such a matter as this is clear. I may refer to the case of *Kirkwood* v. *Webster*, 26 W. R. 812, 9 Ch. D. 239, where Fry, J., on a party and party taxation, allowed the costs of a third counsel which had been disallowed by the taxing master. But I have felt considerable doubt whether it is right for me to review the taxation in this respect, for I recognise fully that the discretion of the taxing master ought not to be lightly interfered with. There are, however, circumstances in this case which I think justify me in referring it back to the registrar to allow the proper costs of a second counsel. When a trustee is attacked, and sought to be rendered liable for a considerable sum of money, and when the attack fails and the judge directs taxation of his solicitor and client costs, I think that it is not reasonable to refuse to allow him the same assistance from counsel as the plaintiff, the attacking party, had. The registrar seems to have proceeded upon a wrong principle, and to have been influenced by the fact that Byrne, J., thought fit to allow a separate set of costs to each of the defendants; but I do not think that this circumstance makes any difference. The right given to the defendant Hall to appear by separate counsel ought not to prejudice the defendant Wright. The position of a trustee is at all times one of difficulty, and I am not disposed to say that Mr. Wright acted unreasonably or improperly in instructing two counsel to represent him.

Solicitors, *Wright, Becket, & Co.*, Liverpool; *Gibbons & Arkle*, Liverpool.

Q. B. Div. (Phillimore, J.) July 10.

QUEEN OF THE RIVER STEAMSHIP CO. (LIMITED) v. CONSERVATORS OF THE THAMES. (*a*.)

Thames—Landing stage—Authorized toll of sixpence for use of pier—"Every time of calling"—Illegal charges—Right to recover excess so paid—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 68, 165.

By section 165 *of the Thames Conservancy Act*, 1894, *the conservators are authorized to levy a toll of sixpence "for each and every time of call" on any vessel using any of their piers or landing stages to embark or discharge her passengers and goods.*

The plaintiffs owned a pleasure steamer which ran day trips between the Old Swan Pier, London Bridge, and Hampton Court. The steamer was brought alongside the Old Swan Pier about three-quarters of an hour before the advertised starting time and remained there until she started, her officers meanwhile doing all they could to get persons to take tickets for the trip.

The conservators by resolution decided that the plaintiffs used the pier for a longer period daily than would be covered by a mere "call" at the pier by their vessel, for which the 6d. toll was payable, and they alleged their right to impose a terminal charge for this use of the pier by the plaintiffs of £2 a week. For a time this increased charge was paid.

Held, that, although the conservators might have a right to ask for special payment from a vessel using the pier other than for the purpose merely of embarking passengers or goods, that would be based on contract; but there was nothing in the Act which gave the defendants the right to levy more than the 6d. toll on a vessel merely because she was more than a few minutes alongside a pier embarking or discharging her passengers or goods; and that the extra charge already paid, being unauthorized, was paid without consideration, and could be recovered back.

The plaintiffs were the owners of the steamship *Queen Elizabeth*, which during the summer months ran between London and Hampton Court, using the Old Swan Pier at London Bridge as the starting point of the trip, and competed with *The Cardinal Wolsey*, the property of the Thames Steamboat Company.

By section 165 of the Thames Conservancy Act, 1894, the conservators, in whom the Old Swan Pier is now vested, are entitled to charge a toll of 6d. each

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law

time a steamer calls at that pier for the purpose of embarking or disembarking passengers or goods.

During 1897 the defendants received from the plaintiffs this toll of 6d., but as it was the custom of the plaintiffs to bring *The Queen Elizabeth* alongside the Old Swan Pier about three-quarters of an hour before the advertised starting time, and to remain there until the steamer started, soliciting passengers, the defendants alleged that they were entitled to make a special charge to steamers using the pier in this way.

Accordingly the conservators passed a resolution that a toll of 10s. a day should be demanded from all steamers making more than a passing call at the pier. The plaintiffs paid this increased sum down to February, 1899, when it was agreed, after negotiations had been going on for some time between the parties, that the defendants should charge them a fixed sum of £2 a week, instead of 10s. a day. While these negotiations were pending, the plaintiffs were advised to take up the position that the defendants had no power to demand more than the statutory toll, and in spite of the agreement come to, they brought this action to decide the question of the legality of the charge, and to recover back £54, the amount of the excess of the toll so paid.

G. Spencer-Bower, for the plaintiffs.—The charge made by the defendants over and above 6d. is illegal, and ought never to have been demanded, and being money paid by us under a mistaken belief of fact, can be recovered.

J. Eldon Bankes, for the defendants.—The additional charge is permissible, because the plaintiffs received for it extra privileges. The ordinary toll of 6d. is for a passing call for the purpose of taking on board passengers or goods, but the plaintiffs lie alongside the pier for a much longer period than in the ordinary course of things would be necessary to take on board or discharge passengers and goods. Not only is that the case, but they have representatives on and about the pier and its approaches touting for passengers. They have got something beyond what they are entitled to demand under the statute, and their use of the pier and the sum they are to pay for the privilege is consequently a matter of agreement, being outside the statute altogether. At any rate, money already paid at the increased rate cannot be recovered, for it was paid not under any compulsion, but under a mistake of law, and the consideration for the payment by the plaintiffs was the many facilities afforded them for carrying on their trade.

G. Spencer-Bower, in reply.—The special facilities offered us are only the same as those granted to *The Cardinal Wolsey*, which is charged only the authorized toll of 6d. Nor do we remain alongside the pier a longer time than is reasonably necessary to embark our passengers. As for the defendants' contention that the excess paid cannot be recovered, that is clearly wrong on the authority of *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149. Lord Westbury, at page 170, says: "It is said that *Ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, or the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right the maxim has no application." In *West London Commercial Bank* v. *Kitson*, 32 W. R. 757, 13 Q. B. D. 360, Bowen, L. J., in his judgment says: "Where there is a representation made as to a mere matter of law, it is in nineteen cases out of twenty made by a person who does not know the law better than the person to whom it is made, and at whose risk it is taken and acted upon. Still, I am not prepared to say, and I doubt whether, if a man who wilfully misrepresented the law would be allowed in equity to retain any benefit he got by such misrepresentation." If we remain at the pier a longer time than is reasonable, or cause an obstruction, the Act gives the defendants a remedy.

PHILLIMORE, J.—The main question turns in this case upon section 165 of the Thames Conservancy Act, 1894, which gives the conservators power from time to time to demand, and receive in respect of steam and other passenger vessels landing or embarking passengers or goods from any pier or landing place belonging to them, tolls not exceeding 6d. for each and every time of call at the same, or demand such other toll as by byelaws of the conservators for the time being may be appointed, and if the conservators think fit they may permit a vessel to use the landing stage without payment of any toll whatever. Another difficulty arises from the correspondence that has passed between the parties on the subject of the 10s. toll. [His lordship read the correspondence and continued:] The whole difficulty arises from the ambiguity in the words "each and every time of call." The defendants contend that the lying alongside a pier for the purpose of taking on board a number of passengers was different from a passing call at the pier by a steamer in the course of her passage up or down stream, and that they were entitled to make an extra charge in the former case. But is there really any difference, beyond the fact that a steamer would have to make a longer stay at the pier from which she started than at intermediate piers? There is power given to the defendants under the Act to order a vessel to leave the pier, if the steamer remained an unreasonably long time, and I see no reason why the parties should not come to some arrangement by which the defendants should be paid an increased sum in return for their granting the plaintiffs any additional or special facilities at their piers. But that is not the ground upon which the increased toll has been demanded. The defendants said they were entitled to make a terminal charge for the use of the Old Swan Pier. In my opinion, such a charge as they sought to enforce was an improper one, in the sense that it was illegal as unauthorized by the Act of 1894. If my view is right, then the payments made by the plaintiffs were made without consideration, and they are entitled to recover.

Then, as to the complaint of preferential treatment. I do not see that the plaintiffs have made out any case within section 68 of the Act. That section is in these words: "If any officer or servant of the conservators shall give undue preference to or unnecessarily retard or obstruct any vessel . . . . embarking, landing, loading, or unloading persons or goods at any pier . . . . he shall for every such offence be liable to a penalty not exceeding 40s."

All they allege is that the defendants permitted the rival company to have a man on the pier to act as a sign-post in directing passengers to steamers of that company. The question has arisen since this action was brought, and I cannot therefore grant an injunction as otherwise I might have done, but I think that whatever privileges of this sort are granted to one company by the defendants must also be granted to the other, and if the defendants fail to do so in the future and an action claiming an injunction be brought it should succeed. In my judgment the plaintiffs are entitled to the amount claimed on the writ, with costs.

Solicitors for the plaintiffs, *Barlow & Barlow*.

Solicitor for the defendants, *James Hughes*.

Q. B. Div.
(Lawrance and Channell, JJ.) Feb. 11, 17.

ROWLANDS (*Appellant*) *v.* MILLER (*Respondent*). (*a.*)

Ship—Seamen—Wages—Seaman engaged abroad—Advance of wages abroad by master—Right to deduct—8 Geo. 1, *c.* 24. *s.* 7—*Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 140, 163.

When a ship is in a foreign port, the master of the vessel can make a valid contract with a seaman whom he is there engaging for the homeward voyage for an advance to the seaman of any sum on account of his wages conditionally on his shipping. Such advance is not limited to one month's wages, and if the master pays the sum so advanced to the seaman, or to any person authorized by the seaman to receive it, he can at the end of the voyage deduct from the seaman's wages the whole sum advanced, as such advances are not prohibited by section 163 *of the Merchant Shipping Act,* 1894, *or otherwise.*

Case stated by justices of the peace in and for the borough of South Shields.

At a petty sessions held at South Shields a complaint was preferred by Fred Miller (the respondent) against Morris Rowlands (the appellant) under the Merchant Shipping Act, 1894, charging the appellant with refusing to pay to the respondent the sum of £11 0s. 6d., being a balance of wages alleged to have been earned and due to the respondent as an able seaman on board of the sailing ship *Hutton Hall*, of which the appellant was the master, from the 7th of February to the 10th of September, 1898, on a voyage from San Francisco to Antwerp and the Tyne at the rate of £4 per month.

This complaint was heard and determined by the justices on the 15th of September, 1898, when the appellant was ordered to pay to the respondent the sum of £6 17s. 8d. and 15s. 6d. costs.

The appellant being dissatisfied with the decision of the justices to the extent of £4 2s. 10d., as being erroneous in point of law, applied for and obtained this case.

It was proved before the justices that the vessel *Hutton Hall* was lying at San Francisco wanting a crew, and the appellant (the master) had requisitioned a Mr. Herman, a crimp, to secure him one. Mr. Herman procured the respondent and others, who were entered on the articles as A.B.'s.

The master had made no inquiry as to their ability, but three or four days after sailing from San Francisco, he had the men before him, including the respondent, and he then disrated the respondent and some others from £4 per month to £2 10s. per month, being the rate of ordinary seamen's wages. It was one of the terms of the engagement of the men by the appellant that they should receive an advance of forty dollars (equal in British sterling to £8 5s. 8d.); thereupon a note of which the following is a copy was drawn up (it was not clear by whom) and passed from the respondent to the crimp. It was not signed by the appellant, nor by any one on his behalf, and contained no obligation whatever on the part of the appellant to pay it. No evidence of the payment of the note was tendered before the justices, but there was merely the production of the note.

The note was as follows: "Forty dollars. San Francisco, the 11th of April, 1898. Received on board the ship *Hutton Hall*. Fred Miller, as seaman, who acknowledges to having shipped and received the sum of forty dollars in advance and who hereby assigns this note to Mr. Herman, Officer Commanding."

This note bears the following endorsement, namely: "San Francisco, the 11th of April, 1898. For value received I hereby assign this note to Mr. Herman.—Fred Miller."

The respondent (who had never been to sea before) and was apparently unacquainted with the usages of crimps, did not raise any objection to this, expecting to receive some money from Herman; but he stated that as a matter of fact he got no money from him whatever, but only some odds and ends towards an outfit.

On arriving in England the respondent was offered his wages at the rate of £2 10s. per month, less the advanced deduction of £8 5s. 8d. The respondent refused to accept it, and made this complaint to the justices.

The justices decided that the disrating of the respondent was right and proper; but that the deduction of £8 5s. 8d. for two months' advance at San Francisco on the form above given was not authorised by law, and they allowed a deduction of £4 2s. 10d. only (being one month's wages and a small sum for the difference in exchange) under the limitation contained in section 140 of the Merchant Shipping Act, 1894, sub-section 1.

It was contended on the part of the respondent that by section 140 of the Merchant Shipping Act the utmost advance which could be made, assuming that section applied to the present case, was to the extent of one month's wages.

The appellant contended that the law permitted advances abroad to be made to any extent, and insisted upon the whole deduction.

The respondent, however, relied upon section 163 of the same Act as a distinct prohibition against any advance whatever abroad, and that besides this prohibition the note given to the crimp was not a document binding the appellant to pay it, and therefore not binding upon the respondent at all; that it was not signed by the appellant or by anyone on his behalf, and that it was to all intents an assignment or charge made by the seaman prior to the accruing of wages, which by clause (*b*) of sub-section 1 of section 163 is declared not binding upon the seaman making the same.

On the other hand, the appellant further contended that neither of these sections applied to advances made to seamen abroad; that, in fact, there was no restriction on advances made abroad, and that these two sections had reference to vessels sailing from the United Kingdom only, and that even if section 163 did apply, the transaction was not an assignment within the meaning of the section.

The justices decided that section 163 was controlled by section 140, and that the first part of the section authorized an advance made anywhere but only to the extent of one month's wages, and thereupon they adjudged the appellant to be entitled to deduct one month's wages only from the respondent's claim.

The appellant was dissatisfied, and insisted upon claiming the full deduction of £8 5s. 8d.

The questions for the opinion of the court were: (1) Were the justices correct in their interpretation of section 140, sub-section 1, as applicable to this case, which they held to authorize an advance to the extent of one month's wages, no matter where the ship might be in which the seaman was about to sail; and, if so, were they right in allowing a deduction of one month's wages only? (2) Is section 163 controlled by section 140? If not, and the court should be of opinion that section 163 altogether prohibits advances anywhere out of the United Kingdom, then the respondent should be entitled to receive the whole balance of his wages properly due to him without deducting any part of the alleged advance of two

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

months' wages. (3) If the court should be of opinion that the justices were wrong in their interpretation of these two sections, and that there is no limit to advances which may be made to seamen abroad, and that the advance was lawfully and properly made, and is not otherwise void for want of the appellant's signature making it binding on him, then the order is to be reversed to the extent of £8 5s. 8d., the advance claimed to have been made.

It was admitted in argument that the money had been paid by the appellant to Herman.

The Merchant Shipping Act, 1894 (57 & 58 Vict c. 60), provides: Section 140.—(1) (*a*) "Where an agreement with the crew is required to be made in a form approved by the Board of Trade, the agreement may contain a stipulation for payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement; and (*b*) stipulations for the allotment of a seaman's wages may be made in accordance with this Act. (2) Save as aforesaid an agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman conditionally on his going to sea from any port in the United Kingdom shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages, and a person shall not have any right of action, suit, or set-off against the seaman or his assignee in respect of any money so paid or purporting to have been so paid."

Section 163.—(1) "As respects wages due or accruing to a seaman or apprentice to the sea service —(*a*) they shall not be subject to attachment or arrestment from any court; (*b*) an assignment or sale thereof made prior to the accruing thereof shall not bind the person making the same; (*c*) a power of attorney or authority for the receipt thereof shall not be irrevocable; and (*d*) a payment of wages to the seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of those wages, or any attachment, incumbrance, or arrestment thereof. (2) Nothing in this section shall affect the provisions of this Act with respect to allotment notes."

Horridge, for the appellant.—The master of the ship—the appellant—was entitled to deduct from the respondent's wages the whole sum advanced. He could make a valid agreement with the seaman in this foreign port for an advance to him of any part of his wages and he has done so in this case. Such an agreement made in a foreign port is binding unless it is prohibited by any statute. It is said that it is prohibited, and that by reason of section 140 of the Merchant Shipping Act, 1894, the appellant could deduct at the most a sum equal to one month's wages; but sub-section 2 of that section shows that it has no application where, as in this case, the seaman was engaged in a foreign port. That section deals entirely with cases where the seaman goes to sea from a port in the United Kingdom, and it was so held by this court on the 26th of January, in the case of *Ritchie* v. *Larsen*, *ante*, p. 413, 80 L. T. Rep. 259, which really governs and concludes this case. Here there was very little doubt, as the magistrates seem to have thought, that this sum of money was paid by the appellant to Herman by the respondent's authority. It was therefore a payment made to him, and section 163 does not apply to or affect such payments, as it does not prohibit advances at all.

J. D. Johnson, for the respondent.—The justices ought to have held that the respondent was entitled to receive the whole of his wages on the termination of the voyage. They were wrong in allowing the appellant to make any deduction whatever, even of the one month's wages. Section 163 of the Act governs this case. That section deals with wages due or accruing to the seaman, and it says in clause (*b*) that an assignment or sale of such wages made prior to the accruing thereof shall not bind the seaman, and in clause (*c*) that an authority for the receipt of the wages shall not be irrevocable. What took place in this case was either an assignment or sale by the seaman of his wages, which would not be binding, or an authority to Herman to receive the money, which would not be irrevocable. For the purposes of this case I concede that the money was paid by the appellant to Herman, but I contend that, whether the appellant paid the money to Herman or did not pay it to him, the money cannot be deducted from the respondent's wages. I rely, therefore, on the express words of section 163 as showing that no deduction can be made; and I rely also on the words of section 7 of the Act 8 Geo. 1, c. 24, which is still in force. That section prohibits all payments of wages abroad except to the extent of one-half the wages actually due, and here no wages were due. The case of *Ritchie* v. *Larsen*, which has been referred to, was decided upon section 140, and the sections 163 of the Act of 1894 and 7 of 8 Geo. 1, c. 24, were not referred to.

Horridge replied.

Cur. adv. vult.

Feb. 17.—The judgment of THE COURT (LAWRANCE and CHANNELL, JJ.) was read by

CHANNELL, J.—This was a case stated by justices on proceedings before them taken by a seaman under the Merchant Shipping Act, 1894, to recover wages claimed by him, and it raised a question very similar to that in a case of *Ritchie* v. *Larsen*, *ante*, p. 413, decided by us on the 26th of January last. The magistrates, however, in the present case based their decision on section 163 of the Act of 1894, a section to which our attention was not called on the argument of the former case, and in addition our attention was called by counsel for the respondent in the present case to the statute 8 Geo. 1, c. 24, the 7th section of which appears to be still in force, though almost all the Act has been repealed. It became necessary, therefore, for us to consider not only whether the present case differed in any essential particular from the former case, but also whether our former decision was correct. We accordingly took time to consider the matter. In *Ritchie* v. *Larsen* we decided that advances to seamen conditional on their shipping from a foreign port—although there was a British consul there—were not forbidden by the combined effect of sections 124 and 140 of the Merchant Shipping Act, 1894. We assumed that they were not forbidden by any other statute, as none was called to our attention. Our former judgment was given immediately on the conclusion of the argument, as the case then appeared quite clear. I have now fully reconsidered the whole matter, and I am confirmed in the view I took on the former occasion as to the effect of the sections which we then had under consideration. I still think the effect of those sections is clear, and I think it unnecessary to repeat what I then said. I have also come to the conclusion, though with considerable doubt, that the sections to which we have since been referred do not affect the matter, and that our former decision was correct. I will deal first with the old statute 8 Geo. 1, c. 24, which was "an Act for the more effectual suppressing of piracy." I think the 7th section of that statute is certainly unrepealed. It is printed in the revised edition of the statutes, the

rest of the Act being omitted. In the Law Reports Index of Statutes Repealed the other sections are shown to be repealed, but this not. It is also referred to as existing in most of the editions of Abbott on Shipping, down to the eleventh, though it has been dropped out in the two last editions, apparently because it is considered superseded rather than repealed. The words of the 7th section of that Act are as follows: "And for prevention of seamen or mariners deserting merchant ships or vessels abroad in the plantations, or in any other parts beyond the seas, which is the chief occasion of their turning pirates, and of great detriment to trade and navigation, and is chiefly occasioned by the owner or owners of ships or vessels paying wages to the seamen or mariners when abroad; be it enacted by the authority aforesaid, that no master or owner of any merchant ship or vessel, shall pay or advance, or cause to be paid or advanced, to any seaman or mariner during the time he shall be in parts beyond the seas, any money or effects upon account of wages, exceeding one moiety of the wages which shall be due at the time of such payment, until such ship or vessel shall return to Great Britain or Ireland, or the plantations, or to some other of His Majesty's dominions whereto they belong, and from whence they were first fitted out; and if any such master or owner of such merchant ship or vessel shall pay or advance, or cause to be paid or advanced, any wages to any seaman or mariner above the said moiety, such master or owner shall forfeit and pay double the money he shall so pay or advance to be recovered in the High Court of Admiralty, by any person who shall first discover and inform of the same." Now I think, reading this as a whole and noting that the object is to prevent desertion, that it does not apply to the terms of the engagement of seamen abroad. It applies to seamen already on the ship on its touching at the foreign port, and it forbids payment to them there of more than half of the money which has then become due to them in respect of the outward voyage and the advancing to them of any future wages, with the object of giving them substantial inducement to remain on the ship for the homeward voyage. I do not think that this enactment prevented a master from engaging a man in a foreign port, on the terms that he should be paid so much money down on joining the ship and the balance at the end of the voyage. That might be the only means of replacing deserters, and it could not increase pirates. Even if this view be wrong, I think the only consequence of a breach of the enactment would be that an informer might sue in the Admiralty Court. The case would probably come within the rule that where an enactment and a penalty for breach of it are contained in the same clause, the penalty is the only remedy for the breach; but in any case it seems to me that it would be impossible for a seaman who had been paid in a foreign port a sum in excess of the moiety allowed by this enactment to sue successfully on his return to this country for his whole wages. That would make the master forfeit the sum paid to the seaman as well as forfeiting double the sum to the informer, or treble the sum altogether. I think, therefore, that this enactment does not forbid an advance to a seaman engaged abroad, and, further, that if it did, it would not enable a seaman to recover the sum advanced again as unpaid wages, but would merely enable him or any other informer to recover double the money as a penal sum in the Admiralty Court.

Next, to deal with the 163rd section of the Merchant Shipping Act, 1894. This is as follows: [His lordship then read the section, and proceeded:] It is contended that sub-sections (*b*) and (*c*) of this section in effect make advance notes void as against the seaman, and further that, even if that is not so in all cases, at all events the transaction described in this special case was invalid. It is convenient to consider first the general question, and then see how far the present case differs from the ordinary one. Advances and advance notes have been known for many years and have been for many years the subject of legislation. They have been dealt with in a separate part of this very statute, and it is unlikely that it could have been intended to alter the effect of that part of the statute by this section coming in a later part and not mentioning advances. Sub-section 2 saves allotments under the Act from the operation of the section, and it was necessary to do so as they are clearly assignments. If advance notes were within the section one would expect that the advance notes authorised by section 140, sub-section 1, would be excepted, but they are not. Now it seems clear that unless section 140 does so there is no section of this Act, nor any other Act (other than that of Geo. 1, with which I have dealt) which in any way forbids a contract by a master with a seaman whom he engages abroad to pay that seaman a sum on account of his wages immediately on his joining the ship. Section 163 could only touch payments not to the seaman, but to some one on his behalf and by his order, and then only if the transaction were an assignment by the seaman of the wages before they had accrued due, or an authority to receive wages. Now advance notes really are not mere assignments. The master generally makes himself liable conditionally to a third party, the holder of the note. It is true that it has been held in *The Cardiff Boarding Masters' Association* v. *Cory & Sons*, 9 Times L. R. 388, that advance notes promising to pay the seaman "or order," are not negotiable instruments because they are conditional. But they may be so framed as to be payable directly to the third person either by name or on his fulfilling a condition: see *McKune* v. *Joynson*, 6 W. R. 658, 5 C. B. N. S. at p. 228. I think that advance notes signed by the master in any of the usual forms cannot be considered merely as assignments by the seaman. There is another ground on which they might be considered as not coming within section 163. Section 163 relates, according to its heading, to "wages due or accruing due." Now wages cannot strictly be considered to be "accruing" until the service has commenced. Consequently a sum contracted to be paid when the seaman ships on board, and conditionally upon his so shipping, cannot in strictness be said to be a sum which before he ships is "accruing," notwithstanding that if it becomes payable it is to be taken into account as part of his wages. This is perhaps somewhat fine, but to hold that section 163 is confined to dealings with wages after the service has commenced brings about a result which accords with what appears to be the scheme of the Act, and leaves advances and agreements as to advances made before the commencement of the service to be governed by the earlier sections of the Act. On the whole I come to the conclusion that advance notes signed by the master and in an ordinary form are not struck at by section 163, and that our decision in *Ritchie* v. *Larsen* was correct. Before dealing with the facts of the present case there is another point to be noted in reference to section 163. It does not contain the words which are in section 140, that money paid under the documents referred to shall not be deducted from the seaman's wages, and that a person paying shall have no right of action or set-off against the seaman.

I think, therefore, that a payment made under an assignment before it is avoided, or a power of attorney

or authority before it is revoked, must be good. Take sub-section (c) as to powers of attorney not being irrevocable. This would seem to mean that they should not be irrevocable by reason of the party in whose favour they have been given having an interest in the money, but not that they should be revocable after payment had been made under them. In the same way I think that assignments under sub-section (b) which are declared not binding on the seaman must be voidable only and not void, and consequently could not be avoided after they had been acted on. This latter point might, perhaps, be doubtful, inasmuch as the master paying must necessarily have notice of the invalidity if it exists, as it is created, if at all, by the statute.

Now, to deal with the facts of the present case. The case first states it was one of the terms of the engagement of the respondent by the appellant that he should receive an advance of forty dollars. At common law such a contract would of course be good, and I have failed to find any statute forbidding it. The case then states that thereupon a document set out in the case was made out. It is dated the 11th of April, 1898, and it purports to state that the respondent admitted having shipped. Probably, however, he had not done so, as it appears from the next paragraph that he did not get his outfit until after signing. The document is not signed by the appellant. The facts are not at all clearly stated, and the documents are not easy to construe. The documents, however, whether an assignment or not, and whether an assignment of wages made before they had accrued due, appear certainly to amount to an authority to receive the money. The case states in the early part that there was no evidence of payment, but Mr. Horridge for the appellant contended that later on in the case the magistrates had assumed the payment, and had decided the case on the assumption that the forty dollars had been paid to Herman; and although Mr. Johnson at first contended the contrary, upon our proposing to send back the case to the magistrates to clear up this point, he elected to argue the case upon the footing that the money had been paid to Herman. That being so, it seems to me that the forty dollars which by a valid contract between the respondent and the appellant was to be paid to the respondent, was paid to Herman by the respondent's actual authority. It is stated that the respondent made no objection and there is nothing to indicate that he did so until long after it was paid, if it ever was paid. Under these circumstances it seems to have been a valid part payment of his wages, and there is nothing in the statutes empowering him to recover it over again. If we were to assume that the money was not paid, but that the appellant was merely relying on a supposed liability to Herman, I should have great doubt on the case. I do not think the facts stated in the case show a hability of the appellant to Herman. The appellant not having signed the document was not directly pledged by it to pay. It is doubtful whether it is an assignment, and, if an assignment, whether it is an assignment of a debt already due, or of accruing wages which had not at the time actually accrued. If it had not been agreed that we should decide the case on the assumption that the money had been paid, I should think it necessary to remit the case to the magistrates to find further facts. As it is I think the appellant was entitled to deduct the whole sum paid and that judgment should be given for the appellant. The answers to the three questions put in the case should be—first, the magistrates were not right in allowing a deduction of one month only; secondly, section 163 does not prohibit advances at all; thirdly, there is no limit to advances made abroad, and in this case on the facts agreed the payment was by the respondent's authority and was binding on him. Our judgment, therefore, is that the appellant is entitled to deduct a further sum of £4 2s. 10d. beyond the deduction allowed by the magistrates, and the respondent must pay the costs.

Appeal allowed.

Solicitors for the appellant, *Walker, Son, & Field*, for *Botterell, Roche, & Temperley*, Newcastle-upon-Tyne.

Solicitors for the respondent, *Pattinson & Brewer*, for *R. Jacks*, South Shields.

Court of Appeal.

From Q. B. Div. (Lindley, M.R. and A. L. Smith and Romer, L.JJ.) — July 6.

PRESCOTT v. LEE. (a.)

Election law — Registration — Parliament — Notice of objection — Place of abode of objector — Mistake — Amendment — Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 2 — *Registration Order*, 1895, *Sched. III., Form I.*

In signing a notice of objection to a name being retained on the occupiers' list of voters in a borough, the objector, instead of stating his place of abode, as required by the Registration Order, 1895, *gave the address of a shop within the borough, which was his qualifying property. His place of abode was outside the borough, and he thought he ought to give his address within the borough and not an address outside it. No one was in any way affected by the mistake.*

Held, that the revising barrister had power to amend the mistake.

Judgment of the Queen's Bench Division (*ante, p.* 139) *affirmed.*

Appeal from the judgment of a Divisional Court on a case stated by a revising barrister, *ante*, p. 139.

At a court held for the revision of the lists of voters for the Parliamentary borough of the Strand an objection was made to the name of Thomas Prescott being retained on Division I. of the occupiers' list of voters for the parish of St. Martin-in-the-Fields.

The notice of objection given to Thomas Prescott was signed as follows: "Francis C. Hunt, of 106, Drury-lane, on Division I. of the occupiers' list of Parliamentary electors and county electors for the parish of St. Martin-in-the-Fields." The objector's true place of abode was 50, Nelson-road, Wimbledon, and not 106, Drury-lane. The address 106, Drury-lane was inserted by a mistake on the part of the objector, who thought that he ought to give his address within the borough and not an address outside the borough. The address 106, Drury-lane was the objector's qualifying property in the borough, and was a shop in which the objector could be found the greater part of every week-day. The objector's place of abode was stated in the second column in the overseers' list as 50, Nelson-road, Wimbledon. Neither the said Thomas Prescott nor anyone else was affected in any way by the incorrect statement of the objector's place of abode.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The revising barrister amended the objection by adding the words, "and of 50, Nelson-road, Wimbledon"; and, the grounds of objection having been proved to be good, he struck the name of Thomas Prescott off the list.

Prescott being desirous of appealing, the revising barrister stated this case for the opinion of the court, the question being whether, in the circumstances of the case, the revising barrister had power to amend the notice of objection.

Section 28, sub-section 2, of the Parliamentary and Municipal Registration Act, 1878, enacts that a revising barrister "may correct any mistake which is proved to him to have been made in any claim or notice of objection."

By the Registration Order of the 25th of March, 1895, made by the Queen in Council under the provisions of section 76, sub-section 7, of the Local Government Act, 1888, certain forms relating to the registration of electors are prescribed. Form (I.) No. 2 in Schedule III. to that order is the form of notice of objection to the party objected to; and it ends thus: "(Signed) A. B., of (place of abode) on the lists of Parlimentary electors and county electors for the parish of ——."

The Divisional Court (Lord Russell of Killowen, C.J., and Lawrance, J., Wills, J., dissenting) held that the revising barrister had power to make the amendment, and dismissed the appeal.

The appellant appealed to the Court of Appeal.

Daldy, for the appellant.

Lawless, for the respondent.

Lindley, M.R.—I have no doubt that the revising barrister had power to make this amendment. The section applicable to the case is section 28 (2) of the Parliamentary and Municipal Registration Act, 1878, which is as follows: "He may correct any mistake which is proved to him to have been made in any claim or notice of objection." The revising barrister has found that Thomas Prescott was a claimant for a vote, but that he was not entitled to a vote, and that therefore the objection which was made to his claim was a good objection. But in the form of objection the objector, after his signature, put, not his place of abode, as prescribed by the registration order, but his place of business, which was his qualifying property within the borough. No one was misled by this mistake, nor was there any deception. The revising barrister, in the exercise of his discretion, amended the mistake. The question is, had he power to do so? The Divisional Court held that he had, but Wills, J., dissented. I think the judgment of the majority of the court was right, and I cannot agree with the judgment of Wills, J. In my opinion we ought to be slow to say that a revising barrister cannot in the exercise of his discretion make any amendment, unless we are satisfied that he has no power to make such an amendment. Two cases were cited before us for the purpose of showing that the revising barrister had no power to make the amendment which he did make in this case—viz., *Bridges* v. *Miller*, 36 W. R. 509, 20 Q. B. D. 287, and *Smith* v. *Chandler*, 37 W. R. 351, 22 Q. B. D. 208. But in my opinion those cases do not support that contention. In *Bridges* v. *Miller* the court held that the revising barrister had no power to amend a bad objection so as to make it a good one, which seems an intelligible decision. *Smith* v. *Chandler* was a case of a notice of claim, and the notice was clearly bad, inasmuch as the declaration of the attesting witness was not dated. The *ratio decidendi* of that case was that a form was used which omitted a material part of the prescribed form. In the present case the objection itself was a good objection, and there was only a mistake in the address of the objector. In such a case the revising barrister, in my opinion, clearly has power to amend. The appeal must therefore be dismissed.

A. L. Smith, L.J.—The Act says the revising barrister may correct any mistake in a claim or notice of objection. I cannot see how we can cut that down and say that he can only correct some mistakes. Wills, J., said this was not a mistake, because the objector did what he did on purpose. It seems to me that he did make a mistake and that he did not do it on purpose. He thought that after the word "of" he ought to put his place of business, which was his qualifying property within the borough. In my opinion this case comes within the purview of the section allowing the amendment of mistakes.

Romer, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Ayrton, Biscoe, & Barclay.*

Solicitors for the respondent, *Troutbeck & Co.*

High Court of Justice.

Chan. Div. } Byrne, J. } July 5.

In re Trustees of Hollis' Hospital and Hague's Contract. (*a.*)

Vendor and purchaser—Specific performance—Grant to uses subject to a proviso for re-entry to the heirs of grantor—Common law condition subsequent—Shifting use—Rule against perpetuities in reference to a common law condition—Application of the principles of the common law.

A proviso that lands shall revert to the right heirs of the grantor for condition broken, following on a grant to uses, is a common law condition subsequent, and not a shifting use.

The rule against perpetuities applies to a common law condition for re-entry.

A title which for its validity depended on the application of the rule against perpetuities to a common law condition for re-entry was not forced on a purchaser, the point not formerly having been the subject of a judicial decision, and there being danger of litigation.

Summons.

This was a vendor and purchaser summons on the part of Mr. Ernest Hague, of Castle Dyke, near Sheffield, the purchaser of the hereditaments the subject-matter of the application.

The vendors were the trustees of a charity known as Hollis' Hospital.

The summons asked for a declaration that a good title had not been shown to the hereditaments contracted to be sold.

The facts of the case were as follows: By an agreement dated the 3rd of October, 1898, a contract was entered into by an agent acting on behalf of a majority of the trustees of Hollis' Hospital to sell to the said E. Hague certain freehold property situate at Castle Dyke, near Sheffield, containing 25a. 1r. 17p. for £5,750.

Matters had proceeded so far that the purchaser was willing to accept the title and the draft conveyance had been approved by the trustees' solicitor, when a

(*a.*) Reported by J. Arthur Price, Esq., Barrister-at-Law.

letter dated the 16th day of November, 1898, was received by the purchaser's solicitors, written by a Mr. W. H. Anthony, one of the trustees who had not concurred in the sale, to the effect that as the heir-at-law of one Thomas Hollis, sen. (and also of John Hollis), he thought it his duty to intimate to them that he was no party to the sale of the property and to call their attention to a clause in the title deeds as to the property reverting to the heir-at-law in case of its being devoted to any other purpose than that intended by the settlor. This letter led to the present proceedings. The history and title of the property was as follows: By indentures of lease and release bearing date the 26th and 27th of August, 1703, Thomas Hollis (father of Thomas Hollis, sen.), with the intent to found suitable habitations for sixteen poor persons to be selected from the poor of Sheffield, conveyed certain hereditaments in Sheffield then converted into sixteen small apartments to certain persons therein named as trustees to their use and behoof upon the trusts and subject to the powers, declarations, and agreements therein mentioned and expressed.

By an indenture of assignment dated the 24th of January, 1704, Thomas Hollis (father of Thomas Hollis, sen.) assigned to Thomas Hollis, sen., his executors, administrators, and assigns, certain Government terminable annuities amounting to £90 per annum, and by deed-poll dated the 26th of January, 1704, the said Thomas Hollis, sen., declared that the same annuities were so assigned to him upon trust that he should pay the same towards maintaining the said almshouses and for several other purposes in the said deed mentioned.

By a writing under seal dated the 21st of February, 1715, and annexed to the said deed of assignment, Thomas Hollis, the father, revoked several payments in that deed contained, and left his son, Thomas Hollis, sen., at liberty to continue or discontinue them as he, his executors or assigns, should think fit without being accountable to any person, and after the death of the said Thomas Hollis, the father, the before-mentioned annuities were turned into South Sea annuities and South Sea stock, which annuities and stock were sold by Thomas Hollis, sen., for £1,500.

Thomas Hollis, sen., for the augmentation of the said charities and for the better settlement thereof, added to the £1,500 the sum of £610, and with these two sums purchased certain hereditaments. At the date of the next-mentioned indenture the hereditaments comprised in the indenture of 1703 had become legally vested in Thomas Hollis, sen., Thomas Hollis the younger, and others.

By an indenture of lease dated the 17th of May, 1726, and made between Thomas Hollis, sen., and John Williams, the said Thomas Hollis bargained and sold the property purchased by him, including the hereditaments the subject-matter of this application, to J. Williams for a year to the intent that the said J. Williams might be in possession, and so that he might be enabled to accept a grant and release of the reversion on such trusts as should be by such release expressed, and the trustees of the premises comprised in release of 1703 conveyed their lands by a similar indenture of the same date to the said J. Williams.

By an indenture of release bearing date the 18th of May, 1726, made between the said T. Hollis, sen., of the first part, the ten trustees in whom the lands originally given to the charity were vested, the said J. Williams of the third part, and four new trustees of the fourth part, the said hereditaments so purchased as aforesaid were granted and released to the said J. Williams to have and to hold unto the said J. Williams, his heirs and assigns, for ever to the use and behoof of the said Thomas Hollis, sen., and the other old and new trustees, their heirs and assigns for ever, nevertheless upon the several and respective trusts, and to and for the several and respective intents and purposes thereunder mentioned. Then followed the trusts with regard to the management and maintenance of the charity, and afterwards followed the following proviso upon which the question at issue arose. "Provided always, and it is hereby agreed and declared by and between the said parties to these presents, that if at any time hereafter the premises hereby conveyed or any part thereof, or the rents, issues, and profits of the same or of any part thereof shall be employed or converted to or for any other use or uses, intents, or purposes than as are hereinbefore mentioned and specified, then and from thenceforth the buildings, lands, and premises hereinbefore conveyed to the uses and upon the trusts hereinbefore mentioned shall revert to the right heirs of the said Thomas Hollis, sen., party hereto, anything herein contained to the contrary thereof in any wise notwithstanding." The indenture contained no power of sale.

Anthony was served with the summons, but his counsel stated at the hearing that he declined to take part in the argument.

Farwell, Q.C., and *Bristowe*, for the applicant.—A good title to the property purchased has not been shown. The effect of the release of the 18th of May, 1726, was to vest the hereditaments in the trustees subject to a common law condition subsequent of re-entry in favour of the heirs of Thomas Hollis, sen., in the event mentioned. A common law condition subsequent is not subject to the rule against perpetuities. [They referred to Challis on the Law of Real Property (2nd ed.), pp. 174-177.] In any case, having regard to the claim set up by W. H. Anthony, the title is too doubtful to be forced on a purchaser.

Levett, Q.C., and *Stewart Smith*, for the vendors, the trustees other than W. H. Anthony.—In the first place we contend that this proviso is not a common law condition subsequent but a shifting use. There is under the conveyance only a momentary seisin given to the grantee Williams, and the proviso can only operate to transfer the use. But if so, it is subject to the rule against perpetuities, and so is void. Further, the condition is bad at common law as it was not always ready to operate, since it could not take effect during the lifetime of the grantor.

Leigh Clare, for W. H. Anthony.

Farwell, Q.C., in reply.—This is a proper common law condition, and the release operated at common law: Co. Litt. 271, 272*a*.

BYRNE, J. (after stating the facts of the case).—It is contended on behalf the purchaser that a good title cannot be made by reason of the clause in the deed of the 18th of May, 1726, providing for the reverter to the right heirs of Thomas Hollis, sen., inasmuch as the sale would be a breach of the condition, and alternatively that the title shown is not one which ought to be forced on a purchaser.

It is contended on behalf of the vendors—that is, the trustees other than W. H. Anthony—that the condition is void as tending to a perpetuity, and that that is so whether the clause in question be construed as operating by way of shifting use, as they say it should be, or by way of condition subsequent. The effect of the method of conveyance which was adopted was as follows: The lease for a year operated, and the bargainee, J. Williams, was in possession by the Statute of Uses. The release operated by enlarging the estate or possession of the bargainer to a fee, this was at the common law, and the

use being declared in favour of persons other than the bargainee the statute again intervened and annexed or transferred the position of the releasee to the use of the trustees to whom the use was declared, subject to the proviso: see Butler's notes to the Coke upon Littleton, 272 (*a*), note 6 (2).

I think that this clause is in terms and form a true express common law condition subsequent, being aptly worded and being in favour of the heirs of Thomas Hollis, sen.: see Sheppard's Touchstone, edition by Preston, p. 124.

It was conceded in argument that if this clause ought to be construed as a limitation or as creating a shifting use it would be void as infringing the rule against perpetuities, and it was argued that the clause ought to be construed as one intended to shift the use which was vested by virtue of the release in the trustees, upon the happening of the contemplated event, in the heirs of the original bargainer, and that it was not possible for it to operate otherwise, having regard to the fact that the estate to be defeated was one existing only by virtue of the statute.

I do not think that this argument can prevail. It is laid down in terms in Sheppard's Touchstone, p. 120, that a condition may be annexed to a limitation of uses, and thereby the same (viz., the uses or estates arising from the uses) may be made void. To which statement a note is appended by Mr. Preston: "And shall be executed by statute 27 Hen. 8, so that the donor and his heirs may take advantage of the condition (Savile 77). See further in Vin. Abr., Condition (N)." In *Serjeant Rudhall's case*, Savile 76, at p. 77, case 155, "Wm. Rudhall, Serjeant-at-Law, being *cestui que usi* in fee, devised certain lands before the Statute of Uses by his will in writing to Charles his younger son and the heirs male of his body with remainder to John his eldest son in fee, with this condition, That neither the said Charles nor any of his heirs of his body should aliene or discontinue any of the said lands, but only to the jointure of his wife for the time being and for the use of the said jointures of the said wives of the said heirs for term of life of the said wives; and after the said Wm. Rudhall died and Charles his own son entered and after the year 4 Ed. 6 by his indenture leased the land to the defendants for term of their lives rendering the ancient rent to him his heirs and assigns. Then (1 Eliz.) the said Charles levied a fine to certain persons and their heirs with proclamations, which was to the use of the said Charles and Alice his wife and the heirs male of the body of Alice by him begotten and for default of such issue to the use of the heirs of the said Charles begotten, and for default of such issue to the use of the right heirs of the said Wm. Rudhall the father. And it was averred that the use of this fine was for the jointure of the said Alice for term of her life. And the plaintiff, as heir of Serjeant Rudhall, entered for the condition broken. And in this case three doubts arising: one, if it was condition or limitation of estate in use; another, if the condition was broken; and the third, if the heir of the *cestui que use* should take advantage of condition broken by the Statute of Uses. And it appears that this is condition, because condition destroys the estate and returns the land to the donor and his heirs; and limitation of estate is when the first estate is destroyed and new estate limited by way of remainder or otherwise. And here is condition, because there is not a new estate limited over, but the estate to which it is annexed is destroyed. And then arises for consideration if the condition is broken, and it appears that lease for lives of the defendants, reserving the ancient rent being made according to the statute, is not a discontinuance. For the statute has given power to make such estates, that they are legal, and legal estates cannot make injurious discontinuances. Therefore the condition in this respect is not broken, but the limitation of other uses by which other heirs are inheritable than were at first, is to break the condition. For the limitation of use on fine in special tail is contrary to the will of Serjeant Rudhall and the limitation of the fee to the heirs of Serjeant Rudhall is other limitation to heirs than as he himself limits; for he limits the fee to John Rudhall his eldest son, and his heirs, and it might be that John Rudhall and his heirs are heirs of the half blood to the direct heirs of Serjeant Rudhall, whence it is other inheritance than as was in the first limitation which is breach of the condition. And as to the taking advantage of condition annexed to the use, it appears that the Statute of Uses has given this advantage when the uses and possession are united, that the heir of the father enter, by which it appears by the opinion of all the justices that the entry was allowable and the plaintiff shall recover, and it is adjudged that his entry was allowable for the condition was broken by limitation of use in special tail, and of the other remainder in fee in the heirs of the father; but lease for life, according to the statute, is not discontinuance, and therefore no breach of condition. Also this entry for condition is guaranteed (?) by the Statute of Uses, and also it was agreed that this was condition and not limitation." I have translated the report out of the Law French, and I think that the case (which is also reported Moore 212 and Leonard 298) is an authority for the statement in Sheppard's Touchstone.

The next question is, whether or not the condition being an express common law condition subsequent is void for perpetuity. I have not been referred to any case deciding the question, nor have I since the argument after a considerable search been able to find any authority in the reports enabling me to say that the point has ever been judicially decided.

For the exposition of our very complicated real property law it is proper, in the absence of judicial authority, to resort to text-books which have been recognized by the courts as representing the views and practice of conveyancers of repute. Except in the comparatively recent although most valuable book of the late Mr. Challis (whose loss we all regret), to which I shall have to refer more fully later on, I cannot find any definite statement of opinions adverse to the views expressed by Mr. Sanders and by Mr. Lewis in their well-known treatises, and I will first refer to Sanders on Uses and Trusts (5th ed.), vol. 1, at pp. 206, 207, and also at p. 213. [His lordship read the passages, and continued:] I find in Lewis on Perpetuity the opinion of the learned author expressed in clear and unambiguous language: see Lewis on Perpetuity (ed. 1843), at pp. 615, 616. [His lordship read the passage which concludes "Any event, consequently, ascertained to be too remote in reference to remainders and executory limitation, will vitiate a common law condition limited to arise upon it."] Amongst quite modern text-writers I find a similar expression of opinion: see the work of the learned American author Mr. Gray, who has written on the law of perpetuity, at p. 215, where he states his views, in spite of the fact that there are American authorities tending the other way, the point not having been taken or argued in such authorities; and see also Marsden on Perpetuity, at p. 4.

I have purposely avoided referring to certain *dicta* in recent cases until I come to examine Mr. Challis's argument, which was in fact the basis of the argument put forward on the part of the purchaser in the present case. That argument and the learned author's

expression of opinion are to be found at pp. 174, 175, 176, and 177 of Challis on Real Property (2nd ed.).

Mr. Challis there says: "The question whether a common law condition in defeasance of an estate of freehold is within the rule against perpetuities in the sense that it is void, if it may defeat the estate at a time more remote than is allowed by the rule, may perhaps, in view of the present disposition of the courts, which leans strongly in favour of the rule, be a question requiring to be treated with some degree of caution. The affirmative reply is open to the objection that the rules relating to common law conditions had been settled for some centuries before the rule against perpetuities had been thought of, and that there is not only no case to be found in the old common law authorities of any disposition to apply what may be called a 'time test' to common law conditions, but their language by the clearest implication asserts the absence of any such rule. "In the old common law authorities, down to and including Lord Coke, there are innumerable references to conditions in defeasance of a freehold expressed *simpliciter* without any hint of a restriction within any period whatever, and not only do such references invariably assume that the validity of such conditions had never been called in question upon this ground, but in some cases they affirm, by the clearest implication, that the benefit of a condition of re-entry may be claimed at any distance of time by the heirs of the grantor. At a subsequent time it became necessary to devise a novel restriction to be applied to novel forms of limiting, or otherwise conferring an estate or interest unknown to the common law. Upon what principle can it be said that the emergence of novel matter into the law had simultaneously introduced into the common law a new rule of construction, made applicable to matters with which the common law was familiar, but previously unknown to the common law. The prescription upon which the common law depends is of much greater antiquity than the reign of Henry 8. No court except the High Court of Parliament has any jurisdiction or authority to alter the common law: Co. Litt. 115*b*. When any part of the common law is found to require amendment, the Legislature alone is competent to apply the remedy: *Cunliffe* v. *Brancker*, 3 Ch. D. 393, at p. 416, 25 W. R. Dig. 339. In imposing the rule against perpetuities upon the novel limitations and interests to which by universal acknowledgment it is applicable, the inferior courts did not alter the common law, but merely laid down certain terms upon which they would interpret certain statutes in relation to the creation of legal estates and upon which they would give legal effect to equitable interests of a certain type. Much more than this is needed in order to bring matters previously settled by the common law within the scope of the new rule." [His lordship continued reading to the end of p. 177, and continued:]

Pausing at the introductory paragraphs, I do not propose to embark upon a consideration of the origin or development of the rule or rules against perpetuities about which there has been, and will continue to be, grave differences of opinion amongst real property lawyers. I find a clear and well recognized rule certainly applicable to all ordinary methods of disposition in vogue since the Statute of Uses; and what I have to do is to see whether or not that rule applies to prevent the effectuating by means of a common law condition of that which is forbidden by the law in the case of all other methods of disposition of property.

Mr. Challis is right, of course, when he says that when any part of the common law requires amendment the Legislature alone is competent to apply the remedy. But the courts have first to find what is the common law—that is, the principle embodied in what is called the common law, and to apply it to new and ever-varying states of facts and circumstances. The common law is to be sought in the expositions and declarations of it in the decisions of the courts and in the writings of lawyers. New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing restraints upon alienation. I may give, by way of illustration, what was said by Lord Macnaghten in the case of *Nordenfelt* v. *Maxim, &c., Co.*, [1894] A. C. 534, pp. 564-5: "In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy and therefore void: *Colgate* v. *Bacheler*, Cro. Eliz. 872. In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognized that all partial restraints might be good, though it was thought that general restraints — that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation proposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential difference between the two cases."

"When the restraint is general," says Lord Macclesfield in *Mitchel* v. *Reynolds*, 1 P. Wms. 181, "not to exercise a trade throughout the kingdom," the restraint "must be void, being of no benefit to either party and only oppressive, as shall be shown by-and-by." Later on he gives his reason: "What does it signify," he says, "to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." "Any deed," says Best, L.C.J., in *Horner* v. *Ashford*, 3 Bing. 322, at p. 326, "by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom would be void, because no good reason can be imagined for any person's imposing such a restraint on himself."

Might it not be said from Mr. Challis's point of view that if it was the common law in the reign of Elizabeth that all restraints of trade, general or partial, were void, that they must be still void? The answer would appear to be that the principle was that restraints of trade were contrary to public policy; and that is the principle still; it is the application of it that has varied. An illustration of a void condition because impossible of fulfilment is given in Sheppard's Touchstone, p. 133—viz., that if one give or grant land on condition that a man shall go to Rome in three days. That which was impossible at the time when the illustration was given has now become possible owing to a change of circumstances, and though the old principle stands, the application of it has changed. In reference to the suggestion as to devising a novel restriction to be applied to novel forms of limiting, &c., I may point out that in the present case the object of the grantor could not have been obtained without adopting a novel form of assurance. He wanted to vest the estate in himself jointly with others. It is right here to mention that

the present case being one of a gift for charitable purposes that the question could not have arisen had the deed been dated ten years later than it was, having regard to the provisions of the Mortmain Act (9 Geo. 2, c. 36), which provides that the gift or conveyance must be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever for the benefit of the donor or grantor or of any person or persons claiming under him. I think that some of Mr. Challis's criticisms of the *dicta* of the late Master of the Rolls in the case of *In re Macleay*, 23 W. R. 718, L. R. 20 Eq. 186, are not quite reasonable. The use of the expression "tenant in tail" at p. 190 in the L. R. 20 Eq. is an obvious slip either verbal or clerical for "tenant in fee," as is clear by reference to p. 187, where the learned judge says: "Looking at the will I have no doubt there is a condition annexed to the gift in fee," and this is followed in the next sentence by the remark, "First of all it is to be observed that the condition good or bad is confined within legal limits; it is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness."

This being so, I find in the passage I have read, coupled with the passage at p. 190, referred to by Mr. Challis, a clear expression of opinion by Sir G. Jessel that had the condition in question not been limited in point of time, as it was, it would have been void for remoteness.

The decision of North, J., in *Dunn* v. *Flood*, 32 W. R. 197, 25 Ch. D. 629, at p. 632, as to the remoteness of the power of re-entry in that case was *obiter* in the sense that it was unnecessary for the purposes of the decision to determine it—although it was a question raised and argued—but I think that Mr. Challis, in saying that nothing was said on appeal to support the *obiter dictum*, appears to have overlooked the observation of Baggallay, L.J., 33 W. R. 315, 28 Ch. D. 586, see p. 592, where he says "This right of re-entry was held by North, J., to be void for remoteness. We have not heard the counsel for the defendant, but as at present advised I concur with North, J., that this right could not be enforced, being void under the rule against perpetuities."

I must also notice that Mr. Challis makes no reference whatever to the opinions of Sanders and Lewis which I have quoted. The result appears to be that there are expressions of opinion by Sir George Jessel, North, J., and Baggallay, L.J., and the opinion of two great real property lawyers and text-writers in favour of the invalidity of such a condition as the one in question, besides the opinions of two modern text-writers; while on the other hand there is nothing definite except the opinion and reasoning of the late Mr. Challis in his work on real property.

I am of opinion that the condition in question is obnoxious to the rule against perpetuities. But this still leaves another question for consideration—viz., is the title one which ought to be forced upon a purchaser? The rule which should be followed in such cases is stated by Chitty, J., in the case of *Thackwray and Young's Contract*, 37 W. R. 74, 40 Ch. D. 34 (pp. 38, 39, 40). I have not, in the present case, any decisions or *dicta* of judges to lead me to a contrary conclusion to that to which I have come, and the question is one of general law, upon which I have the *dicta* of eminent judges and opinions of text-writers of authority which I consider justify the view I have expressed.

At the same time the point is one of some obscurity and difficulty, and one which cannot be said to have been the subject of exact judicial decision. Moreover, regard must be had to the fact that the person claiming to be heir-at-law of Thos. Hollis, sen., has given a notice which must be taken to be notice of his intention to claim the benefit of the breach of condition if the condition is broken, and he has declined to argue or to be bound by the present decision, so that the purchaser, if he completes, will be in danger of immediate litigation—an element which must have very great weight in considering whether or not the title ought to be forced on a purchaser: *Pegler* v. *White*, 12 W. R. 455, 33 Beav. 403; Fry's Specific Performance (3rd ed.), p. 408.

Upon a consideration of all the circumstances I do not think that I ought to say that such a title has been shown as ought to be forced upon the purchaser if he is unwilling to complete.

Declaration accordingly.

Solicitors, *Johnson, Weatherall, & Sturt*, for *Burdekin & Co.*, Sheffield; *R. Sutton Clarke; Torr & Co.*, for *Anthony & Imlach*, Liverpool.

Chan. Div. } Wright, J. } June 14, 15.

In re BANGOR AND NORTH WALES MUTUAL PROTECTION ASSOCIATION (LIMITED). (*a*.)

Company—Winding up—Company limited by guarantee—Contributories—Debts.

A member of a mutual marine insurance company limited by guarantee is not liable to be placed on the list of contributories, in the event of the company being wound up, for a larger amount than is prescribed by the company's memorandum of association. He may be a debtor to the company or to the other members of it for losses, but, though he may be sued in respect of such losses, he cannot be made a contributory in the winding up in respect of them.

The applicant, J. Baird, had been a member of the association which was now being wound up, but had withdrawn in 1893.

The association had been incorporated in December, 1891, as a company limited by guarantee, and not having a capital divided into shares. The principal object of the company was the mutual insurance of ships belonging to members.

The memorandum of association contained the following clause:

"Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding £1 per cent. on the value of his tonnage indemnified in the association, at £15 per ton."

The articles of association which are material were as follows:

Art. 4.—"Every person shall be deemed to have agreed to become a member of the association who insures any ship or share in a ship in pursuance of the regulations hereinafter contained."

Art. 11.—"The admission of a ship shall be deemed to have been effected and the member's right to insurance and liability to contribute shall begin at 12 o'clock at noon on the day of the date of its entry on the register; and such insurance and liability shall thenceforth continue without intermission until terminated in the manner hereinafter named."

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Art. 13.—"A member may withdraw his ship wholly or in part by giving not less than thirty days' written notice of his desire to withdraw on the 31st of December following, and, if such notice be given, this insurance and the liability to contribute to future claims shall cease on the expiration of such notice and the payment of then all unpaid subscriptions and (or) calls."

Art. 14.—"In the event of the total loss of a ship her insurance and liability to contribute shall cease on the owner giving a written notice thereof, and on payment of all unpaid subscriptions and (or) calls."

Arts. 15 to 18 provided for the termination of membership or insurance on bankruptcy, or in certain events by notice from the directors for non-payments of calls. Art. 20 made the insurance mutual, each member insuring the other members in consideration of their insuring him.

Art. 29.—"There shall be paid to the association for each ship on admission an entrance fee of 1s. per cent. on the sum insured, and on or before the 1st of January in every succeeding year the like sum of 1s. per cent."

Art. 30.—" . . . Calls shall be made for the payment of allowed claims and of current expenses at such dates as the directors may direct."

Art. 33.—"If any member neglect or refuse to pay any subscription and (or) call, after demand made in writing (as provided by Art. 32), the member so neglecting or refusing shall be excluded from all benefit in respect of any insurance effected by him, but he shall, notwithstanding such exclusion, remain liable for his contribution of any liability incurred during his membership."

Art. 34.—"Unpaid subscriptions and (or) calls shall bear interest . . . and shall be recoverable, with interest, by action at the suit of the association, although the defaulter may have ceased to be a member of the association."

Art. 77.—"The calls on members for the payment of claims and for the necessary expenses of the association may be made in such manner and at such dates as the board in its discretion deems right; and payment thereof may be enforced by action at the suit of the association in any county court or in any division of the Supreme Court of Judicature."

Another article provided that the secretary was to keep a register of members and ships insured which was to show the name of the member and of the ship insured, the tonnage for which it was insured, and its value at £15 a ton, and if necessary when and how the insurance ceased. The secretary was also authorized to admit members and ships for insurance.

A compulsory winding-up order was made against the company in April, 1897, Baird being placed on the list of contributories on the ground that there were calls due from him in respect of the year 1893, and that by article 13 of the articles of association he continued a member until the payment of such calls.

Baird now applied to have his name removed from the list of contributories.

R Younger, for Baird.—My client is not liable to be placed on the list of contributories under section 38 as he ceased to be a member in 1893, which is more than a year prior to the commencement of the winding up. Even if he is still a member he cannot be placed on the list of contributories with regard to the calls made in 1893, as they are not sums which he is liable to contribute to the assets of the company under section 38.

A. J. Chitty, for the liquidator.—By article 13 the applicant is still a member of the association. To cease to be a member a man must strictly comply with the requirements of the articles of association. *In re Marlborough Club Co.*, 16 W. R. 668, L. R. 5 Eq. 365, is distinguishable, as this is a company limited by guarantee.

He also quoted *Maxwell's case*, 23 W. R. 646, L. R. 20 Eq. 585; *M'Ewan's case*, 25 W. R. 857, 6 Ch. D. 447; and *Lion Insurance Association* v. *Tucker*, 32 W. R. 546, 12 Q. B. D. 176.

Cur. adv. vult.

June 15.—WRIGHT, J.—On the evidence and admissions in this case it must be taken, for the purpose of this application, that Baird duly withdrew his ships at the end of 1893, and that no subscriptions or calls in respect of 1893 have ever been demanded from him. But, as I understand the matter, I am asked to decide the case on the supposition that there are calls due from him in respect of 1893, the amount of which is, if necessary, to be the subject of an inquiry or action. Even on that supposition, he ceased to be a member at the end of 1893, unless by force of the 13th article of association he continued to be a member until payment of all due subscriptions and calls. The true construction of this article is not easy to determine. Membership seems ordinarily to be constituted by insurance of a ship, which insurance involves a corresponding liability to the other insured owners, but by article 11 the insurance and liability are to continue until terminated "in the manner hereinafter named." These last words apparently refer to articles 13 to 18. Article 13 provides that "a member may withdraw his ship wholly or in part by giving not less than thirty days' written notice of his desire to withdraw on the 31st day of December following, and, if such notice be given, this insurance and the liability to contribute to future claims shall cease on the expiration of such notice and the payment of all then unpaid subscriptions and (or) calls." If this article is to be literally construed, it makes the insurance itself continue until calls in arrear are paid, although the ship has been withdrawn, and this without any further subscription. So, on the similar words in article 14, the insurance of a ship which has been lost or sold would continue in like manner. I think that cannot be the true meaning. The meaning seems to me to be that the insurance and liability are to cease subject to the continuing liability for arrears of subscriptions or calls, which liability is by articles 34 and 77 enforceable by action. It is to be observed that article 13 does not in terms say that membership is to continue, and article 34 shows that a person may have ceased to be a member although he is in arrear with his subscriptions or calls. I think, therefore, that Baird ceased to be a member at the end of 1893, although he may still be liable to actions for unpaid subscriptions or calls. Further, I think that, even assuming Baird to continue to be member, he is not liable as a contributory beyond the amount prescribed by the memorandum of association. Section 38 of the Act of 1862 seems to me too clear to admit of much doubt. The two decisions of Malins, V.C., which were cited for the liquidator—viz., *Maxwell's case* and *M'Ewan's case*—turned upon a different Act and related to companies limited by shares. Whether they are authorities on the construction of the Act of 1862 even as to companies limited by shares, it is not necessary to consider. The case of *Lion Insurance Association* v. *Tucker* shows that he is liable to be sued for these losses, but it is not there suggested that he can be made a contributory in the winding up in respect of them. He is a debtor to the company or to the other members in respect of them, not, as it seems to me, a contributory in the winding up.

Solicitors, *Wynne, Holme, & Wynne*, for *H. Forsh & Hawkins*, Liverpool; *Simpson & Co*, for *Hughes, Pritchard, & Rodway*, Bangor.

Q. B. Div.
(Day and Lawrance, JJ.) June 8.

Ex parte FLINN & SONS. (*a*.)

Licensing Law—Spirits—Sale of spirits without licence—Second conviction—Disqualification to hold licence—Application by owner to carry on business—Justices—Jurisdiction to entertain application—Licensing Act, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 3—*Licensing Act,* 1874 (37 *&* 38 *Vict. c.* 49), *s.* 15.

A beerhouse-keeper was upon the same day twice convicted under section 3 *of the Licensing Act,* 1872, *of selling spirits without a spirit licence, and upon such second conviction he was disqualified for two years from holding any licence, and by the operation of the section he also, upon such second conviction, forfeited his licence to sell beer. Upon an application being made after the second conviction by the owner of the premises under section* 15 *of the Licensing Act,* 1874, *for an authority to carry on the business until the next special sessions,*

Held, that the justices had jurisdiction to entertain the application, although made after the second conviction, as the words "for the first time" in section 15 *were to be construed as governing the latter part of the section as well as the former, and that the application could be made after the first conviction which caused a personal disqualification or a forfeiture of the licence, which, in the case of selling spirits without a spirit licence, was the second conviction.*

Case stated by justices for the borough of Saffron Walden, in the county of Essex.

On the 13th of February, 1899, an information was laid against Walter Peachey, of the Royal Oak beerhouse in Saffron Walden, beerhouse-keeper, for having on the 20th of December, 1898, unlawfully sold by retail intoxicating liquor—to wit, rum—which he was not then licensed to sell by retail, contrary to section 3 of the Licensing Act, 1872.

On the 14th of February, 1899, a second information was laid against Peachey for having on the 14th of January, 1899, unlawfully sold by retail intoxicating liquor—to wit, whisky—which he was not then licensed to sell by retail, contrary to section 3 of the Licensing Act, 1872.

Both these informations were separately heard and determined at the petty sessions for the borough held on the 18th of February, 1899, and the defendant was convicted on the first information and was adjudged on such first conviction to pay the sum of five pounds and costs, and was subsequently convicted on the second information and was adjudged on such second conviction to pay the sum of twenty-five pounds and costs, and ordered to be disqualified for two years from holding any licence for the sale of intoxicating liquor.

By the operation of section 3 of the Licensing Act, 1872, Peachey thereupon forfeited his licence to sell beer.

At the petty sessions held on the 25th of February, 1899, application was made on behalf of the owners of the Royal Oak beerhouse for an authority under section 15 of the Licensing Act, 1874, to carry on until the next special sessions for licensing purposes the business of beersellers, being the same business as had previously to his convictions been carried on by Peachey at the Royal Oak beerhouse, but the justices finding as a fact that prior to such application Peachey had been convicted for the second time of the offence of selling spirits without a spirit licence, held that they had no jurisdiction to hear and determine the application under section 15 of the Licensing Act, 1874, inasmuch as the opening words of that section limit the right to make such applications to cases where a person is convicted for the first time, and that any application for a licence for the premises could only be entertained at the general annual licensing meeting for the borough.

The question of law for the opinion of the court was whether or not on the facts as above stated it was open to the justices to hear and entertain an application on behalf of the owners of the beerhouse, under section 15 of the Licensing Act, 1874, to carry on the same business on the same premises until the then next special sessions.

Section 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), provides: "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same. . . . Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail . . . shall be subject to the following penalties: (1) For the first offence he shall be liable to a penalty not exceeding fifty pounds, or to imprisonment with or without hard labour for a term not exceeding one month; (2) for the second offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for a term not exceeding three months, and he may, by order of the court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors. In addition to any other penalty imposed by this section, any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence."

Section 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), provides: "Where any licensed person is convicted for the first time of any one of the following offences: (1) Making an internal communication between his licensed premises and any unlicensed premises; (2) forging a certificate under the Wine and Beerhouse Acts, 1869 and 1870: (3) selling spirits without a spirit licence; (4) any felony; and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises."

Foote, Q.C. (*H. O. S. Ellis* with him), for the appellants.—The construction placed by the justices upon section 15 of the Licensing Act of 1874 is too narrow. The words of that section are that where a licensed person is convicted "for the first time" of any one of the four offences specified, and "in consequence" of such conviction becomes disqualified or has his licence forfeited, then the owner may make the application under the section. The words "for the first time" are to be read as governing, not only the word "convicted," but also the words "becomes personally disqualified or has his licence forfeited"; so that the owner can apply under the section upon or after the conviction which for the first time causes a forfeiture of the licence or a personal disqualification. It is only upon the happening of the compound event, the conviction and the forfeiture of the licence or disqualification, that the owner's right to apply arises, and the time for the owner to apply is upon the conviction which for the first time causes a forfeiture or a disqualification. There are four offences specified in the section. With

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

regard to three of these offences forfeiture or disqualification arises upon the first conviction, and an application in such cases under the section might require to be made after such first conviction; but with regard to the fourth offence—namely, selling spirits without a spirit licence—under section 3 of the Licensing Act, 1872, it is only upon a second conviction that the licence is forfeited or that a person can be declared disqualified, and in fact it was upon the second conviction that Peachey in this case was so declared disqualified. The owner can therefore, after such second conviction of Peachey, make his application under section 15 for authority to carry on the same business on the same premises until the next sessions. The justices were therefore wrong in holding that they had no jurisdiction under the section to hear and entertain the application.

The justices did not appear as respondents.

DAY, J.—I think the construction now contended for on behalf of the appellants is the most reasonable construction to be placed upon this difficult section. I think, therefore, that the justices had jurisdiction to hear this application, and the case must be remitted to the justices with the direction that they had jurisdiction to hear and entertain the application of the owners of the premises.

LAWRANCE, J.—I am of the same opinion.

Appeal allowed; case remitted.

Solicitors for the appellants, *Thorneycroft & Willis*, for *Baker & Thorneycroft*, Bishop's Stortford.

Q. B. Div. (Darling and Channell, JJ.) } April 18; May 6.

MOSS (*Appellant*) v. HANCOCK (*Respondent*). (*a.*)

Criminal law—Larceny—Restitution and recovery of stolen property—Current coin of the realm—Larceny Act, 1861 (24 & 25 *Vict.* c. 96), *s.* 100—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict.* c. 49), *ss.* 27 (3), 33 (1).

A current coin of the realm which has not been passed into circulation may be sold as a curiosity, and if such coin has been stolen from its owner by the vendor, and the latter is subsequently convicted of larceny, an order of restitution of the coin to the owner may be made against the purchaser under section 100 *of the Larceny Act*, 1861.

Semble, *that, if the thief has dealt with the coin as current coin and has passed it into circulation, no order of restitution can be made against a* bonâ fide *receiver, notwithstanding that the coin may be able to be identified.*

A. stole a five-pound gold piece, which had never passed into circulation, from B., who had kept it as a curiosity, and changed it with a dealer of curiosities for five sovereigns.

Held, that an order of restitution might be made under section 100 *of the Larceny Act*, 1861, *against the purchaser.*

Case stated by justices.

On the 25th of December, 1898, at a court of summary jurisdiction sitting at Hove, in the county of Sussex, Thomas Neale was charged for that he while being a servant in the employ of one Hancock, the respondent, feloniously did steal, take, and carry away one gold five-pound piece the property of his master.

Neale was convicted and sentenced and the justices then made an order of restitution under section 100 of the Larceny Act, 1861, of the gold coin by the appellant Moss to the respondent.

From the facts stated in the special case it appeared that the prisoner was butler in the service of the respondent, to whom the gold coin had been presented by the Goldsmiths' Company in the Jubilee year 1887. The coin, though a current coin of the realm, had never been in circulation, and it was kept by the respondent in a case in a cabinet in his drawing-room. When the prisoner stole the coin he took it to the shop of the appellant, a dealer in new and second-hand clothing and other articles, where he changed it for five sovereigns.

The questions for the court were whether the justices had power to make the order of restitution, whether the appellant was a person aggrieved so as to be entitled to require a case to be stated when neither party to the proceedings did so, and whether the whole question was not one of fact.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of or knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property or his executor or administrator and convicted thereof, in such case the property shall be restored to the owner or his representatives, and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner. Provided that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27, "Where an indictable offence is authorized to be dealt with summarily—

"(3) The conviction for any such offence shall be of the same effect as a conviction for the offence on indictment, and the court may make the like order for the restitution of property as might have been made by the court before whom the person convicted would have been tried if he had been tried on indictment."

Section 33, sub-section 1.—"Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated."

Firminger (*E. Bowen Rowlands* with him), for the appellant).—The justices had no jurisdiction to make the order of restitution. The "money" referred to in section 100 of the Larceny Act of 1861 is not current coin, but is specific money in a box or bag. The earliest statute on the subject is 21 Hen. 8, c. 11, and under that statute it was held in *Holiday* v. *Hicks*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Cro. Eliz. 638, 661, that restitution could be ordered of money found on the prisoner or money that was in some way ear-marked; but money once passed in circulation could not be the subject of such an order, because there could be no identification: *Miller* v. *Race*, 1 Smith's Leading Cases (10th ed.), p. 447. The statute of Hen. 8 was repealed by 7 & 8 Geo. 4, c. 27, but was re-enacted by section 57 of 7 & 8 Geo. 4, c. 29. Section 100 of the Larceny Act, 1861, now governs the matter. No new right, however, is conferred by that section. The appellant was a person aggrieved within the meaning of section 33 of the Summary Jurisdiction Act, 1879.

The following cases were also cited: *Lindsay* v. *Cundy*, 24 W. R. 730, 1 Q. B. D. 348; and *Clarke* v. *Shee*, Cowp. 197.

Boxall, for the respondent.—The order made by the justices was right. The gold coin, although current coin, had never been passed in circulation. It was kept as a curiosity and sold as such. Even if it had been in circulation it might be ordered to be restored if it could be identified. The word "property" in section 100 of the Larceny Act, 1861, includes money.

The following cases were cited: *Reg.* v. *Horan*, 6 Ir. R. C. L. 293; *Scattergood* v. *Sylvester*, 15 Q. B. 506; *Taylor* v. *Plumer*, 3 M. & S. 562; *Rex* v. *Stanton*, 7 C. & P. 431; *Bentley* v. *Vilmont*, 36 W. R. 481, 12 App. Cas. 471.

Cur. adv. vult.

May 6.—DARLING, J., read the following judgment: This was a special case stated by justices, and the following facts were stated as proved or agreed. The prisoner, a butler in the service of the respondent, was convicted of having stolen from his master a five-pound gold piece, presented by the Goldsmiths' Company to the respondent in the Jubilee year, 1887, the year of its date. The gold piece had been kept in a cabinet until November, 1898, when it was stolen by the prisoner, and had never been in circulation. The appellant is a dealer in new and secondhand clothes, jewellery, and other articles, and the prisoner changed the gold piece with the appellant's son in the appellant's shop for five sovereigns. Upon the prisoner's conviction the justices found that the five-pound gold piece stolen by the prisoner was the respondent's property, and they made an order for its restitution to the respondent, acting under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. 49), s. 27, sub-section 3. It was admitted during the argument that the gold pieces of the issue to which this one belonged are, by Royal proclamation, constituted current coin of the realm; and for the appellant it was contended that the order for restitution was therefore wrong. By section 100 of the Larceny Act, 1861, it is provided that, on the prosecution to conviction of a thief the court may order the restitution of the things stolen to the prosecutor, and among other stolen things may order the restitution of money. It was contended before us in this case that, although even after they had been sold by the thief in market overt and so the property in them had passed, stolen goods might still, by virtue of an order under this statute, be revested in the owner from whom they had been stolen, yet no such restitution could be ordered of money, unless it were money in a bag or otherwise "ear-marked," as it was said. For this proposition decisions given in actions for trover and conversion of money were cited such as *Holiday* v. *Hicks*, Cro. Eliz. 638, 661. But section 100 of the statute distinctly applies to "money," and long before this it was stated in Hale's Pleas of the Crown, p. 542: "So if money be stolen, and the thief taken, and the money seized, he (that is, the true owner) shall have restitution of the money." Reliance was also placed on the case of *Miller* v. *Race*, 1 Burr. 452, 1 Sm. L. C. (10th ed.), p. 447, which was an action of trover upon a bank-note, in which case it was held that the property in such a note passes like cash by delivery. And Lord Mansfield there said: "Now they (bank-notes) are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Further on in his judgment Lord Mansfield said, referring to some expressions attributed to Holt, C.J.: "'Tis a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said that 'the reason why money cannot be followed is because it has no ear-mark'; but this is not true. The true reason is upon account of the currency of it; it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration; but before money has passed in currency an action may be brought for the money itself." Now, here it is plain that the mere fact that the stolen gold piece was money would not render it unfit for the application to it of an order for restitution. The true question seems to me to be whether by the manner of dealing with it which the thief adopted the gold piece passed in currency. The exchanging of a coin for other coins is not conclusive proof that the exchanging was that of dealing with current coin on both sides. Many coins which yet have not been formally withdrawn from currency have a price far beyond their denominated value by reason of their antiquity or rarity, or for their beauty of design or execution (though this last is perhaps merely to say again by reason of the coins being struck in another age and mint than ours). Money as currency, and not as medals, seems to me to have been well-defined by Mr. Walker in Money, Trade, and Industry (F. A. Walker in Money, Trade, and Industry. p. 4, cited in Encyclopædia Britannica, subtitle "Money") as "that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities." Bearing in mind all the foregoing considerations, and applying them to the facts stated for us by the magistrates, I ask myself, Was this gold piece passed on in its character as coin of currency, or was it rather the subject of a sale as an article of *vertu*? We are permitted to draw inferences from the facts stated to us, and besides it was stated in the course of the argument that this piece was of somewhat greater value than that of its denomination and so was worth more than the five pieces given in exchange for it, though each of those was of a fifth of the nominal value of this gold piece. Upon the facts stated I come to the conclusion that this gold piece never passed in currency, though it was the subject of a sale (as a medal might have been) to a dealer in old or curious

things; and that therefore the magistrates acted within their powers in making an order for its restitution.

CHANNELL, J., read the following judgment: I entirely agree with the judgment that has just been delivered, but as I have prepared a judgment of my own, I think it well to deliver it.

In this case, stated by magistrates, an appellant appeals against an order made under section 100 of the Larceny Act ordering him to restore to the prosecutor a five-pound gold piece stolen from him by a thief who has been convicted. The magistrates suggest a doubt whether they have power to state a case, but I think that there is no foundation for this doubt. The magistrates next suggest that the whole question is one of fact. They leave us, however, in some doubt as to what they mean to find. In one view it is a question of fact, in another one of law. They state certain facts, but they do not state what inference they draw from them. That being so, we have power under the Rules of Court to draw any inferences which the magistrates might have drawn. The facts have been already fully stated, and I think the proper inference to be drawn from those facts is that the thief did not pass the coin as current money, but sold it for £5. It is true that, by Royal proclamation issued under the Acts of Parliament relating to the coinage, this piece is made current coin of the realm, and might have been used in payment of a debt or otherwise as money; but though it might be so used, it might also be dealt with as if it were a medal, or ancient coin, or other curiosity. I think it was offered to the appellant because he dealt in curiosities, and was taken by him as such.

It is also doubtful whether the magistrates meant to find the transaction *bonâ fide*. Without meaning to suggest that the appellant's son could be found guilty of receiving the coin knowing it to be stolen, I still think the circumstances were such that the magistrates might well find that it was not taken *bonâ fide*, so that, if it had been a bill of exchange or other negotiable instrument no better title would have been taken than the thief had. If that was the view of the magistrates, they would be right in considering the question one of fact; and if it was not their view, much that they state in the case is wholly immaterial. Under these circumstances we ought to draw the inference ourselves, and upon that inference I think the order of the magistrates a good one.

If the coin had been dealt with and transferred as current coin of the realm, as, for instance, in payment for goods purchased or in satisfaction of debt, or *bonâ fide* changed as money for money of a different denomination, I think a question of law of great difficulty would arise. If that were the case, no doubt the property would have passed to the appellant; but the operation of the statute is to revest in the prosecutor, on conviction of the thief, the property in the thing stolen notwithstanding that the property in it has previously passed effectively to a transferee as by sale in market overt: *Horwood* v. *Smith*, [1788] 2 T. R. 750; *Scattergood* v. *Sylvester*, 15 Q. B. D. 506. The history of the matter is to be found in 2 Hawkins' Pleas of the Crown, c. 23, ss. 49-57. The mere fact of the property in the coin having passed would not, therefore, prevent the statute operating, and it is curious that in all the statutes, beginning with that of 21 Hen. 8, c. 11, money stolen is placed on the same footing as chattels stolen. Unless, therefore, there is something exceptional in the way in which property in money passes, it would appear that, in all cases where by some accident the particular coin or coins stolen could be identified at the date of the conviction, the person then owning them would lose his property though the money had been taken *bonâ fide*. But we have to consider the proviso, which was in the statute of Geo. 4 as well as in the present statute, protecting persons who had *bonâ fide* taken a negotiable instrument. Now, all the considerations which could have induced the Legislature to protect holders of stolen negotiable instruments must equally apply to stolen money taken *bonâ fide*. In fact, it is because bills of exchange, &c., are like currency that they are negotiable: see *Miller* v. *Race*, 1 Sm. L. C. (10th ed.), p. 447. It may be that the Legislature did not think it necessary to protect, by including them in the proviso, persons who had *bonâ fide* taken stolen money, because in the great majority of cases it would be impossible, in fact, to identify the money, so that only in rare cases would protection be wanted; but that seems hardly satisfactory. It seems to me that the Legislature must have assumed that persons having *bonâ fide* taken stolen money did not come within the statute. The matter is very doubtful; but, on the whole, I think the explanation may be this: it may be that the true meaning of the saying that money has no ear-mark is that when current coins of the realm have passed *bonâ fide* from hand to hand as currency and as money they are considered, for all purposes of property in them, not to be identifiable. They become merely so much money in the possession of the person to whom they have passed. If it is a sovereign, then for all purposes of the property twenty shillings or eight half-crowns are the legal equivalent of the sovereign. If the payment to the man has been made in error the right against him is, as a rule, merely to recover so much money, and not the identical coins. A man cannot, as a rule, be convicted of larceny as a bailee of money: *Reg.* v. *Hassall*, 9 W. R. 708, 30 L. J. M. C. 173. Of course, this view in no way prevents a servant or agent being liable to hand over identical coins received to his master. The point only arises upon the passing or the coins from one person to another as money. The doctrine that money has no ear-mark, whatever it means, is undoubtably a doctrine of our law. Lord Mansfield in *Miller* v. *Race*, 1 Sm. L. C. (10th ed.), p. 447, criticized the expression, not as being incorrect, but as not being the true reason why the property in money passed on transfer independently of the title of the transferor. The doctrine is discussed and explained both in *Taylor* v. *Plumer*, 3 M. & S. 562, and in the judgments of Sir George Jessel and Thesiger, L.J., in *In re Hallet's Estate*, 28 W. R. 732, 13 Ch. D. 696. I think the view which I have suggested as to money, on its being dealt with and passed as money *bonâ fide*, being treated in law as having lost its identity, and being merely so much money in the hands of the person who took it, is really consistent with all the cases, if not with all the *dicta*. If it is correct, it makes the 100th section of the Larceny Act, 1861, work as one would expect. I cannot think that if a thief steals a sovereign and buys some article of small value with it in a shop, and goes away with the article and the change, and then by reason of some accidental circumstance such as the shopkeeper happening to have no other sovereign in his till at the time, the coin can be identified in fact, that upon conviction of the thief the shopkeeper loses his title to the sovereign. I incline to think that the effect of the 100th section of the Larceny Act, so far as money is concerned, is limited to cases where the money stolen or proceeds of it are found on the thief or in the possession of someone taking from him otherwise than by the money passing as currency. When the statute of Hen. 8 was passed its most important effect probably was the same as the effect of an appeal and writ of restitution in the old

rocedure: see 2 Hawkins' Pleas of the Crown, . 23, ss. 49-57—namely, to prevent forfeiture to ie Crown or to any lord having right to waifs or trays or goods of felons; but all that is now bsolete.

I have thought it right to discuss the questions of iw which were argued before us; but as I have ready said, the points do not arise upon the iference which I think it right to draw from the icts stated. I think that the appeal must be dis-issed.

Appeal dismissed.

Solicitor for appellant, *H. Clifton*, for *Plumbridge*, righton.

Solicitors for respondent, *Venn & Woodcock*, for . *A. Goodman*, Brighton.

Q. B. Div.
Darling and Channell, JJ.) May 2.

WILLIAMS *v.* MACDONALD. (*a.*)

icensing Acts—Traveller—Sale during prohibited hours —Travelling in order to obtain refreshment—Licensing Act, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 25—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 10—*Sunday Closing* (*Wales*) *Act*, 1881 (44 *&* 45 *Vict. c.* 61), *s.* 4.

A person cannot be convicted under section 25 *of the icensing Act*, 1872, *of falsely representing himself to be traveller and obtaining intoxicating liquor at a railway ation refreshment room during the hours when licensed emises are closed if, at the time he obtains the drink, has taken a ticket and intends to travel by railroad, id does so travel, even though he only took such ticket id travelled so as to be able to obtain such drink.*

Case stated by the justices of the peace for the unty of Glamorgan sitting as a court of summary risdiction in the petty sessional division of Aberavon the said county under the Summary Jurisdiction it, 1879.

On the 8th of November, 1898, an information was id by Alexander MacDonald, inspector of police Aberavon aforesaid, the respondent, against lward Williams, of Margam-street, Cymmer, in the id county, the appellant, charging that he on the h of November, 1898, by falsely representing mself to be a traveller unlawfully did obtain from e Rhondda and Swansea Bay Railway Co. at sir refreshment rooms at Cymmer railway station tain intoxicating liquor—to wit, beer—in contra-ntion of the provisions of section 10 of the Licensing t, 1874. The justices convicted the appellant, who w appealed.

The facts of the case as found and stated by the gistrates were as follows: The Rhondda and Swansea y Railway Co. were at all material times duly nsed to sell intoxicating liquor in and upon their reshment rooms at the station at Cymmer aforesaid. On Sunday, the said 6th of November, 1898, the d Edward Williams was in the refreshment rooms the station aforesaid at 9.40 a.m., and he repre-ited that he intended to depart from the said mmer station by railroad to Blaengwynfi, another tion on the Rhondda and Swansea Bay Railway o miles distant from Cymmer station, and asked and obtained from the servant of the company in rge of the said rooms a glass of beer. The said ward Williams then had and produced to the pondent at his request a ticket from the said Cymmer station to the said Blaengwynfi station. He did in fact depart from the said Cymmer station by the train leaving for Blaengwynfi aforesaid at 9.48 a.m.

The place where the said Edward Williams lodged during the night previous to the said 6th of November, 1898, was within three miles of the said refreshment rooms.

The said Edward Williams was not a *bonâ fide* traveller at the time he entered the said refreshment rooms and obtained the said glass of beer, and obtained his said ticket and entered the train as aforesaid for the purpose of obtaining intoxicating liquor at the said refreshment room before starting.

It was contended on behalf of the said appellant that as he was a person intending to depart by train he was entitled to ask for and to be supplied with the said glass of beer as aforesaid, and that the provisions as to *bonâ fide* travellers in the said 10th section of the Licensing Act, 1874, did not apply to this case; and also that upon the said facts the said Edward Williams had not committed any offence against the provisions of the said 10th section, and could not be prosecuted or convicted under such section or under section 25 of the Licensing Act, 1872.

The justices were of opinion and determined against the said contentions that inasmuch as the said Edward Williams had lodged within three miles of the said refreshment rooms during the previous night he was not a *bonâ fide* traveller, and that he obtained his ticket and departed by the train for the purpose as aforesaid of obtaining intoxicating liquor before starting, and that he had no right to ask for and to be supplied with the said beer, and that on the facts stated he was guilty in law of the offence charged.

The question for the opinion of the court was whether the determination and conviction were right in law.

By section 25 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), it is enacted that "Every person who by falsely representing himself to be a traveller or a lodger buys or obtains, or attempts to buy or obtain, at any premises any intoxicating liquor during the period during which such premises are closed in pursuance of this Act shall be liable to a penalty not exceeding five pounds."

By section 10 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), it is enacted that "Nothing in this Act contained as to hours of closing shall preclude the sale at any time at a railway station of intoxicating liquors to persons arriving at or departing from such station by railroad. . . . A person for the purposes of this Act and the principal Act shall not be deemed to be a *bonâ fide* traveller unless the place where he lodged the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."

By section 4 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), it is provided that "Nothing in this Act contained shall preclude the sale at any time at a railway station of intoxicating liquors to persons arriving at or departing from such station by railway."

S. T. Evans, for the appellant.—The magistrates were wrong, and the conviction ought to be quashed. The appellant was a traveller within the meaning of the Act. Section 4 of the Sunday Closing (Wales) Act, 1881, specially exempts railway travellers. The words in this section are disjunctive, "arriving at or departing from such station by railway."

He quoted *Fisher* v. *Howard*, 13 W. R. 145, 34 L. J. M. C. 42; *Peache* v. *Colman*, 14 W. R. 439, 35 L. J. M. C. 118.

(a) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

J. E. Bankes, for the respondent.—The Sunday Closing (Wales) Act, 1881, enacts that railway station refreshment rooms shall be closed on Sundays except to travellers by railroad. A person who only goes from one station to another for the purpose of obtaining refreshment is not such a traveller as is referred to by the Act. The justices may find as a fact that a man bought a ticket not intending to travel but merely to obtain drink, and such a man would not be a person arriving at or departing from a station by railroad within the section. They are also entitled to consider whether the man is a traveller, and, if so, whether he is a person travelling for other purposes than to obtain drink. But for the appearance of the inspector the appellant might not have departed by train. Apart from this the mere going by a train does not constitute a man a traveller. In *Penn* v. *Alexander*, 41 W. R. 392, [1893] 1 Q. B. 522, it was held that persons who had come more than three miles in order to obtain beer at a licensed house were not *bonâ fide* travellers within the meaning of the Licensing Act of 1874.

DARLING, J.—In this case the appellant went to a railway station in Wales and obtained a ticket during the time that public-houses were closed, which entitled him to travel to a place two miles off on the railway, and the magistrates found that he obtained the ticket and departed by the train. They also found that he obtained his ticket and departed by the train for the purpose of obtaining intoxicating liquor before starting. Upon behalf of the appellant it is contended that he was wrongly convicted, because by section 10 of the Licensing Act, 1894, it is provided that "Nothing in this Act contained as to hours of closing shall preclude the sale at any time at a railway station of intoxicating liquors to persons arriving at or departing from such station by railroad." The appellant was charged under section 25 of the Act of 1872 with falsely representing himself to be a traveller; and if he had falsely represented himself to be a traveller and got drink at a railway station at a time when public-houses ought to be closed, I do not think that anything in section 10 of the Act 1874 would have availed to save him. But he did depart by the train, and the section entitled him to be served with intoxicating liquors if he was arriving at or departing from the station by railway. If he was to be supplied on departing from the station, he must be supplied before departing by the train. If he departed, he certainly travelled by railway; but upon behalf of the respondent it was contended that the appellant was not a real genuine traveller within the meaning of the word "traveller"—I do not use the term "*bonâ fide* traveller" in this case, because it applies perhaps specially to another branch—so as to exempt him from the operation of section 25 of the Act of 1872. It was contended that the appellant was not a traveller, because he did not intend to depart when he bought the drink; that when he obtained his ticket and departed it was for the purpose of obtaining intoxicating liquor. There is nothing in section 10 of the Act of 1874 enacting that a traveller must be a traveller for a particular purpose—that he must be a traveller engaged on business and not on pleasure. The only pleasure of some people is to drink. In my opinion a person does not cease to be a traveller because he takes a ticket and makes a journey with the object of obtaining drink at the station from which he starts, and probably more at the station at which he arrives, and again at the same station before he returns. If the appellant had taken a ticket, never meaning to travel, and in fact did not travel, he would not have been a traveller nor a person arriving at or departing from a station. The appellant, whatever his motive, did actually depart from the station. Consequently he cannot possibly be said to be a person falsely representing himself to be, what in fact he actually was—namely, a traveller, and the appeal must be allowed, and the conviction quashed.

CHANNELL, J.—I am of the same opinion. Section 10 of the Act of 1874 must be read as saying that persons arriving at or departing from a railway station are, for the purposes of their being supplied at that station, *bonâ fide* travellers within the meaning of the Act. Read in that way there is no inconsistency. If a person is not, in fact, departing from the station at the time when he is supplied—that is to say, about to depart—he would not be entitled to be served either as a *bonâ fide* traveller or a traveller in any sense of the word. There would have been no difficulty if the justices had found that when he was being supplied with liquor the appellant did not intend to go by train, and he only afterwards intended to go by train because a police inspector came in. In those circumstances the conviction would have been right; but they have not found that. In my opinion the appellant was a person departing from the station by railway, and therefore entitled to be supplied. The latter part of the section does not appear to me to cause any difficulty, because, if the proprietor of the refreshment rooms at the station had been prosecuted for serving the appellant, and proved that he had represented himself to be departing by the train when he was not, the licence-holder would come within the provision of the latter part of the section, and the proper course to take would be to prosecute the person supplied under the Act of 1872 for falsely pretending that he was departing from the station. Thus construed, the whole section becomes consistent. It is quite true that it is left open to a person to travel to a station two miles off, or any other distance, when his real motive is to get drink; but it is impossible to so draw an Act of Parliament that no person can evade it or keep himself outside it, and that is what the appellant appears to have succeeded in doing. As to this case I entertain no doubt that the conviction ought to be quashed.

Conviction quashed.

Solicitors for the appellants, *Sharpe, Parker, & Co.*, for *Cuthbertson & Powell*, Neath.

Solicitors for the respondent, *Norris, Allen, & Chapman*, for *Tennant & Jones*, Aberavon.

Prob. Div. & Adm. Div. } May 11.
Admiralty. }

"THE CARLOTTA." (*a.*)

Ship—Collision—Regulations for Preventing Collisions at Sea, art. 4 (a)—*Vessel aground—Whether Regulations for Preventing Collisions at Sea apply in Thames.*

Plaintiffs' vessel, while proceeding up the Thames, ground at Limehouse Reach about 3.20 *p.m., and remained hard and fast. She sounded the four-blast signal prescribed by article* 40 *of the Thames Bye-laws to signal that she was out of command. Defendants' vessel, which was following her up the river, disregarded these signals and ran into her stern.*

In an action by the plaintiffs to recover damages, the defendants alleged that the plaintiffs' vessel had failed to

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

carry two black balls as prescribed by article 4 (a) *of the Regulations for Preventing Collisions at Sea in the case of vessels out of command.*

Held, that, assuming without deciding that the Regulations for Preventing Collisions at Sea applied to the River Thames, article 4 (a) *of those regulations was not applicable, as it applied only to vessels not under command whilst afloat; and, further, even if that article did apply to vessels aground, the case was governed by article* 40 *of the Thames Bye-laws.*

This was an action of damage instituted on behalf of the owners of the steamship *Dundee* against the steamship *Carlotta* to recover the damages arising out of a collision which occurred between the two vessels in Limehouse Reach of the River Thames on the afternoon of the 21st of November, 1898, about 3.25 p.m., when *The Dundee* whilst on a voyage from Dundee to London with a general cargo and passengers, in charge of a duly qualified pilot and proceeding up Limehouse Reach, took the ground in about mid-channel heading straight up the reach, and remained aground with her engines stopped.

The action was heard on the 27th of April before Barnes, J., assisted by two of the Elder Brethren of the Trinity House, when evidence was given, *inter alia*, that before the collision, on *The Carlotta* approaching *The Dundee* four short blasts in rapid succession had been sounded on the steam whistle of *The Dundee*, but that she had not exhibited the signals mentioned in the 4th article, sub-section (*a*), of the Regulations for Preventing Collisions at Sea.

Pickford, Q.C., and *Head*, for the plaintiffs.—Those on board *The Dundee* obeyed all the material bye-laws of the Thames Conservancy, and made the signals required by article 40 of those bye-laws when they found *The Dundee* was aground and *The Carlotta* was approaching. The power given to her Majesty by Order in Council to make rules for preventing collisions at sea under section 418 of the Merchant Shipping Act, 1894, clearly appears from that section and the provisions of section 421 of the same Act not to extend to the making of rules for preventing collisions in waters connected with the sea, and any clause in the Order in Council of the 27th of November, 1896, purporting to give a wider authority to the Regulations for Preventing Collisions at Sea is *ultra vires*.

They referred to *The Franconia*, 2 P. D. 8; *The Ripon*, 33 W. R. 659, 12 P. D. 65; *The Monte Rosa*, 41 W. R. 304, [1893] P. 23.*

Carver, Q.C., and *Stubbs*, for the defendants.

Their argument appears from the judgment. In addition to the authorities there cited they referred to *The Leverington*, 11 P. D. 117, 34 W. R. Dig. 175.

BARNES, J.—It was argued on behalf of the defendants that *The Dundee* must in any event be held to blame, on the ground that she ought to have complied with article 4 (*a*) of the Regulations for Preventing Collisions at Sea by putting up two black balls to indicate that from an accident she was not under command. There is no doubt that those in charge of *The Dundee* did not do that, though after the collision they were put up for a short time but hauled down again, as the pilot considered that their exhibition was wrong in the river; at any rate they were not there at the time of the collision, and the defendants say that if the balls had been put up prior to the collision the fact that the vessel was aground would have been more readily noticed. I doubt whether it would have made any difference, for it seems to me on the evidence that those on board *The Carlotta* were so careless as not to be keeping a proper look-out; still, I must deal with the point, because it was argued on behalf of the defendants that it might have affected the case. This is really a point of law.

On behalf of the plaintiffs it was argued that article 40 of the Thames Bye-Laws was complied with, and that as that article deals with the case of a vessel not under command, the sea rules do not apply, and that therefore article 4 (*a*) does not apply. On the defendants' side it was contended that the sea rules do apply, and that when they are applied article 4 (*a*) applies to this particular case, so that a sight signal was required as well as the sound signal by article 40 of the Thames rules.

The first question is whether the sea rules apply. The Regulations for Preventing Collisions at Sea at present in force—namely, those of 1897, are made under the authority of section 418 of the Merchant Shipping Act, 1894, which provides for the making of "Regulations for the Prevention of Collisions at Sea." The regulations themselves, as drawn, commence with a preliminary statement, "These rules shall be followed by all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels." It is also provided by article 30 of those regulations that "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation of any harbour, river, or inland waters." For reasons which I will give presently, I do not think it is absolutely necessary for me to determine whether the sea rules apply or not, though—assuming that there are either no rules, or no rules which ought reasonably and properly to prevent their application, my present opinion is that they would apply—that is to say, I think that the sea regulations in such circumstances are intended, and ought, to apply to tidal waters connected with the high seas navigable by sea-going vessels. There is no doubt that the Regulations for Preventing Collisions at Sea for the time being in force have from time to time been treated as so applying. For instance, in the cases of *The Concordia*, L. R. 1 A. & E. 93, 15 W. R. Adm. Dig. 28; *The Velocity*, 18 W. R. 264, L. R. 3 P. C. 44; and *The Cologne and The Ranger*, 21 W. R. 273, L. R. 4 P. C. 519, the sea rules as then existing were treated as applying to the Thames.

I felt a little difficulty in understanding why they were assumed to apply, and why the Thames rules were not considered in those cases; but the explanation appears to be that at the time those cases were decided the "steering and sailing" part of the rules of the Thames, as we now have them, had not been framed. As far as I can ascertain, the rules at that time in the Thames were those which were made in the years 1860, 1862, and 1864 as bye-laws under the provisions of the Thames Conservancy Act, 1857. These bye-laws only contain a general rule that vessels are to be navigated in a careful manner, together with certain provisions as to lights. It was not until 1872 that the sailing and steering parts of the rules applicable to the Thames seem first to have been put forward in their present shape. This seems to be the reason why no reference is made in the cases I have mentioned to anything but the sea rules. Then, again, the sea rules have been treated as applying in the Humber in the case of *The Germania*, Maude & Pollock's Merchant Shipping, vol. 1, p. 606 (note), and in the Clyde in *The Ariadne*,

* See *The C. S. Butler*, 23 W. R. 113, L. R. 4 A. & E. 238, at p. 241, and *The Fyenoord*, Swa. 374, which latter case seems to explain why in some cases where no special local rules for preventing collisions in rivers have been made by lawful authority. The Regulations for Preventing Collisions at Sea have been applied as binding.

9 Ct. Sess. Cas. 4 ser. 118, where, as far as I can see, there was nothing to prevent their application. If, therefore, this case were to depend upon an absolute decision whether the sea rules applied in the Thames, I should be disposed to hold that they did apply.

But whether the sea rules apply in the Thames or not, it seems to me that article 4 (*a*) of those rules does not apply to a case like the present. That article is applicable in its terms to "a vessel which from any accident is not under command," and in my opinion those words do not apply to a vessel which is fast aground. They apply to a vessel which is afloat. They might apply to a vessel touching and moving, but I do not think they apply to a vessel which is hard and fast aground. The words I have read lead me to that view, and that view is fortified by the fact that in article 11 of the sea rules there is an express provision for "a vessel aground in or near a fairway" to carry the light or lights mentioned in that article, and the two red lights prescribed by article 4 (*a*). Article 11 therefore deals with the case of a vessel aground at night, but does not provide for the case of a vessel aground in the daytime. The view I have expressed is further fortified by what is to be found in article 15, sub-section (*e*), of the same rules—namely, that "a vessel under way, which is unable to get out of the way of an approaching vessel through not being under command or unable to manœuvre as required by these rules, shall . . . at intervals of not more than two minutes, sound three blasts in succession." It is also material to notice that there is, in the present Thames rules (article 30), a provision for "a vessel of 150 feet or upwards aground in or near a fairway" carrying certain anchor lights, which shows that the Thames rules, when dealing with a ship aground require that at night certain lights shall be carried but make no provision with regard to the ship aground in the daytime. The reason suggested to me by the Elder Brethren for this apparent omission is that in the daytime you can see that a ship is aground, and that if you cannot see her by reason of fog or other analogous cause, then she must make some signal—I have not considered exactly what—to warn other vessels of her position. But there is this further consideration, that even if article 4 (*a*) were to apply to a vessel aground it would not in my opinion apply to a vessel aground in the Thames; because, assuming that the words in that article "vessel which from any accident is not under command," apply to a ship aground, there is an express provision in article 40 of the Thames rules for giving a signal "by four blasts of the steam whistle," and there is no provision for putting up balls in the daytime. It seems to me that if you find an article in the Thames rules which—assuming that article 4 (*a*) of the sea rules applies to a ship aground—would also apply to a ship in that position, then it is not consistent with the whole scope of those rules, or with some decisions, to require that the provisions in article 40 of the Thames rules should be supplemented by the provisions in the sea rules. In other words, article 30 of the sea rules comes into operation and prevents the interference of the sea rules with the operation of what is a special rule duly made by local authority.

The argument for the defendants was that, assuming article 40 of the Thames rules applied, and required one signal, article 4 (*a*) of the sea rules added another, to be given at the same time. To my mind this argument is not sound, because I think that where there is a certain rule which deals with the whole scope of the subject, to add parts of provisions of the sea rules would be to interfere with the operation of the Thames rules.

I am strengthened in this view by the decision of Butt, J., in *The Ecossaise*, Shipping Gazette Weekly Summary, 1885, p. 806. That was a case of collision in the Thames, and in a part of the Thames in which there is no starboard-hand rule as there is in the sea rules, but, according to the argument for the defendants there would be nothing inconsistent, where the Thames rules are silent, in adding to the Thames rules from the sea rules. Butt, J., however, held that they did not apply, for it is obvious, when considering that case, that the starboard-hand rule in that part of the Thames was left out because it is necessary for the navigation of the Thames that there should not be any such rule in that part of the river. To imply such a rule from the sea rules would, therefore, be inconsistent with the general scope of the Thames rules.

On these grounds, in my opinion, the signal which it is contended by the defendants should have been given by *The Dundee* was not required, and there was no breach by her of the sea rules, even if those rules are to be considered as applying to the Thames.

I only desire to notice one other point urged by the defendants—namely, that under article 38 of the Thames rules *The Dundee* ought to have rung a bell. That rule does not, in my opinion, apply to this case. In the result, and for the reasons I have already given, I find *The Carlotta* alone to blame for this collision, and that her owners are liable.

Solicitors for plaintiffs, *Cooper & Co.*

Solicitors for defendants, *Stokes & Stokes.*

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1898, TO THE 12TH OF AUGUST, 1899.

VOL. XLVII.

LONDON: 27, CHANCERY LANE, W.C.

1899.

A DIGEST

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CASES DECIDED IN ENGLAND,

FROM

THE 24TH OF OCTOBER, 1898, TO THE 12TH OF AUGUST, 1899,

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VOL. XLVII. OF THE WEEKLY REPORTER, 1898-99;

AND IN

CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; Q.B.D., the Queen's Bench Division; BKCY., the Queen's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1899, *as well in this Volume* (47) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

ADMINISTRATION:—

1. *Assets—Assignment of policy and investment of money on mortgage—Protection of creditors—Injunction—13 Eliz. c. 5.*—The court has jurisdiction before judgment in an administration action to secure, for the benefit of creditors, the proceeds of moneys which have been received under a deed which is impeached as void by virtue of 13 Eliz. c. 5.—MOWAT, RE, KINGSTON COTTON MILL CO. *v.* MOWAT, *Ch.D. Stirling, J.*, 506; [1898] 1 Ch. 831; 68 L. J. Ch. 390; 80 L. T. 406.

2. *Claims against estate of deceased person—Evidence of claimant—Corroboration.*—There is no rule that the court must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncorroborated evidence of the claimant. Such uncorroborated evidence should be examined with care, and even with suspicion, but if in the result it convinces the court that the claim should be allowed, the court should allow the claim.

In re Hodgson, Beckett v. *Ramsdale*, 31 Ch. D. 183, followed.

In re Finch, Finch v. *Finch*, 23 Ch. D. 267, *dissented from.*—RAWLINSON *v.* SCHOLES, *Q.B.D.*; 79 L. T. 350.

3. *Creditor's action—Right of retainer—Decree for administration—Form of administration bond.*—The form of a creditor's administration bond as now used still permits a creditor who has taken out letters of administration to retain his own debt, even out of assets come to his hands after a decree for administration obtained by other creditors.

Nunn v. *Barlow* (1824), 1 Sim. & St. 588, followed.

Jones v. *Evans* (1876), 24 W. R. 778, 2 Ch. D. 420, distinguished.—DAVIES *v.* PARRY, *Ch.D. Romer, J.*, 429; [1899] 1 Ch. 602; 68 L. J. Ch. 346.

4. *Executor—Retainer—Money paid into court.*—An executor does not lose his right of retainer in respect of money which he has paid into court on his own application.—LANGLEY, RE, JOHNSON *v.* LANGLEY, *Ch.D. Kekewich, J.*; 68 L. J. Ch. 361.

5. *Insolvent estate—Priority of specialty debts.*—An executor has no power to pay simple contract creditors in full, to the prejudice of specialty creditors.

In re Ormond, 58 L. T. Rep. 24, 36 W. R. Dig. 5, not followed.—HANKEY, RE, CUNLIFFE SMITH *v.* HANKEY, *Ch.D. North, J.*, 444; [1899] 1 Ch. 541; 68 L. J. Ch. 242; 80 L. T. 47.

6. *Locke-King's Act*, 1854 (17 & 18 *Vict. c.* 113).—*Republication—Statute of Limitations—Money charged on land—Presumption of payment—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—A testator made a will in 1845, leaving real estate on trust for sale, and, after directing payment of his debts, directed that the income should be paid to his widow during her life. By a codicil in 1855 the testator specifically devised certain portions of the real estate to his wife for life, with remainder over, and in other respects confirmed his will. The testator's whole property was subject to a mortgage for £3,000, not created by the testator, and also to charges created by him.

The testator died in 1855, and in 1865 the real estate (other than the specifically-devised portion) was sold, and the mortgage debt of £3,000 and the charges paid out of the proceeds. The widow died in 1895. After the sale, and until her death, she received the income of the residue of the proceeds of sale, and also the rents of the unsold specifically-devised real estate.

Held, that the property specifically devised by the codicil was liable to contribute towards payment of the £3,000, as it was not a debt of the testator; and, as the codicil confirmed the will, 17 & 18 Vict. c. 113 applied.

But held, that, owing to the delay from 1865 to 1895, the liability was barred by the Statute of Limitations.—ALLEN, RE, BASSET *v.* ALLEN, *Ch.D. North, J.*, 55; [1898] 2 Ch. 499; 79 L. T. 207.

7. *Practice—Creditor of the executors—Executors continuing the business.*—Administration of testator's estate ordered in an action by a creditor of the executors who had continued to carry on the testator's business.—SHOREY, RE, SMITH *v.* SHOREY, *Ch.D. Byrne, J.*, 188; 79 L. T. 349.

8. *Practice—Staying proceedings—Laches—Knowledge of proceedings in Chancery—Subsequent delay—Order—Suit dismissed.*—The plaintiff, who had been aware of, and had taken steps in, administration proceedings in the Chancery Division in the year 1894, and who also had knowledge at the time that the claim of parties in those proceedings and her own claim (if any) depended upon the legitimacy or illegitimacy of the mother of the intestate, took no steps until 1898 to prosecute her claim as the alleged next-of-kin of the intestate.

On the 21st of April, 1896, an order was made for the balance of the estate to be distributed among the persons who were found, in the Chancery proceedings, to be the next-of-kin, all further proceedings therein were stayed; and on the 7th of June, 1898, the writ in the present action in the Probate Division was issued by the plaintiff claiming, as next-of-kin of the deceased, administration to his estate.

Held, that although it was necessary to determine whether the matter was *res judicata*, the plaintiff had practically acquiesced in the Chancery proceedings and had been guilty of such laches as to disentitle her to maintain, against those who had shared the estate under the orders in the Chancery proceedings, a suit to compel them to refund their shares; and, that as the only object of the present suit, which was in form to revoke letters of administration granted in 1892 and obtain a grant in her own favour, was to aid her in an attempt to recover the property which had been distributed, this court ought not to assist her attempt to obtain a grant which, if obtained, would be useless to her.

Held, that the suit must be dismissed with costs.—MOHAN *v.* BROUGHTON, *P.D. & Ad.D.*; [1899] P. 211; 68 L. J. P. 91.

9. *Testamentary expenses—Probate costs—Costs of unsuccessfully opposing probate.*—By his will, a testator charged his residuary real and personal estate with the payment of his debts and funeral and testamentary expenses. His personal estate was insufficient for the payment of his debts. An action was brought in the Probate Division by a person claiming to revoke the probate of the will, and to have an earlier will established; but that action was dismissed, and the costs of all parties were directed by the Probate Division to be paid out of the testator's estate.

Held, that the plaintiff's costs of such action were not testamentary expenses within the meaning of the provision in the will, and that they were therefore not payable out of the testator's real estate.—PRINCE, RE, GODWIN *v.* PRINCE, *Ch.D. Stirling, J.*, 25; [1898] 2 Ch. 225.

See also Bankruptcy, 2, 3; Executor, 2; Married Woman, 4; Trustee, 7.

ADMIRALTY:—

1. *County Court—Appeal—Amount of damage under £50—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 31.—A plaintiff in a collision action, instituted on the admiralty side of the county court, whose damages are less than £50, has no right of appeal from a judgment dismissing the suit on a question of fact although he institutes his action in a sum exceeding £50.—"BURMA," THE (No. 2), *P.D. & Ad.D.*; 80 L. T. 839.

2. *County court—Jurisdiction—Service of summons—Agent—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 21, *sub-section* 2.—By the County Courts Admiralty Jurisdiction Act, 1868, s. 21, "Proceedings in an admiralty cause shall be commenced—(2) in the county court having admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides. . . ."

In an action *in personam* instituted in the City of London Court by the plaintiffs, the owners of a barge damaged by collision with the defendant's steamship within the jurisdiction, the summons described the defendant as "George Smith, of 75, Boswell-street, Glasgow, the owner of the steamship or vessel *City of Agra*, whose agents in England are Messrs. Montgomerie & Workman, of 36, Gracechurch-street, E.C., within the jurisdiction of this court." The summons was served on a member of the firm of Montgomerie & Workman; but the *City of Agra* had been lost before the commencement of the action.

Held, by Gorell Barnes, J., that the service of the summons be set aside, as "agent in England" means a person acting for another person in relation to the vessel or property proceeded against at the time the service of the process is effected, and, at that time, the agency had ceased.

The cases of *The County of Durham*, [1891] P. 1, and *Pugsley* v. *Ropkins*, [1892] 2 Q. B. 184, explained.—"CITY OF AGRA," THE, *P.D. & Ad. D.*; [1898] P. 198; 79 L. T. 307.

3. *County Court—Practice—Payment into court with denial of liability—Meaning of word "tender"—Final Order—County Courts Admiralty Jurisdiction Act*, 1868, *s.* 26—*County Court (Admiralty) Rules*, 1892, *Ord.* 39b, *rr.* 48-50.—Order 39*b* of the County Court Rules of 1892 contains special rules to be applied in admiralty actions in county courts having admiralty jurisdiction, and certain rules of such Order are headed "Tenders." Of these rules so headed, rule 48 requires a notice of tender to be given, and provides, further, that money may be paid into court with a denial of liability, and that if this is done the form of notice of tender shall be altered accordingly; and rule 49 directs that within forty-eight hours after receipt of such notice of payment into court the adverse party shall file a notice of acceptance or rejection of "the tender," whilst rule 50 is in terms as follows: "A party accepting a tender shall be entitled to his costs of suit, and shall be at liberty to tax and enforce payment of the same without the necessity of an application to the court for the purpose."

Held, that the term "tender" in rules 49 and 50 of the above-mentioned Order referred to and included both a payment into court without denial of liability and a payment into court with a denial of liability.

An order of the judge of a county court having admiralty jurisdiction refusing the taxation of his costs to a party entitled to the benefits given by the latter of these two last-mentioned rules is a final order within section 26 of the County Courts Admiralty Jurisdiction Act, 1868, and is consequently appealable without the permission of the judge of the court appealed from.—"VULCAN," THE, *P.D. & Ad.D.*, 123; [1898] P. 222.

4. *Limitation of liability—Practice—Costs—Objection to registrar's report—Discretion of registrar.*—In a limitation of liability suit the plaintiffs objected to certain items of the defendants' claim for damage to cargo sustained in consequence of the collision, upon the ground that a large proportion of the damage was owing to the defendants' failure to use due diligence after the collision to minimize the damage. The registrar found that the plaintiffs' objections were well founded, and allowed only a portion of the defendants' claim, and ordered each party to pay their own costs of the reference. From this order the defendants appealed by motion.

Held, confirming the report of the registrar, that though there is a general rule of practice that the plaintiff in a limitation of liability suit must pay the costs, that practice is not invariable; that the registrar has discretion in a proper case to make such order as to costs as he thinks just; and that his order was right.—"RIJNSTROOM," THE, *P.D. & Ad.D.*; 80 L. T. 422.

5. *Limitation of liability—Unregistered steam-tug under fifteen tons burden entitled to limit her liability—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 2, 3, 72, 503—*Meaning of ship "not exceeding fifteen tons burden."*—The 2nd section of the Merchant Shipping Act, 1894, provides: "(1) Every British ship shall, unless exempted from registration, be registered under the Act. (2) If a ship required by this Act to be registered is not registered under this Act, she shall not be recognized as a British ship"; whilst amongst the ships exempted from registration under the Act are, by section 3 of the same Act, "ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom." By section 503 the owners of a steamship shall not, where without their actual fault or privity any loss or damage is caused to any other vessel by reason of the improper navigation of their steamship, be liable to damages beyond £8 for each ton of the "gross tonnage" of the steamship without deduction on account of engine room, but deducting the space "certified" under the Act to be occupied by seamen.

Held, that the words "tons burthen" in section 3, meant the tonnage measured in accordance with the provisions of the Act and the tonnage regulations thereof.

Held, consequently that a ship, employed solely in navigation on the rivers or coasts of the United Kingdom and not exceeding fifteen tons burthen so ascertained, was properly exempted from registry; and that her owners were entitled to limit their liability under section 503 to £8 per ton of her "gross tonnage."—"BRUNEL," THE, *P.D. & Ad.D.*, 288; [1899] P. 45; 68 L. J. P. 1; 79 L. T. 527.

6. *Practice—Action of restraint—Minority owners—Value of shares—Amount of bail.*—In an action of restraint the amount of bail to be put in by the defendants is the same proportion of the whole value of the vessel as the number of shares held by the plaintiff bears to the whole number of shares in the vessel.—"CAWDOR," THE, *P.D. & Ad.D.*; 79 L. T. 357.

ADULTERATION:—

1. *Milk—act of stranger—Liability of innocent vendor—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6; *Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.—A vendor of milk under a contract, consigned milk to a railway company for carriage to Paddington Station, where it was to be delivered to purchasers. On arrival at that station the milk was found to be adulterated by the addition of 9 per cent. of water. The adulteration took place without the knowledge of the vendor during the railway transit.

Held, that the vendor was liable to be convicted, under section 6 of the Sale of Food and Drugs Act, 1875, for selling, to the prejudice of the purchaser, milk which was not of the nature, substance, and quality demanded; but that the vendor's personal innocence of the adulteration was a fact to be taken into account in mitigation of punishment.—PARKER *v.* ALDER, *Q.B.D.*, 142; [1899] 1 Q. B. 20; 68 L. J. Q. B. 7; 79 L. T. 381.

2. *Food and drugs—Facts within justices' own knowledge—Application of.*—Upon the hearing of a charge of adulterating food, the justices are entitled to take into consideration facts within their own knowledge as to whether or not the food has been adulterated.

Reg. v. *Field, Ex parte White*, 64 L. J. M. C. 158, followed.—SHORTT *v.* ROBINSON, *Q.B.D.*; 68 L. J. Q. B. 352; 80 L. T. 261.

ADVANCEMENT.—See Will, 2.

ADVOWSON.—See Charity, 6; Will, 11.

AGENT.—See Contract, 6; Negligence, 1, 2; Principal and Agent.

ANIMAL:—

1. *Cruelty to — Killing — Intention to commit cruelty.*—An intention to commit cruelty is no part of an offence under section 2 of the Cruelty to Animals Act, 1849. The question is, whether in

fact there is cruelty.—DUNCAN *v.* POPE, *Q.B.D.*; 80 L. T. 120.

2. *Cruelty—Summary conviction—"Cause" act of cruelty—"Knowingly advise and counsel" commission of offence—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.—By section 5 of the Summary Jurisdiction Act, 1848, a person who shall counsel the commission of any offence which is punishable on summary conviction shall be liable to be proceeded against and convicted, either together with the principal offender or before or after his conviction.

Therefore a person who knowingly counsels the owner of a horse to perpetrate an act of cruelty upon the animal may be convicted upon an information under section 2 of the Cruelty to Animals Act, 1849, for causing to be cruelly ill-treated the horse, although his advice to the owner was the remote, and not the proximate, cause of suffering to the animal, and no proceedings had been instituted against the owner.—BENFORD *v.* SIMS, *Q.B.D.*, 46; [1898] 2 Q. B. 641.

ARBITRATION:—

1. *Damages—Arbitration under Public Health Acts—Diseased meat—Value—Costs of defending prosecution—Duty of arbitrator.*—Upon an arbitration under section 308 of the Public Health Act, 1875, all that is to be considered by the arbitrator is whether the person claiming compensation has suffered damage and the amount of such damage.

The costs of successfully defending a prosecution for exposing for sale unsound meat, which meat is the subject of the claim for compensation, cannot be recovered as damages.—DAVIES *v.* RHONDDA DISTRICT COUNCIL, *Q.B.D.*; 80 L. T. 696.

2. *Ship—Salvage—Authority of master—Lloyd's salvage agreement—Committee of Lloyd's—Staying proceedings—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—The master of two steamships signed an agreement known as "Lloyd's salvage agreement," by clause 1 whereof they agreed to perform salvage services to another steamship for a fixed sum, and that in the event of any dispute arising as to the adequacy or otherwise of such sum, the remuneration should be fixed by the Committee of Lloyd's

By another clause (11 (4)) of the agreement it was provided that the Committee of Lloyd's might itself object to the sum named in the salvage agreement.

The owners of the salving steamers instituted salvage actions in the Admiralty Court, whereon the defendants applied to have the actions stayed under section 4 of the Arbitration Act, 1889.

Barnes, J., refused to stay the actions.

Held, by the Court of Appeal (affirming Barnes, J.) that in refusing to stay the actions the learned judge had rightly exercised the discretion given him by section 4 of the Arbitration Act, upon the grounds that there is great doubt whether the master of a vessel has authority to bind his owners to arbitration.

Held also, by Rigby, L.J., that the fact that the Committee of Lloyd's were to be the arbitrators, and that it also had the right to send the matter to arbitration was a good ground for refusing to stay the actions.

Query, whether the master of a vessel has authority to bind the owners to submit to arbitration.—"CITY OF CALCUTTA," THE, *C.A.*; 79 L. T. 517.

See also Company, 42; Industrial Society; Landlord and Tenant, 3; Limitation Statutes, 1; Local Government, 15; Master and Servant, 3; Railway, 3, 8, 13, 16.

ASSIGNMENT:—

1. Chose in action—*Assignment of a debt to accrue arising out of a contract—Agreement to form fund to promote company—Advance by bank on agreement—Notice to subscribers to agreement—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25 (6).—By an agreement dated the 1st of June, 1897, the defendant for the consideration therein appearing promised and agreed to pay to one V. the sum of £100 or his nominees or assigns within fourteen days after being called upon so to do.

On the 3rd of June, 1897, V. assigned all his rights and interests under that agreement to the plaintiff bank, and notice of such assignment was given to the defendant. On the 18th of March, 1898, the bank's solicitors gave the defendant notice to pay the bank the £100 within fourteen days.

Held, that the bank were entitled to recover on the authority of *Walker* v. *The Bradford Old Bank*, 12 Q. B. D. 511.—MERCANTILE BANK OF LONDON *v.* EVANS, *Q.B.D.*; 79 L. T. 496.

2. *Debt*—Chose in action—*Notice—Judicature Act*, 1873, *s.* 25 (6).—Where a notice of assignment of a debt under section 25, sub-section 6, of the Judicature Act, 1873, stated a wrong date for the assignment,

Held, that the notice was invalid.—STANLEY *v.* ENGLISH FIBRES INDUSTRIES, *Q.B.D.*; 68 L. J. Q. B. 839.

3. *Debt — Negotiable instrument — Assignment of consideration — Notice of assignment after negotiation—Duty of debtor.*—A debtor who, after giving a negotiable instrument for his debt, receives notice that the debt itself has been assigned, may properly disregard such notice and pay to the assignor who still holds the instrument.—BENCE *v.* SHEARMAN, *C.A.*, 350; [1898] 2 Ch. 582.

4. *Voluntary gift—Banker's deposit receipt—Indorsement and delivery—Donee appointed executor.*—The indorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operate as a good equitable assignment of the amount on deposit at the bank; but, if anything be required to complete the gift, the appointment of the donee as executor of the donor perfects the gift.—GRIFFIN, RE, GRIFFIN *v.* GRIFFIN, *Ch.D. Byrne, J.*; [1889] 1 Ch. 408; 68 L. J. Ch. 220; 79 L. T. 442.

AUCTIONEER.—See Solicitor, 1.

BAILMENT:—

Loan of chattel—Defect in chattel—Injury to borrower therefrom—Liability of lender to borrower.—In the case of a gratuitous loan of a chattel the lender is not liable to the borrower for injury caused by a defect in the chattel unless he knew of the defect at the time of the loan, and either concealed it from the borrower or was guilty of gross negligence in not informing him of it.

Blakemore v. *Bristol and Exeter Railway Co.*, 6 W. R. 336, 8 E. & B. 1035, and *MacCarthy* v. *Young*, 9 W. R. 439, 6 H. & N. 329, approved.—COUGHLIN *v.* GILLISON, *C.A.*, 113; [1899] 1 Q. B. 145; L. J. Q. B. 147; 79 L. T. 627.

BANKER:—

1. *Cheque—Defective title—Payment in good faith and without negligence—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.—By section 82, where a banker in good faith and without negligence receives payment for a customer of a crossed cheque,

and the customer has no title or a defective title, the banker is under no liability to the true owner.

A rate collector who had been in the habit of receiving cheques for rates and cashing them at a branch bank of the defendants, where he was known, but had no account, obtained a cheque from the plaintiffs by falsely pretending that a rate was due; the cheque was drawn to his order and crossed and marked "not negotiable." The cheque was presented by the rate collector at the defendants' branch bank and cashed, and he appropriated the proceeds.

In an action by the plaintiffs against the defendants to recover the cheque or its proceeds it was found as a fact that the defendants received payment in good faith and without negligence, and that the rate collector was a "customer."

Held, that the defendants were protected by section 82 of the Bills of Exchange Act, 1882.—GREAT WESTERN RAILWAY CO. *v.* LONDON AND COUNTY BANKING CO., *Q.B.D.*; [1899] 2 Q. B. 172.

2. *Cheque—Effect of drawee bank certifying cheque—Usage—Effect of crediting customer with amount of cheque deposited.*—Unless a specific usage is proved, the only effect of a drawee bank initialling a cheque drawn upon it is to certify that it has funds of the drawer in its hands sufficient to meet its payment.

Held, that the respondent bank, by accepting a deposit of a certified cheque and crediting the depositor with the amount thereof in her account, must be deemed to have accepted it for the purpose of cashing it as the depositor's agent, and could not, in the absence of express agreement to that effect, be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank.—GADEN *v.* NEWFOUNDLAND SAVINGS BANK, *P.C.*; [1899] A. C. 281; 60 L. J. P. C. 57; 80 L. T. 329.

3. *Trust fund—Account not ear-marked as trust account—Set-off.*—Where a company received from the respondents trust moneys paid them to the credit of a separate account between it and the appellant bank, and failed,

Held, in an action by the respondents, that as the bank was not shown to have received the moneys as trust funds, or to have received during the currency of the account notice of their trust character, the bank was entitled to set them off against its own claim against the company in liquidation.—UNION BANK OF AUSTRALIA (LIMITED) *v.* MURRAY-AYNSLEY, *P.C.*; [1898] A. C. 693.

See also Limitation Statutes, 4; Railway, 1.

BANKRUPTCY:—

1. *Act of bankruptcy—Substantial assignment of whole property for past debt—Trader whose property chiefly consists in implements of his trade—Assignment of implements of his trade rendering him unable to continue trading.*—R., a retail trader, within three months of the making of a receiving order against him, assigned to V., a trade creditor, in consideration of a past debt of £174 6s. 6d. and a money payment of £2 13s. 6d., the goodwill of his business, which was of very small value, together with the trade fixtures, three horses and cart and van, and also his household furniture.

At the date of the assignment R. was the owner, in addition to the property comprised in the assignment, of two life policies which produced £46 6s. 3d., and of three leases which were very heavily mortgaged, two of which the trustees disclaimed.

Held, that, as the property of the bankrupt consisted chiefly in the implements of his trade, the assignment which rendered him incapable of carrying on his trade was in substance an assignment of all his property and void as against his trustee.—RAYMENT, RE, TRUSTEE, EX PARTE, *Bkcy.*; 80 L. T. 807.

2. *Administration—Insolvent estate—Executor's right of retainer—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.—The executor of an insolvent testator, against whose estate an order for administration in bankruptcy has been made, is entitled to exercise his right of retainer, notwithstanding that, in ignorance of his rights, he has paid over to the official receiver all the assets he has collected, and has put in a proof (afterwards withdrawn) for the amount of the debt due to him.

Judgment of Wright, J., *ante* 432, affirmed.—RHOADES, RE, OFFICIAL RECEIVER, EX PARTE, *C.A.*, 561; 68 L. J. Q. B. 804; 80 L. T. 742.

3. *Administration—Insolvent estate—Execution creditor—Completion of execution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125.—Section 45 of the Bankruptcy Act, 1883, which disentitles an execution creditor to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he completes the execution before the date of the receiving order, is not applicable to an administration of the estate of a deceased debtor under section 125.—HASLUCK *v.* CLARK, *C.A.*, 471; [1899] 1 Q. B. 699; 68 L. J. Q. B. 486; 80 L. T. 454.

4. *After-acquired property—Solicitor's bill of costs—Chose in action—Assignee for value—Notice by trustee—Priority—Out of pocket expenses.*—An undischarged bankrupt assigned for value the amount of his taxed bill of costs as solicitor for the petitioning creditors of a company in liquidation. His trustee in bankruptcy gave notice, before the assignee, to the liquidator of the company claiming the amount of the taxed bill as part of the after-acquired property of the bankrupt.

Held, that the trustee was entitled to the amount in priority to the assignee.

Mercer v. *Vans Colina*, [1897] 67 L. J. Q. B. 424, followed.

In such a case the bankrupt's out of pocket expenses will, if properly vouched, be allowed to him out of the amount.—BEALL, RE, THE OFFICIAL RECEIVER, EX PARTE, *Bkcy.*; [1899] 1 Q. B. 688; 68 L. J. Q. B. 462; 80 L. T. 267.

5. *Charging order on dividends in favour of stranger to bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 102—*Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—The court sitting in bankruptcy has no power to make a charging order under the Solicitors Act, 1860, upon dividends payable under the bankruptcy to the client of the solicitor seeking the charging order.—COOK, RE, CRIPPS, EX PARTE, *Bkcy.*, 524; [1899] 1 Q. B. 863; 68 L. J. Q. B. 597; 80 L. T. 495.

6. *Contempt of court—Evidence of public examination—Offer of money to bankrupt to suppress.*—It is a contempt of court to offer money to a bankrupt to induce him at his public examination to suppress evidence which, although capable of satisfactory explanation, would be liable to misconstruction, and which might damage a limited liability company of which the offerer is a director.—HOOLEY, RE, RUCKER'S CASE, *Bkcy.*; 79 L. T. 306.

7. *Contempt of court—Publication of official receiver's report before presentation to the court—Comment thereon—Limited company.*—Comment on the report of the official receiver in bankruptcy before

it has been read to the court may amount to contempt of court. The court will not, however, commit except in a case where a real attempt has been made to interfere with the course of justice.

A limited company cannot be committed for contempt of court.—HOOLEY, RE, HOOLEY, EX PARTE (No. 1), *Bkcy.*; 79 L. T. 706.

8. *Costs—Taxation—Retaining fees—Discretion of master—Bankruptcy Rules*, 1886 *and* 1890, *r.* 353—*Scale of Solicitors' Costs General Regulations, rr.* 1, 2.—On the taxation in bankruptcy of the bill of costs of a solicitor of the trustee in bankruptcy, the taxing-master has a discretion to allow retainers to counsel; but, unless in very exceptional circumstances, such retainers will not be allowed.—NORDMANN, RE, HASLUCK, EX PARTE, *Bkcy.*, 151.

9. *County court—Jurisdiction of county court judge in bankruptcy*—Certiorari—*Order for arrest of debtor—"Has absconded or is about to abscond"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 25, 100, 102 (2)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 7.—A writ of *certiorari* does not lie to bring up an order made by a county court judge sitting in bankruptcy.

The effect of section 25 (1) (*a*) of the Bankruptcy Act, 1883, as amended by section 7 of the Bankruptcy Act, 1890, is that an order may be made for the arrest of a debtor if, after a bankruptcy notice or a bankruptcy petition, it appears to the court that there is probable reason for believing that the debtor has absconded before, or has absconded or is about to abscond after, the notice or petition for any of the purposes mentioned in the section.

Decision of the Court of Appeal, *ante*, p. 68, affirmed.—REG. *v.* NORTHALLERTON COUNTY COURT JUDGE, *H.L.*; [1899] A. C. 439.

10. *Damages in the Divorce Court—Bankruptcy of co-respondent—Provable debt—Judgment summons—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 33—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 10.—Damages awarded to a petitioner in a divorce suit constitute a debt provable in the bankruptcy of the co-respondent, although no order directing the damages to be paid to the petitioner has been made at the date of the receiving order.—O'GORMAN, RE, BALE, EX PARTE, *Bkcy.*, 543; [1899] 2 Q. B. 62; 68 L. J. Q. B. 650; 80 L. T. 501.

11. *Discharge—Bankrupt convicted under Debtors Act—Special reasons for not refusing discharge—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8 (2)—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 14, 15.—By section 8 (2) of the Bankruptcy Act, 1890, "The court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, . . . unless for special reasons the court otherwise determines."

The court has no discretion to grant a discharge in cases falling under the above section, unless there are circumstances in the case upon which special reasons can clearly be founded, and such circumstances should be particularly set forth in the order of discharge. — STEVENS, RE, BOARD OF TRADE, EX PARTE, *Bkcy.*, 61; [1898] 2 Q. B. 495; 79 L. T. 80.

12. *Discharge—Transfer from registrar to judge in bankruptcy—Reason—Issues of great importance—Order for prosecution of bankrupt under the Debtors Act*, 1869 (32 & 33 *Vict. c.* 62).—The fact that a bankrupt's application for his discharge raises issues of great importance is a good and sufficient reason for transferring the hearing of such application from the registrar to the judge sitting in bankruptcy.

The fact that the registrar has been concerned in the making of the order for the prosecution of the bankrupt for offences committed under the Debtors Act, 1869, does not prevent the registrar from determining the bankrupt's application for his discharge on its merits, and does not constitute a sufficient reason for transferring the hearing of such an application to the judge.—HOOLEY, RE, HOOLEY, EX PARTE (No. 2), *Bkcy.*; 80 L. T. 495.

13. *Execution—Sheriff's right to poundage—Goods seized but not sold—Sale stopped by official receiver—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 1—*Order as to fees* (31*st August*, 1888) *under the Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55).—A sheriff who has seized goods under a judgment, but has, by notice of a receiving order and a request (under section 11 of the Bankruptcy Act, 1890) to deliver the goods to the official receiver, been prevented from selling, is not entitled to poundage.—THOMAS, RE, SHERIFF OF MIDDLESEX, EX PARTE, *C.A.*, 259; [1899] 1 Q. B. 460; 79 L. T. 356.

14. *Execution—"Tools and implements of trade"—Sheriffs Act*, 1845 (8 & 9 *Vict. c.* 127), *s.* 8—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44 (2), 45, 54 (1)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.—Where the goods of a debtor are seized in execution, and bankruptcy supervenes, unless the official receiver requires the sheriff to hand over the goods seized before sale, the bankrupt will only be entitled to retain the tools of his trade, &c., to the value of £5, as provided by the Sheriffs Act, 1845, *s.* 8, instead of to the value of £20, as provided by the Bankruptcy Act, 1883, *s.* 44 (2).—DAWSON, RE, DAWSON, EX PARTE, *Bkcy.*, 524; [1899] 2 Q. B. 54; 68 L. J. Q. B. 668; 80 L. T. 498.

15. *False and malicious prosecution—Bankruptcy petition—Reasonable or probable cause—Motive—Abuse of remedy sought—Fraud upon court.*—A plaintiff or petitioner who institutes and insists in a process before the bankruptcy or any other court, in circumstances which make it an abuse of the remedy sought, or a fraud upon the court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But to constitute an abuse of process or fraud upon the court, mere motive, however reprehensible, will not be sufficient; it must be shown that the remedy would be unsuitable and would enable the persons obtaining it fraudulently to defeat the rights of others.

It is not the duty of a judge to submit any issue of fact to the jury which is not fairly raised by the evidence.

The jurisdiction of the Registrar in Bankruptcy is confined to a discretion to grant or refuse a receiving order. No question as to *res judicata* arises thereon.

Ex parte Vitoria, 42 W. R. 529, [1894] 2 Q. B. 387, approved.—KING *v.* HENDERSON, *P.C.*, 157; [1898] A. C. 720; 79 L. T. 37.

16. *Fraudulent conveyance by insolvent trader—Sale of business to limited company—Bankruptcy of vendor—Winding up of company—Rights of trustee in bankruptcy and liquidator respectively*—13 *Eliz. c.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (b); *ss.* 43, 44.—Where an insolvent trader, for the purpose of defeating his creditors, transfers his business to a limited company, the transfer is an act of bankruptcy within sub-section 1 (*b*) of section 4 of the Bankruptcy Act, 1883; and if he is made bankrupt on a

petition presented within three months after the transfer, the title of his trustee in bankruptcy relates back to the date of the transfer, so as to enable the trustee to avoid the transfer and to claim the property fraudulently transferred to the company, even after a winding-up order has been made.

Salomon v. *Salomon & Co.* (*Limited*), 45 W. R. 193, [1897] A. C. 22, distinguished.

Decision of Wright, J. (*ante*, p. 192), reversed.—HIRTH, RE, THE TRUSTEE, EX PARTE, *C.A.*, 243; [1899] 1 Q. B. 612; 68 L. J. Q. B. 287; 80 L. T. 63.

17. *Inland Revenue—Proof for income tax—Inquiry by Court of Bankruptcy into assessment—Income Tax Act*, 1845, *ss.* 52, 111, 113, 118.—The Court of Bankruptcy has no power to inquire into the validity of an assessment by Commissioners of Income Tax.—CALVERT, RE, CALVERT, EX PARTE (No. 1), *Bkcy.*, 523; [1899] 2 Q. B. 145; 68 L. J. Q. B. 761; 80 L. T. 504.

18. *Married woman trading separately from her husband in firm name—Non-compliance with bankruptcy notice—Act of bankruptcy—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (5)—*R. S. C., ord.* 48a, *rr.* 4, 5, 8, 11.—Where a judgment has been obtained against a married woman trading separately from her husband in the name of a firm, even if in the form prescribed by *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120, as applicable to married women, she is not liable to be made a bankrupt upon a bankruptcy notice founded on that judgment. The judgment is merely a judgment against her separate estate.—HANDFORD & CO., RE, *C.A.*, 391; [1899] 1 Q. B. 566; 68 L. J. Q. B. 386; 80 L. T. 125.

19.—*Payment of dividends to assignee of debts—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 63; *r.* 225, *form* 126.—An assignee of debts in a bankruptcy cannot obtain payment of dividends on such debts from the trustee except by proving in place of the creditors who have assigned, or producing to the trustee written authorities from each of such creditors in accordance with form 126.—FROST, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*, 512; [1899] 2 Q. B. 50; 68 L. J. Q. B. 663; 80 L. T. 496.

20. *Practice—Evidence—Examination of bankrupt.*—Either party is entitled to elicit from a bankrupt any previous account he has given of a matter, without regard to who calls him.—CUNNINGHAM, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*; 80 L. T. 503.

21. *Practice—Disputed proofs—Motion against creditors to expunge—Service of notice of motion out of the jurisdiction.*—Where leave was given a debtor to serve notices of motion to expunge their proofs on creditors, some of whom were out of the jurisdiction, it was directed that the Scotch directors should be served with the notices of motion by registered post, and that the notices of motion on the creditors in Western Australia should be served on the solicitors in London who had lodged their proofs.—CALVERT, RE, CALVERT, EX PARTE (No. 2), *P.D. & Ad.D.*; 80 L. T. 499.

22. *Preference — Trust for creditors — Right in security—Pledge—Private manager.*—By trust deed executed July, 1895, S., a farmer, conveyed his whole estate to M., "as trustee and in trust and as my commissioner (but hereinafter called trustee) for the uses, ends, and purposes after specified," "with full power to manage the farm until expiry or renunciation of the lease, to sell the stock, &c., to sue and defend actions, pay rent and wages, and out of the remainder pay the creditors" of S.; "or if the remainder was inadequate, to call for claims and divide the sums." S. was declared bankrupt on the 10th of July, 1896. M. claimed a preferential right to be paid a balance due to him in respect of his actings in the management of the farm. He alleged that at the date of the bankruptcy he held the whole estate in security and for payment of his advances, expenses, and remuneration as trustee, and claimed full payment of his debt. And in virtue of his having paid for the seed and labour of sowing and caring for the crop of 1896, he specially claimed to be preferred to the whole sum arising from the realization of the crops, or such part as would recoup him for his expenses, advances, and remuneration. The trustee rejected M.'s claim so far as it included law expenses after the date of the bankruptcy and other small sums, and under deduction of these sums the trustee admitted M.'s claim to be an ordinary debt, rejecting the debt altogether as a preferable one.

Held, affirming the decision of the Second Division of the Court of Session, (1898) 25 R. 398, that M. had no right to a preferable claim, on the ground that he had never held the bankrupt's estate in security, and that the payments made for seed and labour did not entitle him to a preferable ranking.—MESS *v.* HAY, *H.L.* (*Sc.*); [1899] A. C. 233.

23. *Proof—Application to expunge—Claim by the Crown to dividends on the proof of an extinct corporation*—Bona vacantia—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule II.*, *rr.* 23, 25.—A corporation was admitted to proof in a bankruptcy, and subsequently became extinct, having been dissolved by order of the court. Some years after such dissolution a fund became available for the payment of further dividends in the bankruptcy.

Held, that the dividends due to such corporation in respect of its proof passed to the Crown as *bona vacantia*.—HIGGINSON & DEAN, RE, ATTORNEY-GENERAL, EX PARTE, *Bkcy.*, 285; [1899] 1 Q. B. 325; 68 L. J. Q. B. 198; 79 L. T. 673.

24. *Proof—Bill of exchange—Secured creditor—Consolidation of debts and securities.*—The holder of four dishonoured bills of exchange sent in a proof, in the liquidation of the estate of a firm which had endorsed each bill, for the aggregate amount of the four bills, with noting expenses. The trustee in the liquidation had different rights of indemnity in respect of the four bills. In respect of two of the bills the holder had received more than 20s. in the £ upon his proofs against the various parties to the said bills, but the total amount received by him was considerably less than the aggregate amount claimed in respect of the four bills.

Held (affirming Romer, J., 46 W. R. 627, [1898] 2 Ch. 413), that the holder could not be allowed to retain the surplus beyond the amount due on either of the two overpaid bills, and attribute it to payment of the amounts due on the other bills.—MORRIS, RE, JAMES *v.* LONDON AND COUNTY BANKING CO., *C.A.*, 324; [1899] 1 Q. B. 485; 68 L. J. Ch. 299; 80 L. T. 37.

25. *Proof—Partnership—Loan of money at rate of interest varying with profits of business—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 2 (3) (d), 3.—In 1893 a creditor advanced various sums of money to a firm of Bryan & Mason under an agreement to take a share of profits in lieu of interest. In 1895

the firm dissolved partnership, and Mason took over the business and liabilities, entering into a fresh agreement with the creditor to pay five per cent. interest on the money advanced. Mason became bankrupt in 1898, and the creditor proved for the moneys advanced.

Held, that the money must be considered to have been advanced under the agreement of 1893, and not under that of 1895, and that the proof could not be admitted until all the other creditors should have been paid in full.—MASON, RE, BING, EX PARTE, *Bkcy.*, 270; [1899] 1 Q. B. 810; 68 L. J. Q. B. 466; 80 L. T. 92.

26. *Proof—Postponement—Sale of goodwill in consideration of an annuity—Partnership Act*, 1890, *ss.* 2 (3) (e), 3.—Where a business had been sold in consideration of the payment of an annuity to the vendor, not expressed to be payable out of the profits of the business,

Held, by the Court of Appeal (reversing Wright, J.), that, upon the bankruptcy of the purchaser, the vendor was entitled to prove in respect of such annuity, and was not, under section 3 of the Partnership Act, 1890, postponed to other creditors. —GIEVE, RE, SHAW, EX PARTE, RE, *C.A.*, 616; 80 L. T. 737.

27. *Receiver—Title of official receiver under Bankruptcy Act*, 1883—*Registration in Middlesex—"Conveyance"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 54, 121—*Middlesex Registry Act*, 1708 (7 *Anne, c.* 20), *s.* 1.—An order of adjudication in bankruptcy is not a "conveyance" within the the meaning of the Middlesex Registry Act (7 Anne, c. 20), s. 1.

A debtor entitled to land in Middlesex was adjudged bankrupt, and an order was made under section 121 of the Bankruptcy Act, 1883, that his estate should be administered in a summary way, so that no appointment of a trustee was made. He never disclosed to the official receiver the fact of his having the land, and he subsequently mortgaged it to a mortgagee who forthwith registered his mortgage.

Held (reversing the decision of Kekewich, J.), that the title of the official receiver was not postponed to that of the mortgagee by reason of the order of adjudication not having been registered. —CALCOTT AND ELVIN'S CONTRACT, RE, *C.A.*; 46 W. R. 673; [1898] 2 Ch. 460.

28. *Receiving order—Order made on judgment summons—No formal order drawn up—Subsequent action against debtor—Staying action—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 103 (5).—Upon the hearing of a judgment summons under section 5 of the Debtors Act, 1869, Cave, J., in lieu of an order of committal, made a receiving order against the debtor under section 103 (5) of the Bankruptcy Act, 1883. The judge wrote upon the summons "Receiving Order," and signed this with his initials, but no formal order was ever drawn up and nothing further was done.

Held, that a receiving order had been made, within the meaning of section 9 (1) of the Bankruptcy Act, 1883, when the order was made by the judge, and that thereafter a creditor could not bring an action against the debtor in respect of a debt provable in bankruptcy.—BLOUNT *v.* WHITELEY, *C.A.*; 79 L. T. 635.

29. *Release of trustee—Revocation of release by Board of Trade—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 82 (3); *r.* 309.—By sub-section 3 of section 82 of the Bankruptcy Act, 1883, the Board of Trade may revoke an order releasing a trustee in bankruptcy "on proof that it was obtained by fraud or by suppression or concealment of any material fact."

Held, that an order of release ought not to be revoked on the ground that it was obtained by "suppression or concealment of any material fact" unless there is such suppression or concealment as has in it some element of fraud.—HARRIS, RE, HASLUCK, EX PARTE, *Bkcy*, 544; [1899] 2 Q B. 97; 68 L. J. Q. B. 769; 80 L. T. 499.

30. *Scheme of arrangement—Debt carrying interest exceeding 5 per cent.—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 23—*Construction—Retrospective effect.* —The Bankruptcy Act, 1890, was passed upon the 18th of August, 1890, but did not come into operation until the 1st of January, 1891.

Section 23 of that Act provides: "Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved on the estate have been paid in full."

Held, that the above section was not retrospective in its effect, and did not apply to a scheme of arrangement approved by the court upon the 25th of June, 1890.—ATHLUMNEY, RE, WILSON, EX PARTE, *Bkcy.*, 144; [1898] 2 Q. B. 547, 79 L. T. 303.

31. *Sheriff—Execution—Notice to sheriff of landlord's claim for rent—Promise by sheriff to pay landlord—Sale of portion of goods with consent of landlord—Notice to sheriff of receiving order—Completion of sale by sheriff on account of official receiver—No notice to official receiver of landlord's claim—Title of official receiver to whole proceeds of sale*—8 *Anne, c.* 14, *s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 1.—A sheriff, who had levied on goods under a writ of *fieri facias*, received notice of the landlord's claim for rent. Before sale he promised to pay the rent, and a portion of the goods were sold with the assent of the landlord. On the following day a bankruptcy petition was presented against the debtor, of which the sheriff had notice. After the making of a receiving order, of which the sheriff also had notice, the sale was completed on account of the official receiver. The official receiver had no notice of the claim for rent.

Held, that the sheriff must account to the official receiver for the whole net proceeds of the sale without deducting the landlord's rent.

The sheriff might have protected himself and the landlord by giving notice as in *Cocker* v. *Musgrove*, 9 Q. B. 223, but having obtained the leave of the official receiver to complete the execution on his account, without giving any intimation of the landlord's claim, he could only sell on the terms on which he obtained the official receiver's leave to sell—*i.e.*, on the account of the official receiver.—DRIVER, RE, *Bkcy.*; 80 L. T. 840.

32. *Sheriff—Possession for fifteen months—Act of bankruptcy, when committed—Possession money—Consent of execution creditor and execution debtor—"Costs of execution"—Order of 31st of August*, 1888, *under Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11 (2).—Where the sheriff seizes goods and remains in possession for a period greatly exceeding twenty-one days (*e.g.*, fifteen months) there is, under

section 1 of the Bankruptcy Act, 1890, one act of bankruptcy, which is committed at the expiration of twenty-one days, but not a continuing act of bankruptcy or a succession of such acts.

In such a case, therefore, if both execution creditor and execution debtor assented to the sheriff retaining possession, he will be entitled, under section 11 of the Bankruptcy Act, 1890, to possession money for the whole time he remained in possession, notwithstanding that the debtor has been made a bankrupt on a petition presented more than three months after the expiration of the twenty-one days. The only cases in which the sheriff would not be so entitled are cases coming within the provisions of the Bankruptcy Act, 1883, as to reputed ownership and the relation back of the trustee's title, and cases to which the Act 13 Eliz. c. 5 applies.

In re Hurley, 41 W. R. 653, 10 Morrell 120, approved.—BEESTON, RE, BOARD OF TRADE, EX PARTE, *C.A.*, 475; [1899] 1 Q. B. 626; 68 L. J. Q. B. 344; 80 L. T. 66.

33. *Sheriff's fees—*Fieri facias*—Levy by sheriff on debtor's goods—Receiving order against debtor before sale—Notice by official receiver requiring delivery of the goods—Sheriff's right to poundage—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* (1) *—Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55)*—Order as to fees of August*, 1888.—A sheriff in possession of goods under a writ of *fieri facias*, who before sale has received a notice under the Bankruptcy Act, 1890, s. 11, sub-section 1, that a receiving order has been made against the execution debtor, and also a demand from the official receiver for the delivery of the goods of the debtor in his possession, is not entitled to poundage.—THOMAS, RE, TRUSTEE, THE, EX PARTE, *C.A.*; 80 L. T. 62.

34. *Voluntary settlement—Gift of jewels and money—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—Gifts of personal property made by a bankrupt within two years of his bankruptcy, without restricting the donee's power of alienation, but with intention that the donee shall use or retain the property for an indeterminate time, are voluntary settlements within the meaning of section 47 of the Bankruptcy Act, 1883, and void as against the trustee in bankruptcy, but without prejudice to any sale or disposition of the property made by the donee before bankruptcy in good faith and without notice of an available act of bankruptcy. But the donee may have to account for the proceeds of any such sale or disposition remaining in his hands at the commencement of the bankruptcy.—TANKARD, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*, 624; [1899] 2 Q. B. 57; 68 L. J. Q. B. 670; 80 L. T. 500.

See also Company, 35, 41; Vendor and Purchaser, 1.

BETTING.—See Gaming, 1-5; Metropolis, 7.

BILL of EXCHANGE:—

1. *Acceptance—Indorsement by way of security—Subsequent indorsement by drawers—Incomplete bill—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 55, 56.—The plaintiffs agreed with C., who owed them money, to draw a bill on him, and that C.'s father should indorse it as a surety for its payment. They thereupon drew a bill on C. to their own order, and, without indorsing it, handed it to C., who accepted it and then obtained his father's indorsement. He returned it to the plaintiffs, and they then indorsed it beneath the indorsement of C.'s father. The bill was dishonoured at maturity, and the plaintiffs then sued C.'s father as the indorser.

Held, that he was not liable as indorser under section 55 of the Bills of Exchange Act, 1882, nor was he liable under section 56, as the bill was not negotiable at the time he wrote his name on it, as it was irregular and incomplete, owing to the plaintiffs not then having indorsed it.

Held, further, that he was not liable as guarantor, since the requirements of the Statute of Frauds had not been complied with.

Steele v. *McKinlay*, 29 W. R. 17, 5 App. Cas. 754, is still a binding authority, and the principles therein laid down have not been altered by the Bills of Exchange Act, 1882.—JENKINS *v.* COOMBER, *Q.B.D.*, 48; [1898] 2 Q. B. 168.

2. *Oral agreement to renew—Inadmissibility of evidence—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 21, *sub-section* 2 (b); *s.* 29, *sub-section* 2.—Evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible on the ground that its effect would be to contradict the terms of the written agreement.

Young v. *Austen*, L. R. 4 C. P. 553, followed.—NEW LONDON CREDIT SYNDICATE (LIMITED) *v.* NEALE, *C.A.*; [1898] 2 Q. B. 487; 79 L. T. 323.

See also Banker, 1, 2.

BILL of SALE:—

1. *Mortgage—Trade fixtures—Freehold land—Power to sell trade fixtures separately from land—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36).—A mortgage of land, whether by demise or by conveyance of the freehold, if it contain a power to the mortgagee to sell trade fixtures separately from the land, is a bill of sale as to those fixtures.

The principle was established by *Ex parte Daglish, In re Wilde*, 21 W. R. 893, L. R. 8 Ch. App. 1072, and *Ex Parte Barclay, In re Joyce*, 22 W. R. 608, L. R. 9 Ch. App. 576, and is not limited to mortgages by demise.—JOHNS *v.* WARE, *Ch.D. Romer, J.*, 202; [1899] 1 Ch. 359; 68 L. J. Ch. 155; 80 L. T. 112.

2. *Validity—Address of grantee—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Schedule.*—A bill of sale given by way of security for the payment of money is void, under section 9 of the Bills of Sale Act of 1882, if the address of the grantee be omitted. It makes no difference that the grantee is a registered company. —ALTREE *v.* ALTREE, *Q.B.D.*, 60; [1898] 2 Q. B. 267.

3. *Validity—Variation in address of grantors in bill and affidavit—Misdescription.*—In a bill of sale the grantors were described as W. D., of 25, B. F.-road; L. D., of 93, B. F.-road; K., of 94, W.-road. In the affidavit the addresses were 23, B. F.-road; 23, B. F.-road; 24, W.-road.

Held, that the bill of sale was void for misdescription.

Murray v. *Mackenzie*, L. R. 10 C. P. 625, followed. —MARKS *v.* DERRICK, *Q.B.D.*; 80 L. T. 60.

BOND.—See Guarantee; Practice, 18; Principal and Surety, 1; Trustee, 6.

BUILDING SOCIETY:—

Society known to be insolvent—Rule passed to enable society to facilitate realization—Rule ultra vires*—Breach of trust—Classes of shareholders—Distribution of assets.*—It is competent for a building society, even when in a state of insolvency, to pass a new rule for the purpose of facilitating the realization of the assets of the society, provided that such rule

is *bonâ fide* passed for such purpose and does not affect the rights of the members of the society *inter se* in respect of their liability or in respect to the distribution of assets.—SIXTH W. KENT BUILDING SOCIETY *v.* HILLS, *Ch.D. Byrne, J.*, 647; [1899] 2 Ch. 60; 68 L. J. Ch. 476.

See also Trustee, 8.

BURIAL.—See Ecclesiastical Law, 1.

BYE-LAW.—See Corporation, 1; Local Government, 2, 3.

CANADA, LAW of:—

1. *Customs Tariff Act*, 1894 (57 & 58 *Vict. c.* 33), *s.* 4—*R. S. C.* (1886) 49 *Vict. c.* 32, *s.* 150—*Construction—Date of importation of goods.*

Held, that by the true construction of the Customs Tariff Act, 1894, s. 4, as amended by the Tariff Act, 1895, which in effect directs that duty be paid upon raw sugar "when such goods are imported into Canada or taken out of warehouse for consumption therein," the date at which duty both attaches thereto and becomes payable is when the goods are landed and delivered to the importer or to his order, or, when they are taken out of warehouse, if instead of being delivered they have been placed in bond.

Section 150 of the Customs Act, 1886, which directs that the precise time of the importation of goods shall be deemed to be the time when "they came within the limits of the port at which they ought to be reported," refers on its true construction to the port at which the goods are to be landed—that is, where the effective report is to be made. Such construction is required in order to place a consistent, rational, and probable meaning on the context and other clauses of the Act.—CANADA SUGAR REFINING CO. *v.* REG., *P.C.*; [1898] A. C. 735; 79 L. T. 146.

2. *Quebec—Corporation, property of—Liability to taxation—Municipal Code of Quebec, art.* 712, *sub-section* 3—*Construction.*—By the true construction of art. 712, sub-section 3, of the Municipal Code of Quebec, property belonging to a corporation "for the ends for which they are established, and not possessed solely by them to derive a revenue therefrom," is not taxable.

But held, that a farm belonging to the appellant corporation and worked by them as a farm in order to derive revenue therefrom, is taxable, although not detached from the residue of the corporate property and occasionally used for the above ends.—LE SÉMINAIRE DE QUÉBEC *v.* LA CORPORATION DE LIMOILOU, *P.C.*; [1899] A. C. 288; 80 L. T. 331.

3. *Railway Committee of Privy Council—Canada Railway Act* (51 *Vict. c.* 29), *s.* 262, *sub-sections* 3, 4—*Construction.*

Held, that under the true construction of the Railway Act (Canada), 51 Vict. c. 29, the power conferred by sub-section 4 of section 262 upon the Railway Committee of the Privy Council to exonerate a railway company during a specified portion of the year from the duty of filling certain spaces specified in sub-section 4, did not apply to the duty imposed by sub-section 3 of filling certain other spaces specified by sub-section 3. Such extension of power was not authorized by the grammatical construction of the sub-sections, nor rendered imperative by the context.—GRAND TRUNK RAILWAY CO. OF CANADA *v.* WASHINGTON, *P.C.*; [1899] A. C. 275; 68 L. J. P. C. 37; 80 L. T. 301.

4. *Quebec—Railways—British North America Act* 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *sub-section* 29, *and s.* 92, *sub-section* 10—*Municipal Code of Quebec—Powers of provincial legislature—Municipal legislation affecting Dominion Railway.*—By the true construction of British North America Act, 1867, s. 91, sub-section 29, and s. 92, sub-section 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works.

But held, that the provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land, are *intra vires* of the provincial legislature.—CANADIAN PACIFIC RAILWAY CO. *v.* CORPORATION OF THE PARISH OF NOTRE DAME DE BONSECOURS, *P.C.*; [1899] A. C. 367; 68 L. J. P. C. 54; 80 L. T. 434.

5. *Railway company—Contract by company* ultra vires—*Effect of consent judgment—Estoppel—Terms on which contract will be set aside—Relief—Parties—Misjoinder.*—Where by contract *ex facie* legal and regular, the appellant company purported to incur liability to the respondent for railway construction in an amount which was in reality calculated to cover the amount of bonus and of price of issued shares payable by agreement between the respondent and all the shareholders of the company irrespective of either actual or estimated cost of construction,

Held, that the contract was *ultra vires* of the company.

Held, further, that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of *ultra vires* not having been raised either in the pleadings or on the facts stated, was of no greater validity than the contract.

In a suit by the company to set aside the contract and judgment, held, that they must be set aside on terms which were consented to of paying to the respondent the balance due to him for construction on a *quantum meruit*, securing the amount thereof by bonds of the company if and when issued, the whole to be taken by him subject to first and other charges in favour of sub-contractors and banks in advance to them who had acted on the faith of the judgment to which they were not parties without notice of the illegalities of the contract.

The company having joined some of their bondholders and shareholders as co-plaintiffs, raising questions affecting them individually, held, that the action of the court should be confined to issues between the company and the defendants.—GREAT NORTH-WEST CENTRAL RAILWAY *v.* CHARLEBOIS, *P.C.*; [1899] A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35.

CHARITY:—

1. *Ecclesiastical Charity—"Member of Church of England as such"—Appointment of trustees—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 14, 19, 70, 75.

In re PERRY ALMSHOUSES.

The founder of a charity required that the objects of it should be selected from persons who should have (1) regularly attended Divine service at the parish church for a fixed period; (2) been partakers of the Holy Communion; (3) lived a godly, righteous, and sober life, to the glory of God's holy Name; and that the trustees should be members of the Church of England.

Held (affirming Stirling, J., 46 W. R. 360, [1898] 1 Ch. 391), that this was a charity for the members of the Church of England "as such"; and was therefore an ecclesiastical charity within the meaning of

section 75 of the Local Government Act, 1894; and that therefore the parish council had no power to appoint new trustees under section 14 of the same Act.

In re ROSS'S CHARITY.

A testatrix charged certain lands with the payment of £3 a year, to be paid on a certain day annually to the churchwardens of A., to be laid out by them in the purchase of clothing to be given to six old and poor widows of the said parish whom they should judge to be the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public services of the Church.

Held (affirming North, J., 46 W. R. 27, [1897] 2 Ch. 397), that this was not an ecclesiastical charity within the meaning of section 75 of the Local Government Act, 1894, and that, therefore, under section 14 (2) of that Act, the power to appoint new trustees was vested in the parish council, and not in the churchwardens.—PERRY ALMSHOUSES, RE; ROSS'S CHARITY, RE, *C.A.*, 197; [1899] 1 Ch. 21; 68 L. J. Ch. 66; 79 L. T. 366.

2. *Condition precedent—Perpetuity—Statutes of Mortmain.*—A testator, who died in March, 1894, by his will dated in July, 1893, after devising his residuary real estate to trustees upon trust for sale, and to hold the proceeds upon the trusts declared of his residuary personal estate, gave the sum of £10,000 to his trustees upon trust to transfer the same to trustees to be appointed by them, or the trustees for the time being of his will (such appointed trustees to be not less than three or more than six in number), to be held by them upon trust, "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting almshouses" in a certain parish for the deserving poor of that parish, without regard to religious denomination, and in making weekly or other periodical allowances to the inmates of such almshouses; and he empowered the trustees so appointed, in conjunction with the trustees of his will, to make rules for the regulation and maintenance of such almshouses. And, after giving other charitable and general legacies, the testator gave all his residuary personal estate to his trustees upon trust for sale and conversion, and to pay debts and legacies, and hold the residue of the moneys upon trust, to pay or transfer the same to trustees to be nominated and appointed by the trustees of his will, upon trust, "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting and maintaining" a certain orphanage or institution; and the will contained directions for the management and regulation of such institution.

Held, that the language of the will did not constitute a condition precedent to the gifts, but was introduced for the purpose of mere machinery so as to avoid the provisions of the Statutes of Mortmain; and that the principle to be applied to the present case was that explained in *Chamberlayne v. Brockett*, L. R. 8 Ch. App. 206.

Held, therefore, that, without prejudice to any question, if land could not be obtained, there must be a declaration that the sum of £10,000 and the residue were well given to charities; and that special trustees thereof must be appointed as directed by the will, and liberty given to apply.—GYDE, RE, WARD *v.* LITTLE, *C.A.*; 79 L. T. 261.

3. *Gift for political and religious purposes.*—The vicar of a parish by his will dated in 1897 devised to the vicar for the time being a building used as a village club and reading-room "to be maintained for the furtherance of Conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing."

Held, a good charitable gift.—SCOWCROFT, RE, ORMROD *v.* WILKINSON, *Ch.D. Stirling, J.*; [1898] 2 Ch. 638; 79 L. T. 342.

4. *Industrial school—Endowment—Mortgage of property—Petition—Consent of Charity Commissioners—"Cathedral, collegiate, chapter, or other schools"—Words* ejusdem generis—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66.—The proviso at the end of section 62 of the Charitable Trusts Act, 1853, that the "exemption" thereby conferred shall not extend to "any cathedral, collegiate, chapter, or other schools," does not extend to all schools, but only to the schools there mentioned and others of a similar description.

Decision of Stirling, J. (46 W. R. 455, [1898] 1 Ch. 610), affirmed.

Government grants and contributions by school boards and other public bodies to an industrial school are not voluntary contributions within the meaning of section 62.

The trustees of an industrial school which possessed land and buildings occupied by the school, and was maintained partly by voluntary subscriptions and partly by a Government grant and contributions from public bodies, presented a petition asking for the consent of the court to a mortgage of the school lands and buildings.

Held, that the consent of the Charity Commissioners was required to the presentation of the petition and the proposed mortgage, the property to be mortgaged being a permanent endowment.

Whether the Charity Commissioners have jurisdiction over the voluntary subscriptions of a charity which is maintained by voluntary subscriptions and possesses a permanent endowment yielding no income, *quære.*—STOCKPORT RAGGED AND INDUSTRIAL SCHOOLS, RE, *C.A.*, 166; [1898] 2 Ch. 687; 68 L. J. Ch. 41; 79 L. T. 507.

5. *Institution for education—Church of England—Beneficiaries to be brought up in a particular religion—Beneficiaries from another country—Deceased Persons Estates Duties Act*, 1881 (*New Zealand*), *Exemption Act*, 1883—*Land and Income Assessment Act*, 1891 (*New Zealand*), *Exemption Act*, 1892.—A testator, who died in 1894, bequeathed the residue of his estate, both real and personal, to trustees for the purpose of founding and endowing an institution for the maintenance and education of boys who were orphans, or the sons of persons in straitened circumstances, resident in the provincial district of Auckland, or in the province of Ulster, Ireland; and the institution was to be managed by persons of a particular religion, and the inmates were to be brought up and instructed in that religion.

Held to be a charitable devise or bequest, and a "public" institution within the New Zealand Estates Duties Exemption Act, 1883;

Also, as to the land devised, that the institution was "carried on for charitable purposes" within the New Zealand Land and Income Tax Exemption Act, 1892.—DILWORTH *v.* LAND AND INCOME TAX COMMISSIONERS, *P.C.*, 337; [1899] A. C. 99; 68 L. J. P. C. 1; 79 L. T. 473.

6. *Will—Gift to purchase advowsons—General charitable intention—Uncertainty.*—A testator gave his pure personalty to special trustees upon trust to invest, and with power to apply the income or any portion of the capital (1) in grants for or towards

the purchase of advowsons or presentations; (2) in creating or contributing to the creation, improvement, or endowment of churches, chapels, or schools; or (3) in paying or contributing to the salaries or incomes of rectors, vicars, or incumbents, masters, or teachers, upon certain expressed conditions upholding certain religious doctrines, but not in terms applying to (1).

Held, that there was not any general trust for charity binding the whole fund, and that, as the trustees, having a discretion, were not bound to apply the funds to purposes strictly charitable, and as the other purposes to which, in their discretion, they were stated to be applicable were too indefinite to constitute a trust, the whole gift was bad as a charitable gift and void.

Decision of the Court of Appeal (45 W. R. 610, [1897] 2 Ch. 105) reversed.—HUNTER *v.* ATTORNEY-GENERAL, *H.L.*, 673; [1899] A. C. 309; 68 L. J. Ch. 449; 80 L. T. 732.

CHEQUE:—

Securities—Sale of a business for all book and other debts and the full benefit of securities for such debts—Debt paid by cheque not cashed until after date of sale—Conditional payment.—The sale of a business in consideration, *inter alia*, of all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts, will not pass debts for which the vendor has received cheques prior to the sale and which he cashed subsequent to it, payment by cheque amounting to a conditional payment, and the debt only reviving if the cheque is dishonoured.—HADLEY (FELIX) & CO. *v.* HADLEY, *Ch.D. Byrne, J.*, 238; [1898] 2 Ch. 680; 79 L. T. 299.

COMMON:—

Commonable rights—Agreement for sale—Action for specific performance—Counterclaim—Finding of jury on trial of issue of fact—Motion for new trial—Evidence—Admissibility—Reputation—Deposition in suit to perpetuate testimony—Survey and report as to manor made under statute.—In an action in the Chancery Division by a statutory committee of commoners for specific performance of an agreement to purchase commonable rights, an order was made directing the trial before a jury in the Queen's Bench Division of the following issue of fact—namely, whether a certain piece of land was common land or subject to any commonable rights either of the commoners of the parish of C., or of the commoners of the parish of L.,

Held, that evidence of reputation was admissible on the trial of such an issue.

Earl Dunraven v. *Llewellyn*, 19 L. J. Q. B. 388, 392, and *Warrick* v. *Queen's College, Oxford*, L. R. 6 Ch. 716, observed upon.

A deposition made in the year 1815, in a suit to perpetuate testimony by a witness examined on commission on behalf of a predecessor in title of the defendants, was admitted in evidence at the trial of this issue as being a statement made by a person vouched by the party on whose behalf the deponent was examined, and consequently an admission by conduct of a predecessor in title of the defendants. This deposition had been sealed up by the examiners, but was now found unsealed.

Held, that the mere fact that the deposition was now found to be unsealed was not evidence of user or adoption by the party on whose behalf the deponent was examined, and that, in the absence of evidence of such user or adoption, the deposition was inadmissible on the ground on which it was admitted.

Richards v. *Morgan*, 4 B. & S. 641, observed upon.

A survey and report made by a surveyor in 1816, in discharge of a duty imposed upon him by the 8th section of the statute 34 Geo. 3, c. 75, upon the occasion of a sale of Crown lands, and produced out of the proper custody, is admissible in evidence as a public document within the decision in *Sturla* v. *Freccia*, 5 App. Cas. 623. *Phillips* v. *Hudson*, L. R. 2 Ch. 243, distinguished.—EVANS *v.* MERTHYR TYDFIL URBAN DISTRICT COUNCIL, *C.A.*; [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578.

COMPANY:—

1. "*Amalgamation*" *with other company—Sale of assets—Legality of consideration—Meeting—Closure—Refusal to put amendment.*—A clause in a company's memorandum of association empowering the company to "amalgamate" with other companies, authorizes a sale to another company, for shares in the purchasing company, of all the selling company's assets, except certain shares already held by it in the purchasing company.

The majority of a general meeting of a company is entitled, after allowing a reasonable hearing to the minority, to pass a resolution closing the debate.

When a general meeting is called for the single purpose of confirming or rejecting a particular resolution, an amendment altering the terms of the resolution is irrelevant, and ought not to be put by the chairman.—WALL *v.* LONDON AND NORTHERN ASSETS CORPORATION (No. 1), *C.A.*, 219; [1898] 2 Ch. 469; 68 L. J. Ch. 248; 79 L. T. 249.

2. *Articles of association—Classes of shareholders—General meetings of each class—Quorum.*—The articles of association of a limited company provided that whenever the capital was divided into different classes of shares, the rights of each class might be modified by agreement duly confirmed by resolution passed at a general meeting of that class, the quorum at the meeting being members holding or representing three-fourths of the nominal amount of the issued shares of that class. Another article provided that the quorum at general meetings of the company were to be at least three members present, and holding or representing not less than one-tenth of the issued capital of the company. If the meeting was adjourned, a quorum not being present, the members present at the adjourned meeting should form a quorum for the transaction of the business of such meeting.

Held, that the provisions with regard to the general meetings of the company did not apply to general meetings of classes of shareholders; and therefore, at a meeting of a particular class of shareholders summoned to deal with the rights and privileges of that class, the necessary quorum was members of that class holding or representing three-quarters of the nominal amount of such issue, and not members holding or representing one-tenth of the issue of the company.—HEMANS *v.* HOTCHKISS ORDNANCE CO., *C.A.*, 276; [1899] 1 Ch. 115; 68 L. J. Ch. 99; 79 L. T. 681.

3. *Contract—Consideration for shares other than cash—Registration of contract—Matter of prejudice—*"*Just and equitable*"*—Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.—Before granting relief under the Companies Act, 1898, the court will consider the consideration given for the shares which were issued and the nature of the contract sought to be registered. It lies on the applicant to show that, when entering into the contract which he is applying to register, he acted with due caution and consider-

tiousness, and that he did nothing to disentitle him to a relief at the cost of innocent persons.—ROXBURGHE PRESS, RE, SPIERS & BEVAN'S CASE, *Ch.D. Wright, J.*, 281; [1899] 1 Ch. 210; 68 L. J. Ch. 111; 80 L. T. 280.

3. *Contract—Filing of memorandum in lieu of contract—Practice—Procedure—Application for relief—Rectifying Register—Motion—Summons—Shareholders, application by some only—Forms of order and memorandum—Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.—An application under the Companies Act, 1898, s. 1, for leave to file a contract or a memorandum in lieu of a contract, may be made either by motion or summons, but preferably by summons, and if by summons it should be heard in open court and not in chambers, following the better practice on applications to rectify the register of shareholders.

The application, if made by shareholders, may be made by some only, and not necessarily by all, of the shareholders affected.

Where a memorandum in lieu of a contract is approved by the court and ordered to be filed with the Registrar of Joint Stock Companies under sub-section 4, it is not necessary to file a copy of the order as well as the memorandum, but the memorandum should state on the face of it that it has been approved by the court and directed to be filed by the order.

Forms of order and memorandum under the Act.—WHITEFRIARS FINANCIAL CO., RE, REEVES & SON (LIMITED), RE, *Ch.D. Kekewich, J.*; [1899] 1 Ch. 184; 68 L. J. Ch. 79; 79 L. T. 546.

4. *Contract—Shares—Contract to issue fully paid shares in satisfaction of debt—Issue of shares not fully paid—Failure of consideration—Right of shareholder, as assignee of the debt, to prove in winding-up—Interest*—3 & 4 *Will.* 4, *c.* 42, *s.* 29.—Where a company contracts to issue to a creditor a certain number of fully paid shares in satisfaction of a debt due by it to him, and some of the shares are in fact issued as unpaid, there is *pro tanto* a failure of consideration, and the creditor can, notwithstanding that he has become a member of the company, prove in its winding-up for such part of his debt as is represented by the unpaid shares.

Interest cannot be claimed upon such a debt, except either by contract or by way of damages under section 29 of the 3 & 4 Will. 4, c. 42.—RAILWAY TIME TABLES PUBLISHING CO., RE, WELTON'S CASE, *C.A.*, 133; [1899] 1 Ch. 108; 68 L. J. Ch. 50; 79 L. T. 679.

5. *Contract — Shares — Fully-paid shares — Consideration—Omission to file sufficient contract—Leave to file contract after commencement of winding-up—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).—Certain shares in a company had been allotted by it, in pursuance of two agreements, to one S., as fully paid, in consideration of costs, charges, and expenses incurred by him in the promotion of the company. Only one of the agreements had been filed by the company, and that was insufficient to satisfy the requirements of section 25 of the Companies Act, 1867.

The company subsequently went into liquidation, and S. was placed by the liquidator on the list of contributories in respect of the shares.

Upon an application by S. for relief under section 1 of the Companies Act, 1898,

Held, that S. was entitled to relief and that the originals of the agreements not being in his possession, copies of them should be stamped and filed, together with an office copy of the order on this application, with the Registrar of Joint Stock Companies.—MAYS' METAL SYNDICATE, RE, SMITHSON'S CASE, *Ch.D. Wright, J.*; 68 L. J. Ch. 46; 79 L. T. 663.

6. *Contract—Shares—Issue of shares before contract filed—Memorandum—Motion—Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-sections* 1 *and* 4.—A company was formed on the reconstruction of another company the shareholders in which took shares credited as partly paid up in the new company.

These shares were issued pursuant to two agreements, but before these agreements were filed with the Registrar of Joint Stock Companies the directors allotted a number of the shares. Subsequently the agreements were filed. The company moved for an order that the two filed contracts should operate as if they had been filed at or before the issue of the shares.

Held, that as the contracts were actually on the file, an order could not well be made under sub-section 1 of section 1 of the Companies Act, 1898, that the same contracts should be filed; the case came under sub-section 4 of section 1, and a memorandum must be filed in accordance with that section.—LUCKY GUSS CO., RE, *Ch.D. Kekewich, J.*; 79 L. T. 722.

7. *Contract—Shares—Issue of fully-paid shares—Registered contract—Sufficient statement of consideration—Property purchased described merely by reference to prior contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—Where the contract registered under section 25 of the Companies Act, 1867, on the issue of fully paid-up shares merely described (by way of recital of a prior contract entered into between the vendor and a trustee for the company) the property sold, as "certain leasehold messuages, shops, and premises, together with the goodwill of the several businesses carried on by the vendor upon the same, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses."

Held, that the consideration for the issue of the shares was sufficiently stated.

In re Maynards (*Limited*), 46 W. R. 346, [1898] 1 Ch. 515, not followed.

Decision of Romer, J. (*ante*, p. 27), affirmed.—FROST & CO., RE, *C.A.*; 68 L. J. Ch. 544; 80 L. T. 849.

8. *Contract—Shares—Issue of shares at a discount—Companies Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16)—*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118)—*Companies Clauses Act*, 1869 (32 & 33 *Vict. c.* 48).—A company governed by the Companies Clauses Consolidation Act, 1845, and the Acts amending it may issue fully paid-up original shares at a sum less than their nominal value in the same manner as new shares can, under the authority of those Acts, be issued.—STATHAM *v.* BRIGHTON MARINE PALACE AND PIER CO., *Ch.D. Romer, J.*, 185; [1899] 1 Ch. 199; 68 L. J. Ch. 172; 80 L. T. 73.

9. *Contract—Shares—Leave to file contract after issue of shares as fully paid—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).—An order may be made on motion under the Companies Act, 1898, on the application of the parties interested in the shares, with notice to the company; but, *semble*, that in future cases the court may direct notice to be given of the day for hearing the application, and that anyone desiring to oppose can attend.

Cf. Palmer's Company Law (2nd ed.), p. 379.—NORTHERN CREOSOTING CO., RE, *Ch.D. Byrne, J.*; 79 L. T. 407.

10. *Contract—Shares—Omission to file—"Inadvertence"—Sufficiency—Supplemental contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-sections* 1, 4.—By a contract in writing dated the 18th of October, 1897, the owner of a business agreed to sell it to a company for a specified sum of money to be paid wholly or partly in cash, shares, or debentures as the directors should determine. Subsequently the directors allotted specified shares to the vendor as fully paid up in respect of a part of the purchase-money, but no written contract to that effect was entered into. The original contract was not filed as required by section 25 of the Companies Act, 1867, the omission to file it being due to the fact that the parties were ignorant of the provisions of the Act. Upon an application by the vendor for an order for the filing of the original contract with the Registrar of Joint Stock Companies under the provisions of section 1 of the Companies Act, 1898,

Held, that the omission to file the contract was due to "inadvertence" within the meaning of the Act:

Held, however, that the contract was not sufficient within the meaning of the Act, inasmuch as the determination by the directors as to the mode in which payment was to be made was supplemental to the original contract, and without this determination there was no complete contract:

Held, therefore, that there must be an order that a supplemental contract be entered into, that the supplemental contract be filed with the original contract, and that the entire contract when so filed should operate as if it had been filed at the time of the issuing of the shares.—JACKSON & CO., RE, *Ch.D. Kekewich, J.*; [1899] 1 Ch. 348; 68 L. J. Ch. 190; 79 L. T. 662.

11. *Contract—Shares—Omission to file contract—Relief—Going concern—Practice.*—The judge to whom the companies (winding-up) business is assigned has jurisdiction to hear applications for relief for non-compliance with section 25 of the Companies Act, 1867, under the Companies Act, 1898, in the case of companies where no winding-up order has been made; but it is more convenient that they should be disposed of by the other judges of the Chancery Division exercising their ordinary Chancery jurisdiction.—CONCESSIONS ACQUISITION SYNDICATE, RE, *Ch.D. Wright, J.*; 79 L. T. 666.

12. *Contract—Shares—Paid-up shares—Payment—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—The adoption and confirmation by directors of a contract made before the formation of a company by persons purporting to act on behalf of the company does not create any contractual relation between the company and the other party to the contract.

Where a sum is payable by a shareholder in cash to a company it is sufficient to satisfy the requirements of the 25th section of the Companies Act, 1867, if the company agrees with the shareholder to accept, as a set-off and discharge, a like sum then payable by the company to the shareholder.

Spargo's case, 21 W. R. 306, L. R. 8 Ch. App. 407, approved.

Larocque v. *Beauchemin*, 45 W. R. 639, [1897] A. C. 358, followed.—NORTH SYDNEY INVESTMENT AND TRAMWAY CO. *v.* HIGGINS, *P.C.*, 481; [1899] A. C. 263; 68 L. J. P. C. 42; 80 L. T. 303.

13. *Contract—Shares—Shares issued as fully paid—Filed contract—Consideration—Sufficiency of identification—Estopped—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—It is sufficient to satisfy section 25 of the Companies Act, 1867, if an enforceable contract is filed, which states with reasonable plainness the nature of the consideration which is substituted for cash, although it may not be a complete identification.

A statement in a share certificate that the shares are fully paid is not a representation that a sufficient contract has been filed under section 25 of the Companies Act, 1867, so as to estop the liquidator from denying it.—AFRICAN GOLD CONCESSIONS, &C., CO., RE, MARKHAM AND DARTER'S CASE, *Ch.D. Wright, J.*, 509; [1899] 1 Ch. 414; 68 L. J. Ch. 215; 80 L. T. 282.

14. *Contract—Vendor signatory to memorandum for 6,500 shares—Contract for sale to company subsequently filed—Consideration 6,500 shares—Shares earmarked—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-sections* 1, 4.—An arrangement was made between J. and others that a company should be formed to take over and work J.'s business of a maltster, and that J. should sell the business and premises to the company for 6,500 fully paid-up £1 shares. On the formation of the company J. signed the memorandum of association for 6,500 shares. Subsequently a contract was drawn up setting out the terms of his sale to the company, and this was duly filed in accordance with section 25 of the Companies Act, 1867. It was considered and intended that the 6,500 shares for which J. signed the memorandum were those issuable to him under the contract. Doubts having arisen as to this, an application was made for an order under section 1 of the Companies Act, 1898, that a sufficient contract might be filed, or, in the alternative, a memorandum specifying the consideration for which the shares were issued.

Held, that, as there was a sufficient contract filed within the meaning of section 25 of the Companies Act, 1867, the court had no power under the Companies Act, 1898, to grant the relief sought.—JARVIS & CO., RE, *Ch.D. Romer, J.*, 186; [1899] 1 Ch. 193; 68 L. J. Ch. 145; 79 L. T. 727.

15. *Debenture — Condition — Notice to trustees before commencing action or taking any proceedings—Action to enforce covenant to pay—No notice.*—Certain debentures were issued by the defendants by which they acknowledged they were bound to pay the registered holder the sum of £100 and interest, and by which they charged their property with such £100 and interest.

These debentures were issued subject to the conditions indorsed on the back, of which condition 13 was as follows: "The holder hereof shall not commence any action or take any proceedings to enforce the security hereby created, or to procure the appointment of a receiver, or to procure a sale to be ordered of the property subject hereto or for foreclosure . . ." unless he had served a notice on the trustees requiring them to do certain acts, which they had neglected to comply with for six months.

Held, that this condition prevented the registered holder from bringing an action on the covenant to enforce the security, or on the covenant contained in the security, until such notice had been given.—STEWART *v.* BRITISH AND COLONIAL COLLIERY ASSOCIATION, *Q.B.D.*; 68 L. J. Q. B. 14; 79 L. T. 494.

16. *Debenture payable to bearer—Usage.*—The plaintiffs, a limited company, were possessed of certain debentures, issued by an English company in England and payable to bearer, which by reason of the conditions indorsed thereon were not promissory notes. These debentures were kept in a safe, the key of which was entrusted to the plaintiffs' secretary. The secretary, in fraud of the plaintiffs, took the debentures from the safe and pledged them with the defendants for advances made to him by them. The defendants received the debentures in good faith. It was proved that the usage in the mercantile world and on the Stock Exchange for many years had been to treat such debentures as negotiable instruments transferable by mere delivery.

Held, that although the plaintiffs were not estopped by their conduct from denying the defendants' title, yet the defendants were entitled to the debentures as against the plaintiffs on the ground that the debentures were negotiable instruments transferable by delivery.

Crouch v. *Crédit Foncier of England*, L. R. 8 Q. B. 374, has been in effect overruled by *Goodwin* v. *Robarts*, L. R. 10 Ex. 337, 1 App. Cas. 476.—BECHUANALAND EXPLORATION CO *v.* LONDON TRADING BANK, *Q.B.D.*; [1898] 2 Q. B. 658; 79 L. T. 270.

17. *Debenture—Floating security—Sale of assets of company—Dissentient creditors.*—The B. company, which was registered in 1887, was authorized by its memorandum of association to form, or assist in the formation of, any subsidiary company. It had issued debentures for a large amount.

By an agreement dated the 29th of November, 1898, and made between the B. company and the trustee for an intended new company, the B. company agreed to pay all its assets to the new company for £320,000, paid as to £100,000 either in cash or shares at the option of the purchaser, as to £150,000 either in cash or cumulative preference shares at the option of the purchaser, and as to £70,000 in ordinary shares.

The plaintiff, the holder of certain debentures in the B. company, alleged that the rights of the debenture-holders would be destroyed if the arrangement were carried out; that the words of the memorandum of association could not interfere with the rights of secured creditors; and that the right to enforce his security arose when the whole or substantially the whole of the assets were parted with and B. company ceased to be a going concern. He accordingly moved for an interlocutory injunction to restrain the carrying out of the arrangement. It was decided by North, J., [1899] 2 Ch. 130, that the B. company was destroying the substratum of its existence, and therefore the floating charge which the debenture-holders held upon the whole assets attached; and, that an injunction must be granted to restrain the B. company from parting with its property.

The B. company appealed. It appeared that subsequently to the decision of North, J., many of the debenture-holders who had previously dissented had given their assent to the scheme of arrangement.

Held, that if the money owing to the entire number of the still dissentient debenture-holders were brought into court the order of North, J., [1899] 2 Ch. 130, would be discharged.—BORAX CO., RE, FOSTER *v.* BORAX CO., *C.A.*; 80 L. T. 637.

18. *Debentures—Hypothecation of remittances—Receiver—Priorities.*—A limited company owned a railway and also valuable coal mines in a foreign country. In 1888 it issued 5 per cent. debentures on the security of its railway, it being provided by the trust deed securing the same that the security should not, except in the case of suspension of payment by or liquidation of the company, affect its other property.

In 1892 it issued 6 per cent. debentures charged on all its property, and ranking as a first charge on its property other than its railway, in respect of which the 1892 debentures ranked as a second charge after the 1888 debentures, it being provided by the trust deed securing the 1892 debentures that the company, notwithstanding that issue, should be at liberty in the ordinary course of its business, and for the purpose of carrying on the same, to sell, lease, and deal with its property for the time being, but not to create any mortgage or charge on its railway or coal mines in priority to the debentures, and not to sell its undertaking or any substantial part thereof without the concurrence of the trustees for the debenture-holders.

The ordinary course of business was for its foreign agents when they had sufficient cash in hand on account of the company to remit it to the company by bills through its agents in England, who sent the bills to the company's bankers for discounting or for collection on account of the company, and the bankers placed the proceeds to the credit of their account with the company.

In August, 1896, the company being in need of money to pay interest on its 6 per cent. debentures, obtained an advance from its bankers on the security of a letter hypothecating all remittances to be received from its foreign agents; and in September the company, being in need of money to pay off certain debentures, obtained another advance from its bankers on a similar letter of hypothecation.

In March, 1897, the company made default in payment of interest on its debentures, and a debenture-holder's action was brought against it and a receiver appointed on the 27th of March.

On the 18th of March, and again on the 27th of March, the foreign agents having no notice of the appointment of the receiver sent remittances to the company, which were handed to the receiver on the 23rd of April and the 3rd of May respectively.

Held, that the bankers, by virtue of the two letters of hypothecation, were entitled to these remittances in priority to the debenture-holders.—ARAUCO CO., RE, *Ch.D. North, J.*; 79 L. T. 336.

19. *Debenture—Issue of part of series—Issue of writ in debenture-holder's action—Issue of further debentures of series — Time of fixing security — "Ordinary course of business"—Security for solicitor's costs.*—In November, 1895, the directors of H. & Co. (Limited) duly resolved upon the issue of a series of debentures as a floating security, and accordingly issued a portion only of the series.

In October, 1897, the interest on the debentures having fallen into arrear, a debenture-holder's action was commenced.

Subsequent to the issue of the writ, but before the appointment of a receiver in this action, further debentures in the same series were issued to the company's solicitor as security for the costs of defending the action.

The question now arose whether the directors had power to issue further debentures of the series after the action had been commenced.

Held, following the judgment of Jessel, M.R., in *In re The Colonial Trusts Corporation, Ex parte Bradshaw*, 15 Ch. Div. 465, and Lindley, L.J., in *The*

Governments Stock Investment Co. v. *The Manila Railway Co. and Others*, [1895] 2 Ch. 551, that the security was not fixed till the appointment of a receiver on the making of a winding-up order, and that the debentures had been duly issued.—HUBBARD & Co., RE, *Ch.D. Wright, J.*; 68 L. J. Ch. 54; 79 L. T. 665.

20. *Deceased member—Notices—Service—Calls—Forfeiture—Special resolutions.*—Where the articles of association of a limited company define "member" as "a registered holder of any stock or share of the company," and provide that the company may serve notices "upon any member, either personally or by sending the notice prepaid by post addressed to such member at his registered address as appearing in the register of the company," but make no provision as to the service of notices in the case of a deceased member, notices relating to calls, forfeiture, and special resolutions affecting a deceased member's shares, will not be effectively served by being sent by post addressed to such member at his registered address, if the company, at the time of sending the same, know that such member is already dead.

Where one of the articles of association provides that the company "shall have a first and paramount lien for all debts, obligations, and liabilities of any member to or towards the company upon all shares (not being fully paid) held by such member," and there are calls upon partly-paid shares due from a member who is also the only holder of fully-paid shares in the company, the other members cannot by special resolution alter the article by striking out the words "not being fully paid" so as to retrospectively affect, to the prejudice of the non-consenting holder of such fully-paid shares, his rights already existing under the said article.

New Zealand Gold Extraction Co. v. *Peacock*, [1894] 1 Q. B. 622, and *James* v. *Buena Ventura Nitrate Grounds Syndicate (Limited)*, 44 W. R. 372, [1896] 1 Ch. 456, considered.—ALLEN *v.* GOLD REEFS OF WEST AFRICA (LIMITED), *Ch. D. Kekewich J.*, 568; [1899] 2 Ch. 40; 68 L. J. Ch. 540; 80 L. T. 750.

21. *Director—Misfeasance—Payment of dividends out of capital—Representations amounting to fraud—Statute of Limitations.*—The N. Bank of W. (Limited), which was incorporated in 1873, went into voluntary liquidation in 1893, and the liquidator took out this misfeasance summons to ascertain to what amount, if any, the respondent, J. C. (one of the former directors), was liable (besides other claims) to repay certain sums which had been, as alleged, wrongly paid as dividends out of capital while he was a director.

In the opinion of the court the evidence showed that sufficient provision had not been made in each year for debts which were either known to be bad or likely to turn out so; that the respondent had a general knowledge of the affairs of the bank, and had full means of ascertaining its financial position; and that he had admittedly completely neglected his duties, and had been party to the issue of misleading and fraudulent representations of the state of the bank's business in annual reports to the shareholders by the directors, the truth of which he had taken no steps to ascertain.

Held, that the respondent was liable to pay the sum of £3,700 with interest at 5 per cent., being the amount of the dividends wrongly paid out of capital in the years in which he had joined as director in the false representations, and for which he could therefore not claim the benefit of the Statute of Limitations.—NATIONAL BANK OF WALES, RE, *Ch.D. Wright, J.*; 79 L. T. 667.

22. *Director—Place of profit.*—Articles of association provided that the office of director should be vacated by a director "if he accepts or holds any other office or place of profit under the company except that of managing director."

Held, that a director who accepted the trusteeship of a debenture deed given by the company at a salary ceased to be a director.—ASTLEY *v.* NEW TIVOLI, *Ch.D. North, J.*, 326; [1898] 1 Ch. 151; 68 L. J. Ch. 90; 79 L. T. 541.

23. *Director—Qualification—Implied contract to acquire—Remuneration—Apportionment.*—The terms of the implied agreement between a director who has accepted office and acted, and the company—viz., on his part to serve the company on the terms of the articles, and on the company's part that he shall receive the remuneration provided by the articles—are cross-contracts, and are not interdependent.

An article providing that the office of a director shall be vacated if he cease to hold the due qualification, does not apply to the case of a qualification never possessed.

An article providing a sum for the remuneration of the board in each year applies to every member of the board, including a *de jure* director who has not acquired his qualification shares under the articles.

The omission to apply for and obtain such shares from the company is not such a breach of duty as to constitute a defence to any claim for remuneration.

Where the articles provide a sum for the remuneration of the board "in each year," no remuneration can be claimed except for a complete year, and there is no apportionment in respect of an incomplete year.—SALTON *v.* NEW BEESTON CYCLE Co., *Ch.D. Cozens-Hardy, J.*, 462; [1899] 1 Ch. 775; 68 L. J. Ch. 370; 80 L. T. 521.

24. *Director—Unauthorized payment of capital to shareholders—Liability of shareholders to refund.*—The directors of a company owning ships, having received a sum of money under a policy of insurance of one of the ships which had become a total loss, distributed the money among the shareholders in the company, with their knowledge and consent. Subsequently the company was wound up. An order was made in the winding up, under section 10 of the Companies Act, 1890, declaring that the payments to the shareholders were payments in reduction of the capital of the company, and were unlawful, and the directors were ordered to repay the amount to the liquidator. This order was made without prejudice to the right of the directors to be recouped by the shareholders.

Held, that the directors were entitled to recover from the shareholders the money paid to them.—MOXHAM *v.* GRANT, *Q.B.D.*, 282; [1899] 1 Q. B. 480; 68 L. J. Q. B. 283; 80 L. T. 356.

25. *Illegal association—Action to administer funds—Claim by contractors to rank as creditors—Quantum meruit.*—In an action to administer the funds of the defendant syndicate brought by a subscriber against the syndicate the supervising committee and the bankers certain inquiries were ordered, in the course of which it transpired that the syndicate consisted of more than twenty members, and was illegal, not being registered under the Companies Acts, and advertisements were issued for creditors, on which a claim was made by U. Brothers for printing and posting prospectuses. It appeared that U. Brothers were already suing the committee and others in the Queen's Bench

Division for payment of their debt. On a summons to disallow their claim in this action it was

Held, that the only ground for the claim was that the syndicate had taken the benefit of the work, and therefore the claim must rest on a *quantum meruit*. That the doctrine did not apply where other persons were liable, and that as the persons, or some of them, sued in the Queen's Bench Division appeared to be liable, the claim in this action ought not to be allowed.—HUME *v.* RECORD REIGN JUBILEE SYNDICATE, *Ch.D. Stirling, J.*; 80 L. T. 404.

26. *Memorandum of association — Subscribers — Liability to pay calls.*—Persons who subscribe their names to the memorandum of association of a company, though they thereby agree to become members of the company, do not become debtors to the company for the full amount of the shares they take. They are only liable, like any other member of the company, to pay calls if and when made upon them in the manner provided by the articles. —ALEXANDER *v.* AUTOMATIC TELEPHONE CO., *Ch.D. Cozens-Hardy, J.*; 68 L. J. Ch. 514; 80 L. T. 753.

27. *Prospectus—Directors—Shares — Statement in prospectus that directors would take shares—Liability to take shares—List of contributories.*—A prospectus of a company, approved by the directors at their first meeting, stated that the whole of the ordinary shares not taken by the vendors to the company would be taken by the directors. The register of shareholders did not contain the names of any of the directors, nor were any shares allotted to them. In the winding up of the company the liquidator applied for a balance-order against B., one of the directors, in respect of 367 unallotted ordinary shares.

Held, by the Court of Appeal (reversing Wright, J.), that there was no evidence of an agreement by B. to take any definite number of shares, and that therefore he was not liable to be put on the list of contributories.—MOORE BROTHERS & CO. (LIMITED), *C.A.*, 401; [1899] 1 Ch. 627; 68 L. J. Ch. 302; 80 L. T. 104.

28. *Prospectus—Untrue statements—Liability of directors and promoter—The Directors' Liability Act,* 1890 (53 & 54 *Vict. c.* 64), *s.* 3 (1) (*a*)—*Non-disclosure of contract by promoter—Waiver—Companies Act,* 1867 (30 & 31 *Vict. c.* 131) *s.* 38.—A shareholder brought an action against a limited company, its directors and promoter, for rescission of his contract to take shares and for compensation and damages, on the ground that he had been induced to take shares by untrue statements in the prospectus, and that the prospectus was fraudulent for non-disclosure of an agreement to which the promoter was a party, but which did not relate to the formation of the company or the subscription to its capital. Notice of the agreement was alleged to be waived by a clause in the prospectus which provided that "there may be other agreements as to the formation of the company or the subscription to the capital or otherwise. . . . Subscribers will be held to have had notice of all these contracts and to have waived all right to be supplied with particulars, &c."

Held, (1) that the shareholder had been induced to take shares on the faith of statements in the prospectus which were untrue and misleading, and that he was entitled to rescission of his contract with the company; (2) that the directors and promoter were severally liable to pay compensation to the shareholder under the Directors' Liability Act, 1890, s. 3, because, although they believed the untrue statements to be justified by the facts, yet their want of care as business men was such that they could not be held to have had "reasonable ground" for their belief; and (3) that the prospectus must be deemed fraudulent within the Companies Act, 1867, s. 38, as against the promoter for non-disclosure of the agreement, which the court, assuming but not deciding that a statutory provision could be waived, held was not covered by the waiver clause.—GREENWOOD *v.* LEATHER-SHOD WHEEL CO., *Ch.D. Kekewich, J.*; 80 L. T. 462.

29. *Reconstruction scheme — Special resolution — Notice of meeting — Sufficiency — Non-disclosure of interest of directors—Underwriting—Injunction.*—In a notice convening an extraordinary general meeting for the discussion of the reconstruction of a company by the sale of the undertaking to another company, it was stated, *inter alia*, that the full issue of debentures had been guaranteed by a third company.

By another notice, convening a second extraordinary general meeting, the proposal to adopt the said reconstruction scheme was made conditional upon the non-acceptance of an alternative scheme. Neither notice disclosed the fact that the directors of the selling company were directors of or largely interested in the guaranteeing company. The resolutions as to the said reconstruction scheme were passed and confirmed.

Held, that the notices did not sufficiently disclose the interests of the defendant directors, and that therefore the resolutions were not binding upon shareholders absent from the meeting (*Kaye* v. *Croydon Tramways Co.*, 46 W. R. 405, [1898] 1 Ch. 358, discussed and followed); but that all the shareholders had been sufficiently informed of the conditional proposal announced in the second notice.

Alexander v. *Simpson*, 38 W. R. 161, 43 Ch. D. 139, distinguished.—TIESSEN *v.* HENDERSON, *Ch.D. Kekewich, J.*, 459; [1899] 1 Ch. 861; 68 L. J. Ch. 353; 80 L. T. 383.

30. *Shares—Shares partly paid up—Forfeiture—Sale—Credit for amount paid up.*—The articles of association of a company provided that the directors might sell, re-allot, or otherwise dispose of forfeited shares in such manner as they thought fit. A number of shares on which at least £3 per share had been paid having been forfeited, the directors entered into an agreement for the sale of these shares with £2 5s. credited as paid up, for 30s. per share.

Held, that the company could deal with the shares as partly paid up to an extent not exceeding the amount which had been paid up on each at the time of forfeiture, and that the transaction did not amount to an issue of shares at a discount.—MORRISON *v.* TRUSTEES, &C., INSURANCE CO., *C.A.*; 68 L. J. Ch. 11; 79 L. T. 605.

31. *Voting—Conditional allotment of shares—Issue of shares—Shareholder—Name on register—Right to vote—Condition unfulfilled—Conditional agreement to issue shares—Companies Act,* 1862 (25 & 26 *Vict. c.* 86), *ss.* 23, 30 — *Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—An allotment of shares is an appropriation by the directors or managing body of a company of shares to a particular person, but it does not necessarily create the status of membership. The allotment may be subject to a condition —*e.g.*, that the allottee should not only indicate his acceptance, but perform some other act such as make payment of a sum of money; a company therefore may offer specified shares to a person on

the terms that no title to the shares shall arise until a condition provided for in the contract to accept the shares has been fulfilled, and, after the allotment and registration of such shares, the company may decline to treat such person as a member if he has neglected to comply with the condition.

A person who agrees to become a member of a company and whose name is entered on the register of shareholders as the holder of certain shares is not thereby constituted a member entitled to vote at meetings of the company in respect of such shares unless it can be shown that the company have agreed to accept such person as a member; when, therefore, a company have agreed to give a person certain shares upon certain conditions which remain unfulfilled, such person does not become a member, notwithstanding the allotment of shares to him in part performance of the agreement incorporating such conditions and registration of the same in his name, so long as the certificates for such shares are deposited with the intention that they shall not operate according to their purport until the event happens on which they are to issue.—SPITZEL *v.* CHINESE CORPORATION, *Ch.D. Stirling, J.*; 80 L. T. 347.

32. *Voting—Evidence—Articles of association.*—An article provided that votes tendered at a meeting and not disallowed at the meeting or an adjournment thereof should be valid for all purposes.

Held, that in the absence of fraud or *mala fides* a resolution for voluntary winding up could not be impeached upon the ground that votes had been improperly received. — WALL *v.* LONDON AND NORTHERN ASSETS CORPORATION (No. 2), *Ch.D. North, J.*; [1899] 1 Ch. 550; 80 L. T. 70.

33. *Winding up—Company limited by guarantee—Contributories—Debts.* — A member of a mutual marine insurance company limited by guarantee is not liable to be placed on the list of contributories, in the event of the company being wound up, for a larger amount than is prescribed by the company's memorandum of association. He may be a debtor to the company or to the other members of it for losses; but, though he may be sued in respect of such losses, he cannot be made a contributory in the winding up in respect of them.—BANGOR AND NORTH WALES MUTUAL PROTECTION ASSOCIATION, RE, *Ch.D. Wright, J.*; 68 L. J. Ch. 521; 80 L. T. 870.

34. *Winding up — Costs — Order against official receiver personally—County Court—Right of appeal.* —An appeal will lie against an order on an official receiver or liquidator to pay costs personally, for such an order is equivalent to a declaration that such official has been guilty of misconduct.—RAYNES PARK GOLF CLUB (LIMITED), RE, OFFICIAL RECEIVER, EX PARTE, *Q.B.D.*, 499; [1899] 1 Q. B. 961; 68 L. J. Q. B. 529; 80 L. T. 388.

35. *Winding up—Creditor also contributory—Unpaid calls of company—Debt of company—Set-off—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 38, 101—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10. —A company in liquidation which owns shares on which unpaid calls are due in another company which is also in liquidation, and is also a creditor of that company for money lent, is not entitled to set off the debt against such calls, as the bankruptcy law as to set-off is not imported by section 10 of the Judicature Act, 1875, into the law of companies so as to allow set off against calls.

But the debtor company is entitled, when paying a dividend, to retain such part of that dividend as is payable to the creditor company until the calls made on the shares held by the creditor company are paid in full.

Gill's case, 27 W. R. 934, 12 Ch. D. 755, and *Grissell's case*, 14 W. R. 1015, L. R. 1 Ch. 528, followed.—AURIFEROUS PROPERTIES, RE, *Ch.D. Wright, J.*, 75; [1898] 2 Ch. 428; 79 L. T. 71.

36. *Winding up—Injunction—Transfer of shares —Registration*—Lis pendens—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 131.—Where an interlocutory injunction has been granted to restrain the voluntary liquidator and the directors of a company from acting upon resolutions to wind up the company, the directors, in refusing to register transfers of shares pending the trial of the action are not acting "without sufficient cause" within section 35 of the Companies Act, 1862; the jurisdiction of the court extends equally to shares the transfers of which were executed before the commencement of the winding up, and to transfers executed after the winding up.—VIOLET GOLD MINING CO, RE, *Ch.D. Kekewich, J.*; 68 L. J. Ch. 535; 80 L. T. 684.

37. *Winding up—Jurisdiction—Proceedings commenced before winding up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 143—*Stay of proceedings—Defendant preparing affidavits.*—Where proceedings have been commenced before the period after which, under section 143 of the Companies Act, 1862, a company ceases to exist, the court has jurisdiction over such proceedings after that period.

In re Crookhaven Mining Co., 15 W. R. 28, L. R. 3 Eq. 69, followed.

When a motion stands over to enable the defendant to file affidavits by a certain date, the defendant may prepare his evidence and file affidavits, although in the meantime the defendant has got an order ordering the plaintiffs to give security for costs and staying proceedings until such security has been given. — WHITELEY EXERCISER CO. *v.* GAMAGE, *Ch.D. North, J.*, 296; [1898] 2 Ch. 405; 79 L. T. 20.

38. *Winding up — Official receiver's report — "Further report"—Allegation of fraud—Order for public examination—Jurisdiction—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-sections* 2, 3, 7.—In the winding up of a company the further report of the official receiver, made under section 8, sub-section 2, of the Companies (Winding-up) Act, 1890, must allege that fraud has been committed by some specified person or persons in the promotion or formation of the company, and must set out such facts as the basis of his opinion as will warrant the judge in calling upon such person or persons to undergo public examination.

Ex parte Barnes, 44 W. R. 433, [1896] A. C. 146, discussed and explained. — CIVIL, NAVAL AND MILITARY OUTFITTERS, RE, *C.A.*, 233; [1899] 1 Ch. 215; 68 L. J. Ch. 164; 80 L. T. 241.

39. *Winding up—Misrepresentation—Rescission of contract to take shares—Proceedings commenced between petition and order for winding up.*—Notwithstanding the observations of Lord Westbury in *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 77, 78, there is nothing in that case throwing doubt on the decision of Lord Cairns, L.C., in *Kent* v. *Freehold Land Co.*, L. R. 3 Ch. 493, that a shareholder cannot be relieved from liability on his shares on the ground of misrepresentation in an action or proceeding commenced after the presentation of a winding-up petition, but before the order for winding up on that petition is made.

Where an affidavit, in opposition to an application

for final judgment under the Rules of the Supreme Court, 1883, ord. 14, in an action by the company for calls, setting up misrepresentation as a defence, and stating an intention to counterclaim for rescission on that ground, was followed by an order giving leave to defend, and all these matters occurred before the presentation of a winding-up petition, but the counterclaim for rescission was delivered after the petition and before the winding-up order made upon it.

Held, that the shareholder was too late to apply for relief.

Observations on *In re Scottish Petroleum Co.*, 23 Ch. D. 413.—GENERAL RAILWAY SYNDICATE, RE, WHITELEY'S CASE, *Ch.D. Wright, J.*; [1899] 1 Ch. 770; 68 L. J. Ch. 365; 80 L. T. 868.

40. *Winding up—Private examination under section 115 of the Companies Act, 1862—Subsequent proceedings—Interrogatories—Right to inspect depositions—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Companies (Winding-up) Rules, November*, 1895.—A witness is not now entitled as of right to see the depositions of his examination under section 115 of the Companies Act, 1862, but must obtain the leave of the court to do so; and even if the court considers that the witness ought to be allowed to see his depositions, it does not follow that such leave will be granted to him at any moment which he may choose, but the court will consider the circumstances of each case.—MERCHANTS FIRE OFFICE, RE, *Ch.D. Wright, J.*, 480; [1899] 1 Ch. 432; 68 L. J. Ch. 211; 80 L. T. 285.

41. *Winding up—Proof—Costs of proceedings commenced before winding up—Contingent liability—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.—An application under section 35 of the Companies Act, 1862, to rectify the register and for a return of money paid is not a claim for unliquidated damages.

After a successful application to rectify the register of shareholders, sums paid by applicants for shares are provable debts in the liquidation of the company; and the costs of rectifying the register, being costs of obtaining an order without which the debts could not be recovered or admitted to proof, may properly be added to the provable debts.—BRITISH GOLDFIELDS OF AFRICA (LIMITED), RE, *C.A.*, 552; [1899] 2 Ch. 7; 68 L. J. Ch. 412; 80 L. T. 638.

42. *Winding up—Purchase of undertaking—Dissentient shareholder—Arbitration—Award of umpire—Validity of award—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *First Schedule* (*c*) (*d*)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 161, 162.—The articles of association of a company do not constitute an agreement within section 162 of the Companies Act, 1862.

The appointment of an umpire by arbitrators constitutes an act in the arbitration within the meaning of clause (*c*) in the First Schedule to the Arbitration Act, 1889.

Decision of Stirling, J. (*ante*, p. 23, [1898] 2 Ch. 633), reversed.—BARING-GOULD AND SHARPINGTON, &c., SYNDICATE (LIMITED) ARBITRATION, RE, *C.A.*, 564; [1899] 2 Ch. 80; 68 L. J. Ch. 429; 80 L. T. 739.

43. *Winding up — Supervision order — Pending action—Costs prior to winding up—Payment in full.*—The costs of an action begun by a company while a going concern and continued, with leave, by the liquidators after the company has been ordered to be wound up under supervision, and in which judgment was entered in favour of the defendant with costs, are payable in full even when the order granting the liquidators leave to continue the action is silent on the subject.—LONDON DRAPERY STORES, RE, *Ch.D. Wright, J.*, 118; [1898] 2 Ch. 684; 79 L. T. 592.

44. *Winding up—Supervision order—Private examination under section 115 of the Companies Act*, 1862—"*Due regard to interests of creditors or contributories*"—*Public examination—Petition by the official receiver—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict.* 63) *ss.* 8, 14.—The powers which section 14 of the Companies (Winding-up) Act, 1890, gives the court to order a company to be wound up compulsorily on the application of the official receiver includes every case where the powers of the voluntary liquidator are proved, in the opinion of the court, to be insufficient for the purposes of the winding up in so far as the interests of the creditors or contributories are concerned. An order, however, ought not to be made as a matter of course, but a strong case ought to be made out to justify the interference of the court under that section.—JUBILEE SITES SYNDICATE (LIMITED), RE, *Ch.D. Wright, J.*, 606; [1899] 2 Ch. 204; 68 L. J. Ch. 427; 80 L. T. 869.

45. *Winding up—Surplus assets—Distribution—Fully-paid and partly-paid shares.*—One of the articles of association of a company contained the following clause: "If upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid, or which ought to have been paid, on the shares."

The capital of the company consisted of 60,000 shares of £1 each, of which 26,000 were vendors' shares issued as fully paid, besides which 30,357 other shares had been issued on which 10s. only had been paid up. On the voluntary winding up of the company there remained a large sum for distribution among the shareholders after paying all debts and the expenses of liquidation.

Held, that the distribution must be in accordance with the agreement shown in the articles—viz., the balance, after repaying the paid-up capital, must be distributed in proportion to the paid-up capital.—MUTOSCOPE AND BIOGRAPH SYNDICATE (LIMITED), RE, *Ch.D. Wright, J.*, 520; [1899] 1 Ch. 896; 68 L. J. Ch. 417.

See also Bankruptcy, 16; Inland Revenue, 24, 27; Insurance, 2; Practice, 24; Trade Name, 1.

CONTEMPT.—See Bankruptcy, 6, 7; Patent, 4.

CONTRACT:—

1. *Amount recoverable—Two stages in contract—Liquidated damages.*—In an action on a contract, and alternatively on a *quantum meruit*, to recover the price of certain specified work, if the contract is not properly carried out, the plaintiff can only recover the real value of the work done and the materials supplied.

Chapel v. *Hickes*, 2 C.&M. 214, followed.

A contractor undertook to deliver the whole of certain work in connection with wiring and blocks for electric light within twenty days of signing the contract; and, further, to properly fix and connect the fittings within fourteen days of the delivery to him of such fittings. He then wrote: "I undertake to carry out the work in connection with the cables, wires, and fittings in strict accordance with the specification and schedule within the times stated in the said specification for the sum of

£76 10s., and I consent to pay the sum of £5 for liquidated damages and not as a penalty for every day exceeding the number of days within which the work has to be completed."

Held, that £5 per day was payable for delay at either stage of the contract.—STEGMANN *v.* O'CONNOR, *Q.B.D.*; 80 L. T. 234.

2. *Commercial traveller—Refusal by employer to send on journey—Travelling expenses.*—A commercial traveller was engaged for a term. By the contract he was to travel in certain countries, and was to receive a salary of £500 and a fixed allowance per day as travelling expenses. During the continuance of the engagement his employers found that, owing to a fall in prices, it was no longer profitable to take orders in the countries travelled by him. They thereupon refused to send him on further journeys, and refused to pay him the allowance for travelling expenses or any part thereof, but continued to pay him his salary.

He sued them for damages for the injury done to the goodwill of his trade connection by their refusal to send him on journeys, and for the loss of the proportion of his allowance for travelling expenses which by economy he was able to save when travelling.

Held, that the action would not lie.—LAGERWALL *v.* WILKINSON, *Q.B.D.*; 80 L. T. 55.

3. *Conflict of laws—English and South African law — Place of performance — Restriction against trading—Injunction—Intention.*—Where a contract is entered into between parties residing in different countries, where different systems of law prevail, the law by which to determine the intrinsic validity and effect of the contract will be selected by the English courts on substantial considerations, the preference being given to the law of the country with which, according to the intention of the parties, the transaction has the most real connection.

Where a British subject resident in Johannesburg entered into a contract with a company registered in England, but formed for the purpose of carrying on business "in the Transvaal, the colony of Natal, and elsewhere in South Africa," to serve the company in their business carried on "at Johannesburg and in the colony of Natal or elsewhere in South Africa," and thereby undertook not to engage in any similar business in South Africa within a period of ten years after the determination of the contract without the consent of the company.

Held, in an action by the company for an injunction to restrain the defendant from committing a breach of his undertaking, that the contract was governed by the law of the South African Republic, as being the law of the country with which, according to the intention of the parties, the transaction had the most real connection.— SOUTH AFRICAN BREWERIES *v.* KING, *Ch.D. Kekewich, J.*, 681; [1899] 2 Ch. 173; 68 L. J. Ch. 530.

4. *Joint covenantors—Contribution—Evidence of intention — Inference from circumstances.* — The doctrine of contribution between joint covenantors is based on a broad principle of equity, or, as it has sometimes been expressed, on an implied contract, and depends on the intention of the parties contracting. Evidence of such intention is admissible after the death of one of such covenantors; and when a father, on the marriage of his son, had entered, together with the son, into a joint and several covenant with the trustees of the marriage settlement to pay a certain sum of money six months after his death and had specifically charged some of his own property with payment of the same, and the son, at the date of his marriage, was possessed of a reversionary interest only which he brought into settlement, and, the father having died insolvent, the security had to be realised, the court declined to infer, in the absence of express contract, an intention on the part of the father to reserve a right to his executors to sue his son for contribution.—BENTINCK *v.* BENTINCK, *Ch.D. Stirling, J.*; 80 L. T. 71.

5. *Master and servant—Negative stipulation against engaging in similar business—Breach of contract—Validity—Injunction.*—H., the confidential clerk of R. & Co. covenanted that he would not, during his engagement, carry on or be engaged, directly or indirectly, in any trade or business of a similar nature to that of R. & Co., or any other business whatever, on pain of instant dismissal and forfeiture of salary.

Held (reversing North, J.), on motion to restrain H. from engaging, directly or indirectly, in any business relating to goods of the description sold or manufactured by R. & Co., that such a covenant, limited to the period of H.'s engagement, was not unreasonable, and ought to be enforced by injunction.—ROBINSON *v.* HEUER, *C.A.*, 34; [1898] 2 Ch. 451; 79 L. T. 281.

6. *Principal and agent—Introducing purchaser—Contract except as to time for carrying out—Implied term—Withdrawal by vendor—Liability for commission.*—When all the terms of an agreement are stated except the term as to the time when it is to be carried out, and there is no express stipulation as to the time, then it is an implied term that the agreement is to be performed within a reasonable time.

The plaintiff was instructed by the defendant to find a purchaser for his house for £4,000.

On the 16th of January he found one S. ready and willing to pay that sum who required possession by the 15th of March.

The defendant refused the offer on the ground that he could not give up possession on the 15th of March.

The jury found that from the 16th of January to the 15th of March was a reasonable time.

Held, that the plaintiff was entitled to his commission.—NOSOTTI *v.* AUERBACH, *Q.B.D.*; 79 L. T. 413.

7. *Railway—Interest on shares—Payment out of penalties due from contractors.*—By a contract for making the line of the plaintiff railway, it was to be completed to the satisfaction of the engineer of the company in two years from the commencement of the works. The contract price was to be paid in debentures and shares of the company, which were to be issued at the request of the contractors to their nominees, or offered for public subscription. The contractors having requested the debentures and shares to be offered for public subscription entered into an agreement to pay to the company interest on the debenture and preference stock issued by the company until the railway was completed.

The works were commenced on the 15th of January, 1890, but the time for completion was afterwards extended to the 31st of May, 1892.

They were not completed for more than a year after the time fixed. Interest on the debentures and preference stock in the meantime became due, which was not paid by the contractors, and was therefore paid by the company.

This action was afterwards brought, and certain of the matters in dispute were referred to arbitra-

tion, but the award was to be enforced only in the present action.

Held (affirming the decision of Stirling, J., 76 L. T. 542), that the contractors had not completed the line within the time fixed, and were liable to pay the interest between the 1st of October and 31st of December, 1892; but that the arbitrator having found that the company were liable for not taking over the line when it was completed, the contractors were entitled to have the amount for which the company was so liable applied in reduction of the interest, but (reversing the decision of Stirling, J., 76 L. T. 542) that the contractors were not liable for the interest between the 15th of January and the 31st of May, 1892, between which dates the time for completion was extended.

Held also (reversing the decision of Stirling, J.), that it was not *ultra vires* the company to apply penalties due from the contractors in payment of interest on shares as such penalties were not capital, and dividends can be paid out of other money besides profits.—ALCOY AND GANDIA RAILWAY CO. *v.* GREENHILL, *C.A.*; 79 L. T. 257.

8. *Shipment to be made by sailing ship between specified dates—Condition precedent—Implied condition—Measure of damages.*—By agreement in writing the defendants sold to the plaintiffs 250 bales of Manila hemp, shipment to be made from a port or ports in the Philippine Islands by sailer or sailers between the 1st of May and the 31st of July, 1898. The agreement contained a clause that if the goods did not arrive from loss of vessel or other unavoidable cause the contract was to be void. In consequence of the Spanish-American war it was in a business sense impossible for the defendants to ship hemp by sailer between the specified dates, but in September they shipped hemp (which would otherwise have satisfied the contract) by steamer, and on the 27th of October declared it against the contract. The plaintiffs refused to accept this declaration, and returned it to the defendants, who, on the 4th of November, wrote that it was the only declaration that they were in a position to make.

Held, that the stipulations as to shipment by sailer or sailers between the specified dates were conditions precedent, and the declaration was bad; that it was not an implied condition of the contract that it should be possible to ship by sailer between those dates; that the defendants were not protected by the express condition as to non-arrival of the goods, the non-arrival not having been occasioned by any unavoidable cause within the meaning of the contract; and that the damages were to be ascertained by reference to the market price on the 4th of November, the day on which the defendants finally notified their inability to make a declaration in accordance with the contract.—ASHMORE & SON *v.* COX & CO., *Q.B.D.*; [1899] 1 Q. B. 436; 68 L. J. Q. B. 72.

9. *Voluntary trust—Intended transfer of property—Representations influencing conduct.*—N., a promoter of, and vendor to, an unsuccessful mining company, publicly and in good faith promised to create a trust, under which the company and its shareholders would have benefited, but died before the trust was created.

Held, that a person who heard of the contemplated trust could not, in virtue of the fact that he bought or held shares of the company in confidence of N.'s promise being carried out, establish a case of contract as against N., and, in the absence of any fraud or special representation, neither N. nor his executors would be estopped from denying liability, notwithstanding that N. himself might have benefited by the promise having been made.—COLEMAN *v.* NORTH, *Ch.D. Romer, J.*, 57.

See also Company, 3-14; Damages, 1, 2; Foreign Enlistment Act, 1; Frauds, Statute of, 1, 2; Infant, 1; Insurance, 3; Married Woman, 3; Master and Servant, 1; Practice, 39; Principal and Agent, 3; Railway, 2; Restraint of Trade, 1, 2; Vendor and Purchaser, 3.

CONVEYANCING ACTS.—See Landlord and Tenant, 11, 14; Mortgage, 12; Vendor and Purchaser, 12.

COPYHOLD:—

1. *Coal—Special custom for tenant to sell and work—"Not hindering lord's sale."*—In an action by the lord of the manor to restrain copyhold tenants from working and selling coal under their tenements the defendants set up a special custom for the tenants of the manor to work and sell the coal so long as the sale thereof in no way hindered the lord's sale.

Held, that the custom was proved, and that the defendants' sales, being comparatively small, were not in the circumstances a hindrance within the meaning of the restriction.—SITWELL *v.* WORRELL, *Ch.D. Byrne, J.*; 79 L. T. 86.

2. *Customary obligation on tenant to keep in repair—Breach of obligation by tenant—Remedy of lord against executors of tenant.*—An action was brought by the lord of a manor against the executors of a deceased tenant of a copyhold tenement for not keeping the tenement in proper repair. It was proved that by the custom of the manor the tenant was bound to keep the tenement in repair, and that the ordinary mode by which that obligation had been enforced against the tenant was by presentment, fine, and forfeiture. Upon the death of the tenant the premises were found to be dilapidated and out of repair, but there had been no presentment by the lord in respect of such dilapidations.

Held, that, although there had been no presentment, the lord could have maintained an action in respect of the dilapidations against the tenant in her lifetime upon the implied contract by the tenant to keep the premises in repair arising from her admittance, and that this right of action, being founded on contract, survived against the executors of the tenant.—BLACKMORE *v.* WHITE, *Q.B.D.*, 448; [1899] 1 Q. B. 293; 68 L. J. Q. B. 180; 80 L. T. 79.

COPYRIGHT:—

Infringement — "Book" — "Sheet of music" — Perforated sheets for use in a mechanical musical instrument—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 15.—Rolls of perforated sheets were used as parts of a machine sold by the defendants for the production of musical sounds. It was possible, with considerable trouble, to read the notes denoted by the perforations.

Certain words (indicative of pace and expression) which were found in the sheets of music published by the plaintiffs were also printed on some of the defendants' rolls.

Held, that the Copyright Act, 1842, did not prevent the defendants from making or selling the rolls so far as they contained perforations, but that there ought to be an injunction to restrain them from adding the words taken from the plaintiffs' music sheets.—BOOSEY *v.* WHIGHT & CO., *Ch.D. Stirling, J.*, 554; [1899] 1 Ch. 836; 68 L. J. Ch. 379; 80 L. T. 561.

CORPORATION:—

1. *Bye-laws—Validity—Private ground used for betting—"Place of public resort"—Middlesborough*

Improvement Act, 1877 (40 & 41 *Vict. c. xxx.*), *s.* 25.—The Middlesborough Improvement Act, 1877, s. 25, empowers the corporation to make "such bye-laws as they may think fit for the prevention of betting . . . in the public streets . . . and other places of public resort within the borough."

The corporation made a bye-law that "any person who shall frequent and use any street . . . or other place of public resort within the borough . . . for the purpose of bookmaking or betting . . . shall be liable to a penalty."

The appellant used for the purpose of bookmaking an unenclosed piece of private ground within the borough, bounded by streets. Bookmakers and other persons habitually used the ground for betting, but without permission from the owner. The appellant and the other bookmakers conducted their business in an orderly manner, and caused no nuisance, annoyance, or obstruction. The appellant was convicted under the bye-law.

On a case stated,

Held, that the bye-law was within the power given by the Act, and was valid; that, as the ground was in fact habitually used by the public, it was a "place of public resort," within the meaning of the bye-law; and that the appellant was rightly convicted.—KITSON *v.* ASHE, *Q.B.D.*; [1899] 1 Q. B. 425; 68 L. J. Q. B. 286; 80 L. T. 323.

2. *Corporate office—Resignation of office—Office when vacant—Outgoing alderman—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 36, *sub-sections* 1 *and* 2; *s.* 60, *sub-section* 3.—Resignation of his office by a borough alderman in the manner provided by section 36, sub-section 1, of the Municipal Corporations Act, 1882, will not render the office vacant until it is declared to be vacant by the borough council with the formalities prescribed by sub-section 2; and consequently an alderman who, in the course of rotation is about to go out of office under section 14, sub-sections 6 and 7, cannot by merely resigning his office before the ordinary day of election of aldermen, and in the absence of a declaration by the council that the office is vacant, get rid of his disqualification to vote at the election of aldermen under section 60, sub-section 3.—PEASE *v.* LOWDEN, *Q.B.D.*; [1899] 1 Q. B. 386; 68 L. J. Q. B. 239; 79 L. T. 672.

3. *Costs — Borough fund — Licensing appeals — Appeal against refusal of licence—Payment of costs of chief constable—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140, *sub-sections* 1-3; *ss.* 141-143, 190, 191; *5th Schedule, Part II., clause* 5 (*d*), *clause* 12—*Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 2.—A municipal corporation cannot, where there is no surplus of the borough fund, legally pay thereout costs incurred by the chief constable in opposing by direction of the council appeals against the refusal of justices to renew the licences of publicans.

Quære, whether if there be a surplus it can legally be applied to payment of such costs.

The decision of the Court of Appeal, [1898] 1 Q. B. 604, affirmed.—TYNEMOUTH CORPORATION *v.* ATTORNEY-GENERAL, *H.L.*; [1899] A. C. 293; 68 L. J. Q. B. 752; 80 L. T. 633.

4. *Elective auditor—Duties—Remuneration—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 245 *and* 246—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 25, 26, 27, 141, *and* 142.—An elective auditor of a municipal corporation is not entitled, independently of express agreement, to remuneration for auditing the accounts of the receipts and expenditure of the corporation in its municipal capacity. He is entitled to remuneration for auditing such accounts in its capacity as urban sanitary authority.

His duties are limited to verifying the receipts and expenditure as set out in the borough treasurer's accounts. He has no power to inquire into the propriety of any items, provided those items truly represent what the treasurer actually received or disbursed under and by the authority of the council.—THOMAS *v.* DEVONPORT CORPORATION, *Q.B.D.*; 79 L. T. 418.

5. *Malicious prosecution — Action against — Liability.*—An action for malicious prosecution will lie against a corporation.

Edwards v. *Midland Railway Co.*, 6 Q. B. D. 287, followed.—CORNFORD *v.* CARLTON BANK (LIMITED), *Q B.D.*; [1899] 1 Q. B. 392; 68 L. J. Q. B. 196; 80 L. T. 121.

See also Election Law, 1, 2; Practice, 5.

COSTS.—See Administration, 9; Admiralty, 4; Company, 43; Corporation, 3; County Court, 3-5; Damages, 1, 2; Patent, 7; Practice, 1, 2, 6-11, 32, 38; Probate, 15; Public Authorities Protection Act, 1, 2, 4; Railway, 12; Solicitor, 3-8.

COUNTY COURT:—

1. *Appeal—Question of law raised at trial—Request to make a note—Condition precedent to appeal —County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120 —*Rules of Supreme Court*, 1883, *ord.* 59, *r.* 8.—It is a condition precedent to the right of appeal to the High Court from the judgment of a county court judge, under the County Courts Act, 1888, s. 120, that the question of law relied in support of the appeal shall be raised at the trial, but a request to the judge to make a note is not a condition precedent, and therefore if the notes of the judge are not produced, the court has jurisdiction, under the Rules of the Supreme Court, 1883, ord. 59, r. 8, if satisfied that the question of law was raised at the trial, to hear the appeal upon other evidence, though a request to make a note has not been made.—WOHLGEMUTHE *v.* COSTE, *Q.B.D.*; [1899] 1 Q. B. 501; 68 L. J. Q. B. 373; 80 L. T. 529.

2. *Costs—Action struck out for want of jurisdiction —Practice—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 88, 89, 113, 114.—Where an action in a county court is struck out for want of jurisdiction under section 114 of the County Courts Act, 1888, the court may, if it shall think just, award costs against the defendant.—WATSON *v.* PETTS (No. 2), *Q.B.D.*; [1899] 1 Q. B. 430; 80 L. T. 21.

3. *Costs—Remitted action—Judgment under order* 14 *for part of claim—Judgment in county court for residue—Scale of costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.—An action was commenced in the High Court for £73. On an application under order 14, an order was made by a master giving the plaintiff leave to sign judgment for £53, and giving the defendants leave to defend as to £20, and directing the action to be tried in a county court. In the county court the plaintiff recovered judgment for £20.

Held, that the plaintiff, having recovered in the action a sum exceeding £50, was entitled to have his costs taxed upon scale C.

Keeble v. *Bennett*, 42 W. R. 539, [1894] 2 Q. B. 329, approved.

Bailey v. *Watson & Co.*, [1898] 2 Q. B. 270, 46 W. R. Dig. 40, overruled.—WHITE *v.* HEADLAND'S ELECTRIC STORAGE CO., *C.A.*, 273; [1899] 1 Q. B. 507; 68 L. J. Q. B. 354; 80 L. T. 442.

4. *Costs—Remitted action—Judgment in High Court for part of claim—Scale applicable in county court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.—In an action of contract brought in the High Court upon an application for judgment under order 14, an order was made that the plaintiff be at liberty to sign final judgment for a sum of £27, part of the amount claimed, with costs to be taxed; that the defendants have leave to defend as to a sum of £2 odd, which was the residue of the claim then remaining in dispute, and that the action be tried in the county court under section 65 of the County Courts Act, 1888. The defendants paid the £27 and taxed costs, and afterwards the plaintiff lodged the writ and order in the county court. At the trial in the county court the plaintiff recovered the £2 odd, with costs.

Held, that he was entitled to a taxation of his costs on the lower scale in use in county courts where the sum recovered exceeds £2 but does not exceed £10, and not on the higher scale where the sum recovered exceeds £20 but does not exceed £50.

Keeble v. *Bennett*, [1894] 2 Q. B. 329, distinguished. —BAILEY *v.* WATSON & Co., *Q.B.D.*; [1898] 2 Q. B. 270.

5. *Interpleader — Execution on goods of third person—Substantial grievance—Damages against high bailiff.*—Damages are recoverable on an interpleader summons against a high bailiff of a county court for the seizure of the goods of third persons, the claimants, by way of execution on the premises of the debtor, where the claimants have suffered a substantial grievance, although the seizure was *bonâ fide* and there was no misconduct.—LONDON, CHATHAM AND DOVER RAILWAY CO. *v.* CABLE, *Q.B.D.*; 80 L. T. 119.

6. *Practice—Notice of statutory defence—Statute of Limitations—County Court Rules*, 1889, 1895, *ord.* 10, *rr.* 14, 14a, 18a—*Form* 95a.—In a county court action a notice of a defence under a statute of limitation, filed under ord. 10, r. 10, is sufficient if it complies with ord. 10, r. 14*a*, and Form 95*a*, and need not set forth the particular statute relied on nor the date from which it began to run. Ord. 10, r. 18*a*, does not apply to defences under statutes of limitation.—EATON *v.* TAPLEY, *Q.B.D.*, 463; [1898] 1 Q. B. 953; 68 L. J. Q. B. 638; 80 L. T. 797.

7. *Practice—Notice of statutory defence—Statute of Frauds, s.* 17—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4—*County Court Rules*, 1889, 1892, 1895, *ord.* 10, *r.* 18a.—In an action on a contract for the sale of goods of the value of £10 the defence of the Statute of Frauds (as re-enacted by the Sale of Goods Act, 1893) is a "statutory defence" within the meaning of ord. 10, r. 18*a*, of the County Court Rules, 1889, and the defendant if he intends to rely on it must give notice of it under rule 10.—BRUTTON *v.* BRANSON, *Q.B.D.*; [1898] 2 Q. B. 219; 79 L. T. 247.

8. *Trial with judge and jury—Order as to payment of costs varied by judge on subsequent application of unsuccessful party—Jurisdiction*—Functus officio —*Appeal—Prohibition.*—Where a county court judge has made an order he is *functus officio* and has no jurisdiction to vary such order afterwards.

Where an order has been made in circumstances that would give a Divisional Court jurisdiction to issue a prohibition, the party aggrieved is not thereby deprived of his right to appeal against such an order to the Divisional Court in the ordinary way instead of applying for a prohibition.

Barker v. *Palmer*, 30 W. R. 59, 8 Q. B. D. 9, considered and followed.—SWEETLAND *v.* TURKISH CIGARETTE CO., *Q.B.D.*, 511; 80 L. T. 472.

See also Admiralty, 1-3; Bankruptcy, 9; Married Woman, 3; Practice, 3, 15.

CRIMINAL LAW:—

1. *Evidence—Admissibility—Prisoner's statement before the magistrate reaffirming evidence given by him on oath.*—A prisoner charged with an offence under the Criminal Law Amendment Act, 1885, gave evidence on oath at the hearing before the magistrate, and afterwards, in response to the usual inquiry whether he wished to make any statement, said, "What I have already said is true." He was committed for trial.

Held, that his evidence given on oath before the magistrate was admissible as evidence against him on his trial.—REG. *v.* BIRD, NEEDES, EX PARTE, *C.C.R.*, 112; [1898] 2 Q. B. 340; 79 L. T. 156.

2. *Evidence—Misreception of evidence—Prisoners jointly indicted—Case stated on behalf of one prisoner only—Crown Cases Act*, 1848 (11 & 12 *Vict. c.* 78), *s.* 2.—Where two prisoners jointly indicted have been convicted, and a question has been reserved for the consideration of the Court for Crown Cases Reserved on behalf of one of them, that court has power, under 11 & 12 Vict. c. 78, s. 2, if it shall be of opinion that the objection raised is valid and that it affects the conviction of both prisoners, to quash the conviction of the other prisoner as well as that of the prisoner on whose behalf the question has been reserved.—REG. *v.* SAUNDERS, *C.C.R.*; [1899] 1 Q. B. 490; 68 L. J. Q. B. 296; 80 L. T. 28.

3. *Evidence—Procedure—Prisoner sole witness for defence—Right of prosecution to sum up—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *ss.* 1, 2, 3—*Criminal Procedure Act*, 1865 (28 & 29 *Vict. c.* 18), *s.* 2.—Where, on the trial of a person charged with a criminal offence, that person is the only witness for the defence, the right given by section 2 of the Criminal Procedure Act, 1865, to the counsel for the prosecution to sum up the evidence is not taken away by the Criminal Evidence Act, 1898, but is postponed until after the person charged has given his evidence, and in such summing up counsel is entitled to comment upon the evidence given by the person charged as well as upon that given for the prosecution.—REG. *v.* GARDNER, *C.C.R.*, 77; [1899] 1 Q. B. 150; 68 L. J. Q. B. 42; 79 L. T. 358.

4. *False pretences—Evidence—Admissibility—Similar acts by defendant after offence charged—Right of defendant to give evidence before grand jury —Right of judge to comment on failure of defendant to give evidence—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.—The Criminal Evidence Act, 1898, does not entitle the person charged to give evidence for the defence before the grand jury, nor does it negative the right of the presiding judge to comment upon the failure of the person charged to give evidence at the trial.

On the trial of a person charged with obtaining goods by false pretences, it was proved that the prisoner caused an advertisement to be inserted in newspapers suggesting that he was carrying on a *bonâ fide* business, and required the goods for that business, and that the prosecutor supplied him with the goods on the faith of that advertisement. Evidence was admitted that, at intervals of one week and two months respectively after the transaction with the prosecutor, two other persons supplied the defendant with similar goods on the faith of the same advertisement, and were not paid for their goods.

Held, that the evidence was rightly admitted as

tending to show that the defendant had no genuine business, but was carrying on a system of fraud.

Reg. v. *Holt*, 9 W. R. 74, 30 L. J. M. C. 11, distinguished.

Reg. v. *Francis*, 22 W. R. 663, L. R. 2 C. C. R. 128, followed.—REG. *v.* RHODES, *C.C.R.*, 121; [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360.

5. *Falsification of account—Collector of poor rate—Balance of account—Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.—A collector of poor rates whose duties included the keeping of the Overseers' Receipt and Payment Book, stated the account showing a balance to be due from the overseers to the inhabitants. This balance, which was correct as to the difference between receipts and expenditure, he stated as "balance in hand." He, however, was unable to produce this amount.

Held, that the words "in hand" did not make the entry false, the account being a correct record of receipts and expenditure, and that the collector could not therefore be convicted of falsification of accounts even if he had misappropriated the amount.—REG. *v.* WILLIAMS, *C.C.R.*; 79 L. T. 739.

6. *Fugitive offender—Committal to await return—Power to admit to bail—Jurisdiction—Fugitive Offenders Act*, 1881 (44 & 45 *Vict. c.* 69).—Where a magistrate has made an order, under the Fugitive Offenders Act, 1881, committing to prison a person accused of having committed an offence, to which Part I. of the Act applies, in some part of Her Majesty's dominions, or within the jurisdiction of a Consular Court, to await his return to the place where the offence is alleged to have been committed, the Queen's Bench Division of the High Court has jurisdiction to admit the accused to bail until the time for his return.—REG. *v.* SPILSBURY, *Q.B.D.*; [1898] 2 Q. B. 615; 79 L. T. 211.

7. *Larceny—Restitution and recovery of stolen property—Current coin of the realm—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 100—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 27 (3), 33 (1).—A current coin of the realm which has not been passed into circulation may be sold as a curiosity, and if such coin has been stolen from its owner by the vendor, and the latter is subsequently convicted of larceny, an order of restitution of the coin to the owner may be made against the purchaser under section 100 of the Larceny Act, 1861.

Semble, that, if the thief has dealt with the coin as current coin and has passed it into circulation, no order of restitution can be made against a *bonâ fide* receiver, notwithstanding that the coin may be able to be identified.

A. stole a five-pound gold piece, which had never passed into circulation, from B., who had kept it as a curiosity, and changed it with a dealer of curiosities for five sovereigns.

Held, that an order of restitution might be made under section 100 of the Larceny Act, 1861, against the purchaser.—MOSS *v.* HANCOCK, *Q.B.D.*, 698; [1899] 2 Q. B. 111; 68 L. J. Q. B. 657; 80 L. T. 693.

8. *Manslaughter—Infant child—Neglect to provide medical aid—Religious belief that medical aid is wrong—Wilful neglect—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict. c.* 41), *s.* 1.—Section 1 of the Prevention of Cruelty to Children Act, 1894, enacts that "If any person over the age of sixteen years, who has the custody, charge, or care of any child under the age of sixteen years, wilfully . . . neglects . . . such child . . . in a manner likely to cause such child unnecessary suffering or injury to its health . . . that person shall be guilty of a misdemeanour."

On the trial of an indictment for manslaughter it was proved that the prisoner was the father and had the custody of a child of the age of eight or nine months; that the child died of diarrhœa and pneumonia; that during its illness the prisoner, though aware of the gravity of its condition, had not provided it with any medical aid or medicine; that he had the means to do so; that he belonged to a sect called the "Peculiar People," who think it contrary to the teaching of the Bible to use medical aid or drugs for the sick; that the prisoner employed an experienced nurse, also a member of that sect, to nurse the child; that he was in other respects a kind father; and that the child's life would have been prolonged and probably saved if medical assistance had been procured. The prisoner was convicted.

Held, that there was evidence that the prisoner had "wilfully neglected" the child within the meaning of the above section, and that, death having ensued from such neglect, the prisoner was properly convicted of manslaughter.—REG. *v.* SENIOR, *C.C.R.*, 367; [1899] 1 Q. B. 283; 68 L. J. Q. B. 175; 79 L. T. 562.

9. *Obtaining property by false representations—Property obtained in England on false representations made in foreign country—Jurisdiction.*—A person made false representations in Glasgow as to his credit and financial position. On the faith of these representations goods were supplied to him on credit at Gateshead, in the county of Durham. He was shortly afterwards made bankrupt. Upon these facts he was tried at Durham for the offences—under the Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 11 (13) and 13 (1)—of having obtained the goods on credit by false representations within four months next before the presentation of a bankruptcy petition against him, and of having obtained credit for the goods under false pretences.

Held, that the offences were committed at Gateshead, and that the court had jurisdiction to try the prisoner.—REG. *v.* ELLIS, *C.C.R.*, 188; [1899] 1 Q. B. 230; 68 L. J. Q. B. 103; 79 L. T. 532.

10. *Vagrancy—Pretending to tell fortunes—Intent to deceive—Rogue and vagabond—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.—By the Vagrancy Act, 1824, s. 4, "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," shall be deemed to be a rogue and vagabond, and be liable to penalties.

A person was convicted of being a rogue and vagabond, for that she did unlawfully pretend to tell fortunes. The information alleged that the defendant did pretend or profess to tell fortunes. The justices were satisfied on the evidence that the defendant had unlawfully pretended to tell fortunes to deceive and impose upon certain of Her Majesty's subjects.

On the argument of an order *nisi* for a *certiorari* to remove and quash the conviction,

Held, that, in order to justify a conviction under the statute, there must be an intent to deceive, but that the intent was implied in the words "pretending or professing," and therefore it was unnecessary that the intent should be specifically alleged, and the conviction was good.—REG. *v.* ENTWISTLE, EX PARTE JONES, *Q.B.D.*; [1899] 1 Q. B. 846; 68 L. J. Q. B. 580; 80 L. T. 656.

See also Gibraltar, Law of.

DAMAGES:—

1. *Measure of—Contract for sale of coals to ship—Sub-contract by vendor with colliery owner—Costs of reasonably defending action by shipowner—Solicitor and client costs.*—The plaintiff, a coal merchant, entered into a contract with a shipowner for the supply of bunker coals to ships over a certain period, and, in order to carry out this contract, the plaintiff entered into a contract with the defendants, who carried on business in the same place, for the supply of coals to the ships for the same period. The defendants having made default in the supply of coals, one of the ships was detained in dock, and the shipowner brought an action against the plaintiff to recover damages for the detention arising from the breach of contract. The plaintiff gave notice of the claim to the defendants, who repudiated liability. The plaintiff accordingly defended the action and paid a sum of money into court. At the trial it was held that the amount paid into court was sufficient to satisfy the shipowner's claim, and judgment was entered for the shipowner for the amount so paid into court, with costs up to the time of the payment into court, the plaintiff to have the costs of the action subsequent to that time. The plaintiff thereupon sued the defendants for breach of contract, claiming as damages (1) the sum recovered by the shipowner in the former action, (2) the costs paid to the shipowner, and (3) the difference between the plaintiff's costs of the action, taxed as between solicitor and client, and the party and party costs subsequent to the time of the payment into court which he had recovered from the shipowner.

Held, that, as the plaintiff had, in these circumstances, acted reasonably in defending the former action, he was entitled to recover, in addition to items (1) and (2), the difference between the solicitor and client costs of the action, taxed upon the footing that another person was going to pay them, and the party and party costs subsequent to the payment into court.

Hammond v. *Bussey*, 20 Q. B. D. 79, 36 W. R. Dig. 65, followed.

Baxendale v. *London, Chatham, and Dover Railway Co.*, 23 W. R. 167, L. R. 10 Ex. 35, discussed.—AGIUS *v.* GREAT WESTERN COLLIERY CO. (LIMITED), *C.A.*, 403; [1899] 1 Q. B. 413; 68 L. J. Q. B. 312; 80 L. T. 140.

2. *Measure of—Implied warranty of fitness—Breach—Action against person to whom article was warranted—Damages against him—Costs—Costs of appeal—Liability of warrantor.*—Upon the letting of an article for a certain purpose there is an implied warranty that in point of fact the article is reasonably fit for the purpose for which it was supplied.

V. & Co. hired some sacks from O. to unload a cargo of peas. While one sack was being hoisted out of the ship it gave way, and a labourer named B. was injured.

B. brought an action in the county court against V. & Co., and recovered £25 and costs.

V. & Co. appealed against this decision, but the appeal was dismissed with costs.

Held, that the sack was not reasonably fit for the purpose for which it was supplied, and that therefore, the action in the county court not having been unreasonably defended, V. & Co. could recover against O. the £25 damages, the costs they had to pay B., and their own costs in that court, on the authority of *Mowbray* v. *Merryweather* (73 L. T. Rep. 459), but that the costs of the appeal could not be recovered.—VOGAN *v.* OULTON, *Q.B.D.*; 79 L. T. 384.

See also Arbitration, 1; Bankruptcy, 10; Contract, 1, 8; Divorce, 1; Insurance, 5; Mortgage, 2; Ship, 13; Vendor and Purchaser, 7.

DEED of ARRANGEMENT:—

Deed for benefit of creditors generally—Registration—Validity—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 5, 19.—A debtor who was unable to pay his debts called a meeting of his creditors, at which he stated that his liabilities were about £5,500, of which about £3,800 was for money lent by relatives, and his assets about £900. It was arranged that the relatives should withdraw their claims, that the creditors should accept a composition of 5s. in the pound, and that one P., who was present, should be the trustee for the creditors. Three days later a deed was executed between the debtor and P. by which the debtor, in consideration of £50 paid to him by P., conveyed all his property to P. absolutely "and not as trustee" for the debtor or his creditors, and P. covenanted to pay in full all claims against the debtor which would have a preferential right in bankruptcy and to pay a composition of 5s. in the pound to the creditors on their debts not exceeding £1,800. This deed was not registered.

Held, that the deed was a deed made for the benefit of creditors generally within section 4 of the Deeds of Arrangement Act, 1887, and was void to all intents and purposes because it was not registered as required by the Act.—HEDGES *v.* PRESTON, *C.A.*; 80 L. T. 847.

DESIGN:—

Registration of design—Applicable for pattern—"New or original"—"Pattern"—Marking articles—Statutory requirements—"All proper steps"—Coffin plates—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 51, 60—*Designs Rules*, 1890, *r.* 9.—The term "design" in section 60 of the Patents, Designs, and Trade-Marks Act, 1883, was not intended to be used in any technical sense as excluding anything that would ordinarily fall within it; and "pattern" as used in that section might include "shape" or "configuration" or "ornament."

The decision of the Court of Appeal, *In re Rollason's Registered Design*, [1898] 1 Ch. 237, affirmed.—HEATH & SONS (LIMITED) *v.* ROLLASON; *H. L.* [1898] A. C. 499; 79 L. T. 1.

DIVORCE:—

1. *Damages—Co-respondent.*—Loss of *consortium* is not the only ground on which damages ought to be assessed against a co-respondent: the mere fact therefore that a husband was separated from his wife at the time she was seduced is no answer to a claim for damages by the husband against the adulterer.—EVANS *v.* EVANS, *P.D. & Ad.D.*; 68 L. J. P. 70.

2. *Desertion — Husband's refusal to discharge adulterous servant—Consequent separation by wife—Decree.*—Upon a wife's petition for divorce on the grounds of desertion and adultery, it appeared that the respondent had refused to break off relations with and to discharge a servant with whom, when taxed, he admitted that he had committed adultery. The petitioner thereupon left the house, and, although overtures were subsequently made by the respondent for a resumption of cohabitation, the petitioner never returned home, owing to the persistent refusal of the respondent to discharge the servant in question.

Held, that the conduct of the husband constituted "desertion" within the meaning of the Divorce

Acts.—KOCH *v.* KOCH, *P.D. & Ad.D.*; [1899] P. 221; 68 L. J. P. 90.

3. *Wife's petition—Cohabitation.*—A husband may be guilty of desertion, though the husband and wife have never cohabited.—DE LAUBANQUE *v.* DE LAUBANQUE, *P.D. & Ad.D.*; 68 L. J. P. 20; 79 L. T. 708.

4. *Evidence—Indian marriage—Certificate—Copy.*—The court will accept as proof of a marriage in India a copy of the original marriage register furnished by the India Office.—WESTMACOTT *v.* WESTMACOTT, *P.D. & Ad.D.*; 68 L. J. P. 63; 80 L. T. 632.

5. *Foreign law—Decree of foreign court competent to deal with the cause—Irregularity—Want of jurisdiction — Validity.* — A decree pronounced by a foreign court competent to deal with the case must, if not contrary to natural justice, be treated in this country as valid until it is set aside, though the irregularities of the process by which it was obtained were such as by the local law to deprive the foreign court of jurisdiction. A decree of divorce pronounced by a Florida divorce court between persons whom it was competent to summon before it will, therefore, be received here as valid, even if it be the law of Florida that, the the summons having been issued only ten days (instead of ten clear days) before the return day, the court had no jurisdiction, and its decree is an absolute nullity.—PEMBERTON *v.* HUGHES, *C.A.*, 354; [1899] 1 Ch. 781; 68 L. J. Ch. 281; 80 L. T. 369.

6. *Maintenance of wife and children—Payment of capital sum without settlement—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.—Upon a dissolution of marriage at the suit of the wife, where the husband disappeared, and the only asset available was a sum of money standing in his name in a suit in the Chancery Division, the wife being entirely without means, the court, on a petition, ordered the balance (about £200), after payment of costs, to be paid to the wife (without any settlement) for the benefit of herself and children.

Morris v. *Morris*, 31 L. J. P. & M. 33, followed.—STANLEY *v.* STANLEY, *P.D. & Ad.D.*, 272; [1898] P. 227; 68 L. J. P. 7; 79 L. T. 104.

7. *Nullity—Alimony* pendente lite *after decree nisi.*—Where it has been proved beyond question that a marriage sought to be set aside was bigamous, the court has discretion to at once relieve a petitioner from the obligation to pay alimony *pendente lite* between decree *nisi* and decree absolute.—CHILDERS *v.* CHILDERS, *P.D. & Ad.D.*; 68 L. J. P. 90.

8. *Permanent maintenance—Substituted service—Petitioner's affidavit of ignorance as to respondent's whereabouts.*—In an application for substituted service of a petition for permanent maintenance, the affidavit of the petitioner proving ignorance of the respondent's whereabouts is not essential.—SCHRAML *v.* SCHRAML, *P.D. & Ad.D.*; 68 L. J. P. 47; 80 L. T. 328.

9. *Permanent maintenance—Variation of order—Practice—Appeal.*—A wife obtained a dissolution of marriage and filed a petition for maintenance.

A large portion of the respondent's income was derived from a mortgage producing 5 per cent.

The registrar made his report and the court confirmed it on the basis of the respondent's income during the subsistence of this mortgage. Notice that the mortgage was to be paid off had now been given.

Application was now made to vary the order on the ground that after payment of the mortgage interest at the rate of 5 per cent. could not be obtained, and that under the circumstances the respondent would be deprived of an undue amount of income.

Held, that the point not having been taken or reserved at the hearing of the motion to confirm the registrar's report, the court had now no power to vary the order, and that, except by consent, no variation thereof could be obtained except by appeal.—SMITH *v.* SMITH, *P.D. & Ad.D.*; 79 L. T. 124.

10. *Practice — Co-respondent — Assumed name — Service — Amendment of petition.* — The husband petitioned for a divorce on the ground of his wife's adultery with a man who was unknown to the petitioner, but who was alleged to have cohabited with the respondent under a name known to the respondent. The petitioner, who was abroad, applied for leave to proceed without a co-respondent, or, alternatively, for substituted service on the unknown man under the name known to the petitioner.

Held, that substituted service by advertisement ought to be ordered, but that the petition might be amended without being resworn.—NICHOLAS *v.* NICHOLAS, *P.D. & Ad.D.*; 68 L. J. P. 66; 80 L. T. 422.

11. *Practice—Irish divorce bill—Evidence taken in India.*—Evidence taken in India on commission, and received and acted on by the Queen's Bench Division of the High Court of Justice in Ireland, admitted to be used on the second reading of an Irish divorce bill.—JONES' DIVORCE BILL, *H.L.*; [1899] A. C. 348.

12. *Restitution of conjugal rights—Separation—Covenant.*—A breach of covenant in a deed of mutual separation must be of a substantial and deliberate nature to prevent the party committing the breach setting up the deed as a defence to a suit for restitution of conjugal rights. — KUNSKI *v.* KUNSKI, *P.D. & Ad.D.*; 68 L. J. P. 18.

13. *Variation of marriage settlements—Divorced wife—Power of appointment in favour of husband—Remainder to children in default of appointment—Settlement varied as though power of appointment exercised—Proportion of wife's income to be appropriated to husband and children*—20 & 21 *Vict. c.* 85, *s.* 45—22 & 23 *Vict. c.* 61, *s.* 5.—Under a marriage settlement a fund, the property of the wife, was settled on her for life with a power to appoint by will to the husband for life in case he survived her, and in default of appointment to the children of the marriage absolutely.

Held, that on the wife's divorce without exercising the power of appointment, the court had power to order that the income of the settled fund should be paid to the husband for his life after the wife's death, in spite of the fact that the children's interests might thereby be diminished, the ground of the decision being that the husband and the children ought to be placed in the same position, as nearly as circumstances would permit, as if the family life had not been broken up by the wife, and that, but for the wife's misconduct, she would in all probability have exercised the power of appointment in the husband's favour.—HARTOPP *v.* HARTOPP, *P.D. & Ad.D.*; 68 L. J. P. 33; 80 L. T. 297.

14. *Variation of settlement—Allowance for husband—Settlement of one-third—Incumbrances on income of*

wife—Reversionary life interest of wife—Allowance to child of marriage—Continuance of, after attaining majority—Special circumstances—Practice—Divorce Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 32, 45.—In determining the settlement to be made out of the income of a person who is ordered to make a settlement under the Divorce Act, 1857, it must be ascertained what the person ordered to settle receives after keeping down all charges on the income.

In ordering a settlement to be made under section 45 of the Divorce Act, 1857, the court has jurisdiction to take into account any property to which a guilty wife is entitled in reversion, and it is proper so to do, having regard to the principle established by *March* v. *March*, 1 P. & D. 440, and *Noel* v. *Noel*, 10 P. D. 179, notwithstanding the decision of Butt, J., in *Harrison* v. *Harrison*, 12 P. D. 130.

Although, in principle, it is not desirable to make a child, even of a wife who has misconducted herself, independent of his parent, by ordering his allowance for maintenance and education, under section 45 of the Divorce Act, 1857, to continue after he has attained his majority, yet, under special circumstances, it is proper that the provision should not be made to cease on the happening of that event.—SAVARY *v.* SAVARY, *C.A.*; 79 L. T. 607.

15. *Wife's petition—Answer alleging adultery, but claiming no relief—Co-respondent's intervention*—20 & 21 *Vict. c.* 85, *s.* 28—29 & 30 *Vict. c.* 32, *s.* 2.—To a wife's petition for dissolution of marriage, the husband filed an answer alleging his wife's adultery, but claiming no relief.

Held, that the man with whom adultery was said to have been committed had no right to intervene. —HARROP *v.* HARROP, *P.D. & Ad.D.*; 68 L. J. P. 58; 80 L. T. 171.

16. *Wife's petition—Answer alleging wife's adultery with third party, and no claim for cross-relief—Co-respondent—Intervention—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 *Vict. c.* 32), *s.* 2.—If, on the presentation of a petition for divorce, a respondent merely puts in an answer to the petition asking that the petition shall be dismissed and no further relief, the intervention of a third party, whose name has been mentioned in the answer, is not permissible. He can only intervene, if the answer claims such further relief as would admit of the answer being treated as a cross-petition.

Harrop v. *Harrop*, [1899] P. 61, approved.—LOWE *v.* LOWE, *C.A.*, 553; [1899] P. 204; 68 L. J. P. 60; 80 L. T. 575.

17. *Wife's petition—Maintenance—Basis of calculation.*—On an application for permanent maintenance by a wife who had obtained a decree *nisi* on the ground of her husband's cruelty and adultery, the registrar, treating the husband's property as producing 4 per cent. per annum, recommended that an annual sum should be secured to the wife on the husband's property, such sum amounting to one-third of the income thereof at 4 per cent.

The court varied the report by ordering that this sum should be secured on a third only of the husband's property, and that, as to the difference between this sum and the sum produced by such third invested in trust securities, the wife must be content with the husband's personal covenant.

On appeal,

Held, that this order was right, and that the appeal must therefore be dismissed.—SHORTHOUSE *v.* SHORTHOUSE, *C.A.*; 79 L. T. 366.

18. *Wife's suit—Separation deed not pleaded—Cruelty before separation deed—Covenant not to sue—Undefended suit.*—The court granted a wife a decree for dissolution of the marriage on the ground of her husband's cruelty and adultery, the cruelty being before the date of a separation deed, notwithstanding a covenant in the deed providing that no proceedings should be taken in respect of such misconduct, on the ground that the deed had not been pleaded.—DOWLING *v.* DOWLING, *P.D. & Ad.D.*, 272; [1898] P. 228; 68 L. J. P. 8.

See also Bankruptcy, 10; Justices, 4, 5.

EASEMENT:—

Tramway agreement—Personal or real right—Removal of tramway.—Where a servitude, such as a right of way for a tramway, is claimed as having been granted by an instrument in writing subscribed by the proprietor of the land burdened, the fact that the dominant tenement has not been acquired at the date of the instrument cannot, after it has been actually acquired, prevent the servitude from becoming a legal accessory to the dominant tenement, provided the servitude was so used as to give reasonable notice of the burden to any person in whom the property of the land might subsequently become vested. And although the instrument granting the privilege was in terms which might appropriately be employed in the constitution of a personal obligation only, that is not conclusive against the constitution of a proper burden upon the land, if it be matter of reasonable inference from the terms of the document, or the circumstances of the case, that the constitution of a real servitude was what the parties contemplated.

An agreement between the proprietor of the estate of W., the feuars of part of that estate, and a railway company, provided for the use and construction by the railway company of a tramway through the lands of W., including the lands of the feuars,

Held (Lord Morris dissenting), reversing the decision of the Court of Session, (1897) 24 R. 1148, that the privilege of working the tramway as long as it continued was intended to bind, and did bind, all singular successors of the feuars in their lands. —NORTH BRITISH RAILWAY CO. *v.* PARK YARD CO., *H. L. (Sc.)*; [1898] A. C. 643.

See also Landlord and Tenant, 6; Water, 1.

ECCLESIASTICAL LAW:—

1. *Burial—Disinterment—Faculty—Jurisdiction of Consistory Court—Burial Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 25.—An ecclesiastical court has no power, in granting a faculty to disinter a body buried in consecrated ground, to cite the cemetery company to whom the ground belongs to appear before it for the purpose of making an order against such cemetery company that the body should be disinterred.

A faculty was granted by an ecclesiastical court to open a certain vault in consecrated ground and to open the lid of a coffin interred therein. In order to open the lid of the coffin it would be necessary to remove another coffin which contained a body.

Semble, that a licence of a secretary of state, pursuant to section 25 of the Burial Act, 1857, was required for such removal in addition to the faculty.—REG. *v.* TRISTRAM, *Q.B.D.*, 639; [1898] 2 Q. B. 371; 80 L. T. 414.

2. *Churchyard—Enlargement of existing churchyard—"Adjoining" land—Intervening highway—Consecration of Churchyards Act*, 1867 (30 & 31 *Vict. c.* 133).—A plot of ground immediately oppo-

site to, but separated by a highway from, an existing churchyard was proposed to be added to the churchyard under the Consecration of Churchyards Act, 1867, which contains provisions for the conveyance and consecration "of portions of ground adjoining and added to existing churchyards."

Held, that it was "adjoining" land within the meaning of the Act.—BATEMAN (BARONESS) AND PARKER'S CONTRACT, RE, *Ch.D. Kekewich, J.*, 516; [1899] 1 Ch. 599; 68 L. J. Ch. 330; 80 L. T. 469.

3. *Ecclesiastical Commissioners — Glebe lands—Contract for sale—Non-payment of purchase-money—Specific performance — Right to sue — Ecclesiastical Leasing Act*, 1842 (5 & 6 *Vict. c.* 108), *and* 1858 (21 & 22 *Vict. c.* 57).—By an agreement made in July, 1873, D., a vicar, agreed to sell to trustees of settled estates, with the consent of the tenant for life and also of the Ecclesiastical Commissioners and the patron of the living, certain glebe lands for the sum of £24,963. The Ecclesiastical Commissioners were parties to and executed the contract. The title was accepted, and the tenant for life went into possession. Interest on the unpaid purchase-money (which was more than an investment would have produced) was paid regularly to the vicar and his successors in office until 1896, when the Ecclesiastical Commissioners brought an action claiming specific performance of the contract, or damages, or, in the alternative, the enforcement of a vendor's lien.

Held, that the Ecclesiastical Commissioners, by virtue of their statutory powers, were bound to see that the purchase-money was paid and secured, and that, therefore, they had a good cause of action.—ECCLESIASTICAL COMMISSIONERS *v.* PINNEY, *C.A.*, 136; [1899] 1 Ch. 99; 68 L. J. Ch. 30; 79 L. T. 604.

4. *Faculty—Jurisdiction—Re-pewing of portion of new parish church originally appropriated to school children—Absence of power in Ordinary to authorize the creation of pew-rents—Position of parishioners subscribing to church expenses—Church Building Act*, 1818 (58 *Geo.* 3, *c.* 45), *ss.* 75, 77, 84, 85—*Church Building Act*, 1822 (3 *Geo.* 4, *c.* 72), *ss.* 36, 37—*Churchwardens.*—The seats in a new parish church were in 1885 allotted by the Ecclesiastical Commissioners as follows: two pews for the vicar of the parish and his family; 315 sittings to be let to pew-renters; 222 sittings as free seats, and seventy-two sittings as seats for children, in the expectation that the population of the parish would in the main be composed of working men. This expectation was not realized, and in 1898 the vicar and churchwardens of the parish applied to the Ordinary to authorize by faculty the substitution of pews for adults in the place of the seventy-two sittings allotted as children's seats as above mentioned, and the letting of the substituted pews at pew-rents to be expended in church improvements and expenses.

Held, that the Ordinary had no jurisdiction to grant a faculty appropriating to other purposes seats allotted by the Ecclesiastical Commissioners as free seats or authorizing the letting of any seats to pew-renters, but that a faculty might be decreed in his discretion for the substitution of pews for adults in which the churchwardens might seat parishioners in the place of the seventy-two sittings for children; the allotment of such sittings having been made by the Ecclesiastical Commissioners without statutory authority.

Semble, the churchwardens of a church built under the Church Building Acts may, in seating the parishioners in seats in the church not appropriated to pew-renters or allotted as free seats by the Ecclesiastical Commissioners, give a preference to applicants who voluntarily subscribe to a fund for church improvements and expenses.—VICAR OF ST. SAVIOUR, WESTGATE-ON-SEA *v.* PARISHIONERS OF SAME, HOUSEMAN INTERVENING, *P.D. & Ad.D.*; [1898] P. 217.

EDUCATION:—

1. *Employment of child—Purposes of gain—Domestic work—Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *s.* 47.—A child aged thirteen, who had not obtained the certificate mentioned in section 5, sub-section 2, of the Education Act, 1876, and who did not come within the exemption in section 9, was kept at home by her father and employed in household work, whereby the child's mother was enabled to go out to work and to earn a weekly wage.

Held, that the father had not employed his child in any labour for the purposes of gain within the meaning of section 47 of the Act, and was not liable to conviction under that section.—MATHER *v.* LAWRENCE, *Q.B.D.*, 559; [1899] 1 Q. B. 1000; 68 L. J. Q. B. 714; 80 L. T. 600.

2. *Refusal of child at voluntary school—Tender of child at such school—Non-attendance—Breach of bye-law—Reasonable excuse.*—Under the bye-laws of the S. School Board, the parent of every child not less than five or more than thirteen years of age shall cause such child to attend school, unless there shall be a reasonable excuse for non-attendance.

The child of the appellant was ten years of age, and had up to May, 1898, attended at St. G. School, which was a voluntary and public elementary school, but had then been refused admission. The Education Department had confirmed the action of the managers in refusing admission. Since then the appellant had and still declined to send the child to any other school than St. G. School. He had had notice of the managers' refusal, and was informed by the S. School Board that he must send his child to another school, and the board had mentioned to him certain schools within two miles that would receive the child. On several occasions the appellant sent the child, between May and September, to the doors of St. G. School, but it was always refused admission.

Held, that the offering did not constitute an attendance, and that no reasonable excuse for the non-attendance had been proved.—JONES *v.* ROWLAND, *Q.B.D.*; 80 L. T. 630.

3. *Teacher's remuneration—Superannuation fund—Management by board—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 35.—A school board established and managed a superannuation fund for the payment of allowances to their officers and teachers upon their superannuation. This fund was provided by annual deductions from the salaries of the officers and teachers, made in pursuance of contracts between them and the board.

Held, affirming the judgment of a Divisional Court, [1898] 1 Q. B. 4, that the officers and teachers could not recover back the amount of the deductions from their salaries, for (1) even if it was *ultra vires* for the board to pay the expenses of managing the fund out of the school rates, it was no part of the contract between the board and the officers and teachers that this should be done, and the making of the contract was therefore not *ultra vires*; (2) assuming that the board could not undertake the management of the fund, in the absence of power under the Elementary Education Acts to do so, the money having been applied to the purposes for which it was subscribed, and the sub-

scribers having had the right to participate in the benefits of the fund, there had been no failure of consideration.—PHILLIPS *v.* LONDON SCHOOL BOARD; COCKERTON *v.* SAME, *C.A.*; [1898] 2 Q. B. 447; 79 L. T. 50.

ELECTION LAW:—

1. *Municipal corporation—Nomination—Candidate—Right to petition—Disqualification existing at date of nomination—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 77, 88.—The petitioner and the respondent were duly nominated as candidates for election to the office of councillor for a ward of a municipal borough. The petitioner was, at the time of his nomination, interested in a contract with the corporation of the borough. At the hearing of objections to nomination papers the respondent objected to the petitioner's nomination on the ground that his interest in such contract disqualified him (under section 12 (1) (*c*) of the Municipal Corporations Act, 1882) for election. The mayor allowed the objection, and the respondent, being the only other candidate, was declared to be elected as on an uncontested election. On a petition being presented by the petitioner against the return of the respondent, it was admitted, on the authority of *Pritchard* v. *Mayor, &c., of Bangor*, 37 W. R. 103, 13 App. Cas. 241, that the mayor had no jurisdiction to entertain the objection, but it was contended that the petitioner, being disqualified at the date of the nomination, was not entitled as a candidate (within the meaning of sections 77 and 88 of the Act) to present a petition.

Held, that, although the petitioner was disqualified for nomination as well as for election, yet, having been nominated in proper form, he was a "candidate" and entitled to present the petition.

Monks v. *Jackson*, 1 C. P. D. 683, 25 W. R. Dig. 110, distinguished.—HARFORD *v.* LYNSKEY, *Q.B.D.* 653; [1899] 1 Q. B. 852; 68 L. J. Q. B. 599; 80 L. T. 417.

2. *Municipal election — Illegal hiring — Relief—Practice—Municipal Elections (Corrupt Practices) Act*, 1884, *s.* 20.—Where an application for relief from an illegal hiring is made under section 20 of the Municipal Elections Act, 1884, by several candidates, a joint affidavit of the facts upon which the application is based ought to be made by all the applicants.—ANDREWS, RE, *Q.B.D.*; 68 L. J. Q. B. 683.

3. *Parliament—Illegal practice—Penalties—Return of election expenses—"Transmit," meaning of—Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 33, *sub-sections* 1, 5.—By section 33, sub-section 1, of the Corrupt and Illegal Practices Prevention Act, 1883, it is enacted that, within thirty-five days after the day on which a candidate returned at a parliamentary election is declared elected, the election agent "shall transmit to the returning officer a true return" respecting the election expenses. By sub-section 5 a candidate who has failed to comply with the requirements of section 33 is liable to a penalty for each day on which he sits or votes in the House of Commons.

The defendant was a candidate at a parliamentary election, and was declared elected on the 23rd of July. The thirty-five days expired on the 27th of August, on which day, at 10 p.m., the defendant, who was his own election agent, posted to the returning officer a return of his expenses. The return reached the returning officer in the ordinary course of post on the 29th of August. The return was incorrect in that it omitted one item of expenditure, as to which the defendant had not received an authorized excuse under section 34. The defendant sat and voted in the House of Commons on the 28th of August and on subsequent days.

Held, that the defendant, by posting the return on the 27th of August, had complied with the requirements of section 33, sub-section 1, as to transmission within thirty-five days, and that, although the return was incorrect, it was none the less a return within the meaning of section 33.—MACKINNON *v.* CLARK, *C.A.*, 19; [1898] 2 Q. B. 251; 79 L. T. 83.

4. *Registration—Parliament—Borough vote—Claim—Misdescription of qualifying property—Mistake—Amendment—Parliamentary Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-sections* 2, 13.—Sub-section 13 of section 28 of the Parliamentary Registration Act, 1878, applies only to the description of the legal character or nature of the qualification (*i.e.*, the third column of the entry in a list or claim)—not to the description of the qualifying property (*i.e.*, the fourth column).

In a claim, the third column (nature of the qualification) was "houses in succession," and the fourth column (description of the qualifying property) was "202, Gordon-road and 31, Monk-street." The claim having been objected to, it was proved that the claimant had in fact occupied in immediate succession during the qualifying period, 202, Gordon-road and 33 (not 31), Monk-street; and that 31, Monk-street (which was in fact occupied by another person) had been inserted in the claim by mistake instead of No. 33. The revising barrister amended the claim by altering "31," Monk-street to "33," Monk-street in the fourth column.

Held, that the revising barrister had power to make the amendment, as he did not thereby "change the description of the qualification" within the meaning of those words in sub-section 13 of section 28.—KITCHEN *v.* JOHNSON, *Q.B.D.*, 110; [1899] 1 Q. B. 95; 68 L. J. Q. B. 11; 79 L. T. 422.

5. *Registration — Parliament — Borough vote — Duplicate entry—Notice of selection—Appeal—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 14—*Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 42.—Section 28, sub-section 14, of the Parliamentary and Municipal Registration Act, 1878, enacts that, "Where the name of any person appears to be entered more than once as a parliamentary voter on the lists of voters . . . any such person may, by notice in writing delivered to the revising barrister at the opening of his first revision court, select the entry to be retained for voting. . . ."

Held, that this power of selection did not exist where one of two entries was an entry appearing in the overseers' list of voters, and the other was only an entry appearing in the list of claims—even although the claim was, in the course of revision, allowed—because the duplicate entries must exist in the list of voters at the time when the notice of selection is required to be given—viz., at the opening of the first revision court.

Held, also, that no appeal lies from a decision of a revising barrister as to the validity or invalidity of a notice of selection of entry given by a voter.

Reg. v. *The Revising Barrister of Liverpool*, 43 W. R. 220, [1895] 1 Q. B. 155, followed—JONES *v.* MUNRO, *Q.B.D.*, 109; [1899] 1 Q. B. 10.9; 68 L. J. Q. B. 28; 79 L. T. 500.

6. *Registration—Parliament—Notice of objection—*

Omission in body of notice of place of abode of person objected to—Validity—Parliamentary Registration Act, 1885 (48 & 49 *Vict. c.* 15), *s.* 18—*Statute Law Revision Act*, 1898 (61 & 62 *Vict. c.* 22)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 76, *sub-section* 7—*Registration Order*, 1895, *Schedule I., Form* 5 (*a*).—Notwithstanding the repeal of section 18 of the Parliamentary Registration Act, 1885, an immaterial deviation—even though intentional—from any form prescribed in the Registration Order, 1895, will not of itself invalidate a claim or notice of objection; but if a claim or notice of objection fails in any substantial respect to give the information required to be given to the person who is to receive it, then it is invalid.

A notice of objection sent by post to a person whose name was entered on the register of ownership electors omitted to give (as prescribed in Form 5 (*a*), Schedule I., of the Registration Order, 1895), in the body of the notice itself, the place of abode, as described in the register, of the person objected to; but on the back of the notice of objection there was written, for postal purposes, the name of the person objected to and his place of abode as described in the register. The omission to give in the body of the notice the place of abode of the party objected to was intentional.

Held (reversing the revising barrister) that the notice of objection was not invalid on account of such omission.—LINFORTH *v.* BUTLER, *Q.B.D.*, 141; [1899] 1 Q. B. 116; 68 L. J. Q. B. 3; 79 L. T. 498.

7. *Registration—Parliament—Notice of objection—Place of abode of objector—Mistake—Amendment—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 2—*Registration Order*, 1895, *Schedule III., Form* 1.—In signing a notice of objection to a name being retained on the occupier's list of voters in a borough, the objector, instead of stating his place of abode, as required by the Registration Order, 1895, gave the address of a shop within the borough, which was his qualifying property. His place of abode was outside the borough, and he thought he ought to give his address within the borough and not an address outside it. No one was in any way affected by the mistake.

Held, that the revising barrister had power to amend the mistake.

Judgment of the Queen's Bench Division (*ante*, p. 139) affirmed.—PRESCOTT *v.* LEE, *C.A.*, 690; [1899] 2 Q. B. 273.

ELECTRIC LIGHT:—

Inspector—Fees and reasonable expenses—Electric Lighting Orders Confirmation (*No.* 15) *Act*, 1890 (53 & 54 *Vict. c. ccxxxix.*), *s.* 14.—Section 47 of the Electric Lighting Orders Confirmation (No. 15) Act, 1890, provides that all fees and reasonable expenses of an inspector shall, in the absence of any agreement, be paid by the undertakers. There is a proviso by which such fees and expenses are chargeable to the consumer in the event of any default or negligence being shown against him.

Held, that the "fees and reasonable expenses" referred to in the first part of the section are limited to such fees and expenses as would be chargeable against the consumer under the proviso, and that, accordingly, the salary of the inspector, the expenses of an electrical laboratory, the wages of assistants, and the cost of the instruments, furniture, and fittings of the laboratory are not chargeable against the undertakers.—CRAWFORD *v.* CITY OF LONDON ELECTRIC LIGHTING CO., *Q.B.D.*, 45.

ESTOPPEL:—

Res judicata—*Probate—Practice—Heir-at-law party as one of next-of-kin only—Decision establishing will—Action of ejectment by heir-at-law alleging intestacy—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *ss.* 61, 62, 63.—In an action for establishing a will in the Probate Division to which the heir-at-law of the deceased is a party as one of the next-of-kin, it is not necessary also to cite him in his character of heir-at-law in order that he should be bound as to the real estate of the deceased by the decision of the court.

Held, therefore, that an heir-at-law who had been a party to a probate suit as one of the next-of-kin only, was bound by the decision of the court establishing the will, and was estopped from afterwards bringing an action of ejectment founded upon the alleged intestacy of the deceased.—BEARDSLEY *v.* BEARDSLEY, *Q.B.D.*, 284; [1899] 1 Q. B. 746; 80 L. T. 51.

See also Company, 13; Landlord and Tenant, 20; Trover.

EXECUTOR:—

1. *Action for testator's misrepresentations*—Actio personalis moritur cum persona.—An action claiming unliquidated damages arising from the misrepresentations of a testator will not lie against his personal representatives, but only if that which it is sought to recover from his estate can be shown to be still the property of the plaintiff.—DUNCAN, RE, TERRY *v.* SWEETING, *Ch.D. Romer, J.*, 379; [1899] 1 Ch. 387; 68 L. J. Ch. 253; 80 L. T. 322.

2. *Retainer—Following assets—Retainer for debt of deceased without notice of debt of higher degree.*—An executor who pays creditors without notice of the existence of a creditor of higher degree is not liable to account at the instance of that creditor for the sums so paid. Retainer of the amount of a debt out of a deceased person's estate by the executor is payment at law, and he is therefore not liable to refund if an enforceable debt of higher degree, of which he had no notice, should afterwards appear to be due.

Blake v. *Gale*, 34 W. R. 555, 32 Ch. D. 571, distinguished.—FLUDYER, RE, WINGFIELD *v.* ERSKINE, *Ch.D. Romer, J.*, 5; [1898] 2 Ch. 562; 79 L. T. 298.

See also Administration, 4, 7; Assignment, 4; Limitation Statutes, 8.

FACTOR:—

Pledge—Documents of title—Foreign arrestment—Conflict of laws—Goods in Scotland—Factors Acts, 1889, 1890 (52 & 53 *Vict. c.* 45, *ss.* 3, 9; 53 & 54 *Vict. c.* 40, *s.* 1).—Where goods are lodged in warehouses in Scotland a pledgee of the goods must, to make effective all real rights which depend on the constructive delivery of the goods, give notice of the pledge to the warehouse-keeper.

The Factors Act, 1889, extended to Scotland by the Factors (Scotland) Act, 1890, enacts—section 3: "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods"; and section 1: "For the purposes of this Act" (sub-section 5) "the expression 'pledge' shall include any contract, pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability." Section 9 prescribes that the effect of delivery or transfer of the documents of title of the goods under any pledge, &c., by a person who, having bought the goods, obtains, with the consent of the seller, possession of the goods or documents of title, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods

or documents of title with the consent of the owner.

Goods were stored by G., a domiciled Englishman, in a bonded warehouse in Glasgow, transferred into the name of G. as owner; and the warehouse-keeper issued to G. delivery orders showing that the goods were held to G.'s order "or assigns by indorsement hereon." G. obtained a loan from I., an English merchant, and delivered to him in England a letter of hypothecation bearing that he deposited a part of the goods with him in security, with power of sale, and G. indorsed and handed to I. the delivery warrants. I. did not intimate or give notice of the right he had acquired to the warehouse-keeper. R. and B., claiming as personal creditors of G., arrested the goods in the hands of the warehouse-keeper in order to found jurisdiction against G. in Scotland; and then raised an action against him in the Scottish court, upon dependence of which they again arrested the goods, claiming through the arrestment a preferable right thereto.

Held, affirming the decision of the majority of the whole Scottish judges, [1897] 24 R. 758, that the case was governed by the law of Scotland, and that the right of the pledgee, I., in the goods was defeated by the arrestment executed by R. and B., I. not having intimated his pledge to the warehouse-keeper.

Held, also, that section 3 of the Factors Act, 1889, was merely intended to define the full effect of the pledge of the documents of title made by a mercantile agent, and that it had no application to the case of the pledge of the documents of title by one in the positon of G., who was not a mercantile agent within the meaning of the Act; nor was G. a pledgor within section 9 of the same Act.—INGLIS *v.* ROBERTSON, *H.L.* (*Sc.*); [1898] A. C. 616; 79 L. T. 224.

See also Sale of Goods, 1.

FACTORY:—

Fencing machinery—Breach of statutory duty—Liability—Common employment—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *ss.* 5, 82, 87.—Where the proprietor of a factory fails to perform the duty imposed upon him by section 5 of the Factory and Workshop Act, 1878, to fence and maintain the fencing of dangerous machinery, an action to recover damages will lie at the suit of a person injured thereby, notwithstanding that the Act has imposed a penalty for the breach of the statutory duty.

The defence of common employment is no answer to such an action.—GROVES *v.* LORD WIMBORNE, *C.A.*, 87; [1898] 2 Q. B. 402; 79 L. T. 284.

FINANCE ACTS.—See Inland Revenue, 2, 13.

FISHERY:—

Fisheries Committee—Purchase of vessel for use of fishery officer—Expenditure—Power to impose restrictions and conditions—Sea Fisheries Regulation Act, 1888 (51 & 52 *Vict. c.* 54), *s.* 6.—Where a sea fisheries district has been created by an order of the Board of Trade under the Sea Fisheries Regulation Act, 1888, and a joint committee has been constituted consisting of the representatives of several county councils and borough councils as well as other bodies, any one of the paying councils is not exempt from contributing to the expenses incurred by the committee in the purchase of a vessel for the use of their fishery officer unless the restrictions and conditions as to expenditure referred to in section 6 of the said Act are made, if not at the time of the original constitution of the committee, at least before any appointment by the committee of its fishery officer; and such restrictions and conditions cannot be imposed by one only of the contributing bodies, but must be agreed to by all.—REG. *v.* YORKSHIRE (NORTH RIDING) COUNTY COUNCIL, *Q.B.D.*, 205; [1899] 1 Q. B. 201; 68 L. J. Q. B. 93; 79 L. T. 521.

See also Justices, 10.

FOREIGN ENLISTMENT ACT:—

1. *Contract by English owners to sell ships to American Government—Contract to be void if United States became belligerents—Outbreak of war—Action to recover deposit—Foreign Enlistment Act*, 1870 (33 & 34 *Vict. c.* 90), *s.* 8 (4).—By section 8 (4) of the Foreign Enlistment Act, 1870, it is an offence for anyone to despatch, or cause or allow to be despatched, any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state.

The defendants on the 21st of April, 1898, contracted to sell to the plaintiffs, the United States Government, prior to the commencement of hostilities between that country and Spain, two steamships, "to be delivered as soon as possible."

The plaintiffs paid a deposit, which was subject to the following clause of the contract: "If from blockade, or any other cause arising from the United States becoming belligerents and preventing delivery of either of the said steamers, this contract is to be null and void, but the vendor is to retain the deposit as and for liquidated damages."

It was impossible for the defendants to have despatched the ships before the day (23rd of April) when the United States commenced hostilities with Spain; but the proclamation of neutrality by the British Government was not published until the 26th of April. In an action to recover the deposit,

Held, that the defendants' contention that they were "prevented" from making delivery by reason of the above-cited section of the Act of 1870, was a good defence to the action.—UNITED STATES OF AMERICA *v.* PELLY, *Q.B.D.*, 332.

2. *False representation—Right of action—Person induced by misrepresentation to commit crime—Foreign Enlistment Act*, 1870 (33 & 34 *Vict. c.* 90), *s.* 11.—Where a person is induced by the fraudulent misrepresentation of another to do an act which, in consequence of such misrepresentation, he believes to be neither illegal or immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act.—BURROWS *v.* RHODES, *Q.B.D.*; [1899] 1 Q. B. 816; 68 L. J. Q. B. 545; 80 L. T. 591.

FRAUDS, STATUTE of:—

1. *Agreement for a lease—Sufficiency of memorandum—Time of commencement of term not stated—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—In order to satisfy the requirements of section 4 of the Statute of Frauds, the written memorandum of a contract for the grant of a lease must, either expressly or by reasonable inference, state the time at which the term is to commence.—HUMPHREY *v.* CONYBEARE, *C.A.*; 80 L. T. 40.

2. *Contract—Enforceability by action—Contract not to be performed within the space of one year—Lease of chattel for three years.*—The owner of a chattel agreed to let it out on hire for the term of three years at a quarterly rent,

Held, that the consideration for the hirer's promise was not capable of being performed within the

space of one year, and that therefore the contract was within section 4 of the Statute of Frauds.—MILSOM *v.* STAFFORD, *C.A.*; 80 L. T. 590.

3. *Part performance—Landlord and tenant—Verbal agreement for lease with existing tenant—Payment of increased rent.*—Payment by the tenant and acceptance by the landlord of an increased rent in respect of premises hitherto held and occupied by the tenant as a yearly tenant, may be acts unequivocally and in their nature referable to an alleged new agreement for a lease for twenty-one years, and therefore such a part performance as takes the case out of the Statute of Frauds and allows parol evidence to be given of the alleged agreement.

Nunn v. *Fabian*, L. R. 1 Ch. App. 35, 14 W. R. Ch. Dig. 119, explained and followed.—MILLER & ALDWORTH *v.* SHARP, *Ch.D. Byrne, J.*, 268; [1899] 1 Ch. 622; 68 L. J. Ch. 322; 80 L. T. 77.

See also County Court, 7; Sale of Foods, 2; Vendor and Purchaser, 3.

FRIENDLY SOCIETY:—

1. *Moneys payable on death of member—Nomination of person to receive—Revocation of nomination—Moneys payable exceeding £100—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-section* 3.—A member of a friendly society can, under section 15, sub-section 3, of the Friendly Societies Act, 1875, nominate a person to receive a sum not exceeding £100 payable by the society on his death, even though the total sum payable by the society on his death exceeds £100. Such a nomination can only be revoked in the manner prescribed in the section, and cannot be revoked by will.—BENNETT *v.* SLATER, *C.A.*, 82; [1899] 1 Q. B. 45; 68 L. J. Q. B. 45; 79 L. T. 324.

2. *Policy—Assignment by deed—Validity—Nomination—Death of nominee during lifetime of nominator—Claim by executor—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-section* 3.—G. effected a policy on her life for £100 with the defendant friendly society, and assigned all her interest under the same by deed to one J. C., who paid the premiums to the society as they became due. The society refused to treat the assignment as valid, and G. thereupon duly filled up a nomination form and nominated the same J. C. as the person to receive the policy-moneys at her death,

J. C. predeceased G., and the premiums were, during the life of G., paid by C. as the executor of J. C., under the belief that the policy-moneys would become payable under the deed to the estate of the deceased. In an action by C. to recover the policy-moneys upon G.'s death,

Held, that, although a policy granted under the Friendly Societies Acts was not assignable by deed, and therefore that C. could not recover as assignee, yet that he was entitled to the policy-moneys as the executor of the person who had been duly nominated by the assured, since a nomination under section 15, sub-section 3, of the Friendly Societies Act, 1875, if unrevoked, created a vested interest in the nominee.—CADDICK *v.* HIGHTON, *Q.B.D.*, 668; 68 L. J. Q. B. 281; 80 L. T. 527.

GAMING:—

1. *Betting—Criminal law—Sweepstakes on a horse-race—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.—The defendant received subscriptions from a number of persons on the understanding that the money so received, after payment of the actual expenses of management, was to be distributed in certain shares or prizes of different amounts among such of the subscribers as should draw (at a drawing in which all the subscribers were to take part) a ticket bearing a number corresponding with the number attached to the name of a horse in a list of horses entered for a race called "The Derby Sweepstakes," the drawer of the winning horse receiving the largest share or prize.

Held, that the defendant could not be convicted of an offence under section 1 or section 3 of the Betting Act, 1853.

Semble, that the transaction was an illegal lottery.—REG. *v.* HOBBS, *C.C.R.*, 79; [1898] 2 Q. B. 647; 79 L. T. 160.

2. *Betting—Horse-racing—Cheque given in payment of bets—Holder for value with notice—Illegal consideration—9 Anne, c.* 14, *s.* 1—6 & 7 *Will* 4, *c.* 41, *s.* 1.—A cheque was drawn by the defendant in payment of bets lost by him to the payee upon horse-races, and was indorsed for value by the payee to the plaintiff, who had notice of the consideration for which it was drawn.

Held, that the cheque must be deemed to have been drawn upon an illegal consideration, and that the plaintiff, who had notice thereof, could not recover upon it.—WOOLF *v.* HAMILTON, *C.A.*, 70; [1898] 2 Q. B. 337; 79 L. T. 49.

3. *Betting—"Place" used for betting—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.—On a certain part of the ground upon which a race meeting was being held a bookmaker erected a structure consisting of four legs or supports made of bamboo fastened together. On the top there was a board on which from time to time the bookmaker wrote the odds offered against the different horses, and, lower down, a canvas screen or banner some distance off the grounnd, bearing the bookmaker's name. Throughout the day the bookmaker stood upon a box or stool close to the structure shouting the odds and betting with persons upon the ground.

Held, that the bookmaker was a person using a place for the purpose of betting with persons resorting thereto within the meaning of the Betting Houses Act, 1853, there being a sufficient localization of the business of betting at the spot where he stood.—BROWN *v.* PATCH, *Q.B.D.*, 623; [1899] 1 Q. B. 892; 68 L. J. Q. B. 588; 80 L. T. 716.

4. *Betting—Reserved enclosure on racecourse—"Using a place" for betting purposes—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 2, 3.—The keeping an enclosure at a racecourse, to which bookmakers and others resort, and in which betting takes place, with the knowledge and without the interference of the owners of the racecourse, is not contrary to the provisions of the Betting Houses Act, 1853. What is prohibited is the opening, keeping, or using of a place for a betting business.

Hawke v. *Dunn*, 45 W. R. 359, [1897] 1 Q. B. 579, overruled.

Decision of the Court of Appeal, 46 W. R. 8, [1897] 2 Q. B. 242 (Lords Hobhouse and Davey dissenting), affirmed.—POWELL *v.* KEMPTON PARK RACECOURSE CO., *H.L.*, 585; [1899] A. C. 143. 68 L. J. Ch. 392; 80 L. T. 538.

5. *Betting-house or room—User—Public-house—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119)—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17 (2).—A professional betting man went day by day, between the hours of 12 noon and 3 p.m., to a public-house. He generally sat in the part of the house known as the saloon, and there conducted the business of ready-money betting, receiving bets and stakes and paying the bets when won. The proprietor and licensee of the public-house was aware of and consented to what the betting man

did, but the latter paid no rent. Besides the betting business the ordinary business of a public-house was carried on in the saloon. The betting man had no interest in the latter business, neither had the licensee of the public-house any interest in the betting business.

Held, that the betting man used the public-house for the purpose of betting with persons resorting thereto, and was therefore guilty of an offence against section 3 of the Betting Houses Act, 1853, and that the licensee was guilty of an offence against section 17 (2) of the Licensing Act, 1872.—BELTON *v.* BUSBY, *Q.B.D.*, 636.

6. *Purchase and sale of shares—Payment of differences—Balance due from broker—Purchase of shares from broker—Balance to be taken in payment—Breach of contract by not delivering—"Cover"—"Money deposited to abide the event"—Bankruptcy—Proof—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.—Gaming contracts between a stockbroker and his client, for differences on the sale and purchase of stocks and shares, resulted in a balance in favour of the client. It was agreed that the broker should sell certain stock to the client, which he would accept in payment of the balance due to him, and in pursuance of this agreement a contract note was forwarded by the broker. The stock was not delivered, and the client sought to prove in bankruptcy, against the estate of the broker, for damages for non-delivery of the stock.

Held, reversing the judgment of Wright, J., that, as the balance resulting from the gambling transactions could not have been recovered from the broker, there was no consideration for the promise to deliver the stock, and no proof could be admitted in respect of the non-delivery.

The client had deposited money with the broker as cover to secure him against loss on the gaming transactions which had resulted in a balance in favour of the client.

Held, affirming the judgment of Wright, J., that, the money deposited not having been used for the purpose for which it was deposited, proof in respect of the amount was admissible.—CRONMIRE, RE, WAUD, EX PARTE, *C.A.*; [1898] 2 Q. B. 383.

7. *Stockbroker—Agreement by way of gaming or wagering—Sale and purchase of stocks and shares—Bargain for payment of "differences"—Higher price if stocks taken up—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.—Where contracts between a broker and his customer for the sale and purchase of stocks and shares contained provisions that the price should be one-eighth more if the stock was taken up, or one-eighth less if it was delivered,

Held (following *Universal Stock Exchange* v. *Strachan*, 44 W. R. 497, [1896] A. C. 166), that the existence of an option for the customer to demand delivery or payment in cash did not of itself prevent the court finding that the contract was really one for the payment of differences only.

And held, that the provisions as to price showed that the contract was for differences only, and that such an agreement was void as being "by way of gaming or wagering," within the meaning of section 18 of the Gaming Act, 1845.

Decision of Wright, J., reversed.—GIEVE, RE, THE TRUSTEE, EX PARTE, *C.A.*, 441; [1899] 1 Q. B. 794; 68 L. J. Q. B. 509; 80 L. T. 438.

GAS.—See Nuisance.

GIBRALTAR, LAW of :—

Criminal jurisdiction and procedure — Supreme Court at Gibraltar—Morocco Consular Court—Trial at Gibraltar should be by jury.—The Consular Court of Morocco and the Supreme Court of Gibraltar having a concurrent jurisdiction in the matter of an offence charged against the appellant, he was arrested in London and ordered by the Queen's Bench Division to be tried before the Supreme Court at Gibraltar.

Held, that as an incident to that order he was entitled to be tried according to the procedure of that court, that is (see section 38 of the Gibraltar Order in Council), by a jury.—SPILSBURY *v.* REG., *P.C.*; [1899] A. C. 392; 68 L. J. P.C. 66; 80 L. T. 602.

GOODWILL.—See Inland Revenue, 26; Mortgage, 9; Partnership, 2.

GUARANTEE :—

Bond—Construction—Recital and condition.—The respondent, with others, gave a joint and several guarantee to the appellant bank, limited to £2,500, in respect of overdrafts by a customer. Subsequently he with others gave a joint and several bond reciting a desire for advances to the same customer over and above that amount, and securing payment of the balance of account current.

In an action brought both on the guarantee and bond, the former was held to be invalid; but

Held, that the condition of the bond, being plainly to secure repayment of all moneys advanced by the bank and not merely those in excess of the said £2,500, could not be controlled by any recital not plainly inconsistent therewith.—AUSTRALIAN JOINT STOCK BANK (LIMITED) *v.* BAILEY, *P.C.*; [1899] A. C. 396.

See also Limitation Statutes, 4.

HAWKER :—

Taking round oil—Previous request by customer to call—Sale of oil—Amount to be purchased fixed on each call—Hawkers Act, 1888 (51 & 52 *Vict. c.* 33), *ss.* 2, 3, 6.—By section 6 of the Hawkers Act, 1888, a penalty of £10 is imposed upon every person who without a licence does any act for which a licence is required, and by section 3 a licence is required to be taken out annually by every hawker.

By section 2 a hawker for the purposes of the Act is thus defined: "Hawker means any person who travels with a horse or other beast bearing or drawing burden, and goes from place to place or to other men's houses carrying to sell or exposing for sale any goods, wares, or merchandize to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, wares, or merchandize in or at any house, shop, room, booth, stall, or other place whatever hired or used by him for that purpose."

Held, that taking a cask of oil round in a cart to customers in pursuance of orders to call, when the quantity required was fixed by the customer at his house, was hawking within the statute, and required a licence.—O'DEA *v.* CROWHURST, *Q.B.D.*; 68 L. J. Q. B. 655; 80 L. T. 491.

HIGHWAY :—

1. *Local government — Obstruction — Action for damages — Excess of statutory powers—Evidence —Loss of business at shop—Right of action.*—A shopkeeper sued a local authority for damages caused by loss of business at his shop through the road which gave access to the shop being unnecessarily and negligently obstructed by them. Under an Act of Parliament the defendants were empowered to obstruct the road temporarily while making a new street.

Held, that there being no evidence before the

court of any damage to the plaintiff arising out of any excess by the defendants of their statutory powers, the defendants were entitled to judgment.

Quære, whether, assuming a loss of business through such an excess, the injury to the plaintiff would have been actionable.—MARTIN *v.* LONDON COUNTY COUNCIL, *C.A.*; 80 L. T. 866.

2. *Rate—Exemption—Liability to repair* ratione tenuræ—*Order making highway a parish highway—Continuance of Exemption—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 33—*Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 35.—Where, by an order of justices under section 35 of the Highway Act, 1862, a highway repairable *ratione tenuræ* is made a parish highway, and a sum is fixed to be paid to the highway board by the person previously liable to repair, "in full discharge of all claims thereafter in respect of the repair and maintenance of such highway," the exemption conferred upon such person by section 33 of the Highway Act, 1835, continues, and he is discharged not only from liability to repair *ratione tenuræ*, but also from liability to pay highway rates.

Judgment of Wills and Kennedy, JJ. (46 W. R. 582, [1898] 2 Q. B. 66), reversed. — NORTH-EASTERN RAILWAY CO. *v.* DALTON OVERSEERS, *C.A.*, 581; [1899] 1 Q. B. 1026; 68 L. J. Q. B. 640; 80 L. T. 587.

See also Local Government, 6, 26; Metropolis, 8.

INCLOSURE:—

1. *Owner of mines—Owners of surface—Right to sink pits—Buildings affixed to surface.* — Where, under an Inclosure Act, full enjoyment of the minerals under the common inclosed is reserved to the owner of the soil, it must be held that the intention of the Legislature was to confer on the owner all powers which are reasonably necessary for him to win, work, and carry away the minerals. The owner of mines is, therefore, entitled to sink pits and erect buildings for the purpose of working the pits on any part of the inclosed common, though he is not justified in destroying or using existing buildings which are the property of the surface owners.

Bell v. *Love*, 10 Q. B. D. 547, 31 W. R. Dig. 33, 32 W. R. 725, 9 App. Cas. 286, considered.—HAYLES *v.* PEASE, *Ch.D. Stirling, J.*, 370; [1899] 1 Ch. 567; 68 L. J. Ch. 222; 80 L. T. 220.

2. *Turbary—Allotment for—Legal estate in land—Compensation to lord of manor—Inclosure Act*, 1845 (8 & 9 *Vict. c.* 118), *ss.* 34, 73, 76.—An allotment of land made in pursuance of sections 34 and 73 of the Inclosure Act, 1845, to the churchwardens and overseers of a parish in trust to allow the occupiers of certain ancient cottages in the parish to get turf therefrom vests the legal estate in the land in the churchwardens and overseers.

Attorney-General v. *Meyrick*, [1893] A. C. 1, and *Reg.* v. *Inclosure Commissioners*, 23 L. T. 778, distinguished.—SIMCOE *v.* PETHICK, *C.A.*; [1898] 2 Q. B. 555; 79 L. T. 432.

INDUSTRIAL SOCIETY:—

Disputed claim—Arbitration—Failure of society to appoint arbitrator—Sole arbitrator—Plaint in county court—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 6 (b)—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 49 (1) (5).—J., a member of an industrial society, nominated his daughter to receive his interest in the society, and died on the 19th of May, 1898, without having revoked the nomination. Both his widow and the daughter claimed the amount standing to his credit in the books of the society. On the 20th of September the daughter wrote a letter to the society nominating an arbitrator, and asking the society to name an arbitrator to act on their behalf in accordance with one of their rules. The society took no notice of this application, and on the 19th of October the daughter gave notice that the arbitrator named in her former letter had been appointed by her as sole arbitrator under the Arbitration Act, 1889, s. 6 (*b*). The society replied that they would refuse to be bound by the decision of an arbitrator so appointed. On the 1st of November the sole arbitrator gave an *ex parte* award in favour of the daughter. On the 17th of November a plaint was taken out by the daughter in the county court under the Industrial and Provident Societies Act, 1893, s. 49, and the judge enforced the award in favour of the daughter. The society appealed, on the ground that the Arbitration Act, 1889, could not apply, as section 6 (*b*) of that Act was inconsistent with section 49 (5) of the Provident and Industrial Societies Act, 1893.

Held, that it was not necessary to decide whether the Arbitration Act, 1889, was or was not applicable, as the plaint in the county court—the forty days mentioned in section 49 (5) of the Industrial and Provident Societies Act, 1893, having elapsed—might be regarded as an application under that sub-section.—JESSOP *v.* HUDDERSFIELD INDUSTRIAL SOCIETY, *Q.B.D.*; 80 L. T. 598.

INFANT:—

1. *Contract—Apprenticeship deed—Contract not for benefit of infant—Employers and Workmen Act*, 1875.—By a deed of apprenticeship of an infant it was provided that the apprentice should serve for a term of years, excepting the usual holidays and days on which the master's business should be at a standstill through accident beyond the control of the master, and that during the said term, excepting and subject as aforesaid, the master should pay the apprentice wages for her services.

Held, that the provision that the master should not be liable to pay wages to the apprentice during the excepted period was not so disadvantageous to her as to render the apprenticeship deed incapable of being enforced against her under the Employers and Workmen Act, 1875.

Corn v. *Matthews*, [1893] 1 Q. B. 310, distinguished.—GREEN *v.* THOMPSON, *Q.B.D.*; [1899] 2 Q. B. 1; 68 L. J. Q. B. 719; 80 L. T. 691.

2. *Direction to mother to maintain, educate, and bring up—Immoral home—Adultery of mother—Control of court.*—A testator bequeathed the residue of his estate to his trustees upon trust to pay the income to his wife during her widowhood, "she maintaining, educating, and bringing up" unmarried infant sons and unmarried daughters.

The widow, while duly maintaining and educating the infant children, lived in adultery with a married man in the home which she provided for them.

Held, that the widow was not properly performing the obligation imposed upon her, and that, in the circumstances, the court had power to administer the fund.—G. (No. 2), RE, *Ch.D. Kekewich, J.* 491; [1899] 1 Ch. 719; 68 L. J. Ch. 374; 80 L. T. 470.

3. *Guardianship—Mother sole surviving guardian—Re-marriage of mother—Appointment of additional guardian — Discretion of court — Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 2.—By his will X. appointed his wife (during her widowhood) and his own father guardians of his infant son during his minority, and directed that, on the death of either of them, the survivor should be sole guardian. X. and his wife were both Protestants.

X. died in 1886, and his father in 1890. In 1896 the widow married again, her second husband being a Roman Catholic, whilst she remained a Protestant, and the infant son was being brought up as a Protestant. In 1897 the infant's paternal grandmother, as his next friend, took out a summons asking that an uncle of the infant (the husband of a sister of X.) might be appointed to act jointly with the mother as guardian of the infant.

Held (dismissing the summons), that the mother of an infant had entirely new rights conferred upon her under the Guardianship of Infants Act, 1886; she became statutory guardian under the Act, whether she was appointed testamentary guardian by her husband or not.

The court has power, in its discretion, to remove a guardian or to appoint another guardian to act jointly with the statutory guardian; but the court will not interfere except on good grounds shown to be clearly for the benefit of the infant.—X., RE, X. *v.* Y., *C.A.*, 345; [1899] 1 Ch. 526; 68 L. J. Ch. 265; 80 L. T. 311.

4. *Marriage articles—Covenant to settle after-acquired property—Married woman—Repudiation—Reasonable time—Austrian law—Post-nuptial settlement—Rectification.*—Marriage articles entered into by the intending wife (an Irish woman), the intending husband (an Austrian), the father of the lady, and English trustees, drawn up in English form, but executed in Switzerland, will be treated as governed by English law as regards property in this country.

Marriage articles of the above kind cannot be revoked by a post-nuptial document executed by the husband and wife in conformity with the law of Austria, where both parties were domiciled, although the document was by that law valid and effective.

A covenant in marriage articles by the intending wife, then an infant, to settle after-acquired property is as against her voidable, not void, and binds her after the marriage, unless repudiated within a reasonable time after coming of age.

Cooper v. *Cooper*, L. R. 13 App. Cas. 88, 36 W. R. Dig. 98, explained.

To repudiate such a covenant upon becoming entitled to property many years after coming of age is not repudiating within a reasonable time.

Smith v. *Lucas*, 30 W. R. 451, L R. 18 Ch. D. 531, considered.

Semble, that repudiation of such a covenant must be made once for all.—VIDITZ *v.* O'HAGAN, *Ch.D. Cozens-Hardy, J.*, 571; 80 L. T. 794.

See also Practice, 25.

INJUNCTION:—

1. *Building—Pulling down—Mandatory injunction, form of—Practice.*—An injunction the effect of which is to require the performance of a certain act, such as the pulling down and removal of buildings, should now be made in a direct mandatory form, and not in the indirect form hitherto in use.—JACKSON *v.* NORMANBY BRICK CO., *C.A.*; [1899] 1 Ch. 438; 68 L. J. Ch. 407; 80 L. T. 482.

2. *Jurisdiction—Land outside jurisdiction—Plaintiffs and defendants within jurisdiction—Breach of implied covenant for quiet enjoyment.*—In July, 1896, the plaintiffs entered into an agreement with the defendants under which the sole and exclusive right to work certain lands situate in the island of Milos and belonging to the defendants was granted to the plaintiffs for a period of five years; the agreement also contained a provision for a renewal of the period for three further periods of five years each. The right conferred by this agreement was expressed to be granted for the purpose of enabling the plaintiffs to get and work manganese, and they were to pay by quarterly payments certain royalties therefor, and a minimum royalty was fixed. Clause 6 of the agreement provided that in the event of any royalties being in arrear for three months or a breach of any of the provisions of the agreement the defendants might determine the licence and re-enter the premises.

On the 17th of May, 1898, a further agreement was made modifying the first agreement and providing for the payment of the royalties half yearly on the 8th of April and the 8th of October in each year.

A dispute having arisen between the original grantors of the lands and the defendants, and the former having requested the plaintiffs to pay the royalties to them instead of to the defendants, the plaintiffs on the 7th of October declined to pay to the defendants the royalties due on the 8th of October, and offered to refer the question to arbitration. On the 12th of October the defendants took forcible possession of the lands and remained in possession of the same. On the 18th of October the plaintiffs tendered to the defendants the money due, but the tender was refused.

On the 2nd of November the plaintiffs instituted this action and now moved for an injunction to restrain the defendants from taking or keeping possession of the lands in question and of the machinery and stock of manganese in or about the premises. The registered offices of the plaintiffs and defendants respectively were situate in London.

Held, that if there was jurisdiction to grant the injunction sought for, such jurisdiction ought to be exercised with great caution, and that as the defendants were in actual possession of the lands they ought not to be disturbed and that the motion must be refused.—BLACK POINT SYNDICATE *v.* EASTERN CONCESSIONS, *Ch.D. Stirling, J.*; 79 L. T. 658.

See also Administration, 1; Contract, 3, 5; Libel, 4; Light; Metropolis, 11, 16, 17; Nuisance; Railway, 4, 6; Restraint of Trade, 2; Trade-mark, 4.

INLAND REVENUE:—

1. *Bodies corporate and unincorporate—Exemption from duty—"Property appropriated and applied for the promotion of science"—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-section* 3.—By section 11 of the Customs and Inland Revenue Act, 1885, duty is imposed upon the annual value, income, or profits of all property belonging to, or vested in, any body corporate or unincorporate, subject to exemption from duty in the case of "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, science, or the fine arts."

The College of Surgeons was a body corporate with two main objects—namely, the promotion of the science of surgery, and the promotion and encouragement of the practice of surgery, including examinations to qualify for such practice. The property of the college consisted, among other things, of general offices, an examination hall, and a library; but there had been no appropriation of this property by conveyance, declaration of trust, or otherwise, to the first-named of the above objects as distinguished from the second. The fees received in respect of the examinations constituted a large part of the income of the college. The college had

no school of instruction or training for persons seeking admission to the college. The above property having been assessed to the annual duty imposed by section 11 of the Act of 1885,

Held, that as the college had two main objects, only such of its property as was legally appropriated and applied to the first-named object, as distinguished from the second, was exempt from duty within section 11, sub-section 3, of the Act, and that as none of the property in question was legally appropriated thereto the exemption did not apply.

The words "legally appropriated" mean appropriated so as to create a legal obligation upon the part of the administrators of the property to apply it in a particular manner.

Judgment of the Divisional Court (46 W. R. 538) affirmed.—ROYAL COLLEGE OF SURGEONS OF ENGLAND, RE, *C.A.*, 452; [1899] 1 Q. B. 871; 68 L. J. Q. B. 613; 80 L. T. 611.

2. *Estate duty—Gift* inter vivos—*Settlement—Whether possession assumed to entire exclusion of settlor—Reservation of interest to settlor—Power of revocation—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-section* 2 (a) (c)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c).—By a deed, dated 1885, G. transferred certain estates, including a mansion-house of which he was the owner, to the appellant, his nephew, subject, as regards property other than the mansion-house, to an annual rent-charge in favour of G. for life and subject also to the mansion-house being enjoyed as theretofore by G. By the same deed the appellant entered into several covenants relating to the estate, amongst which was one to pay the debts of G. out of the estate; and a power of revoking the deed and reassuming the property in the estate was reserved to G. upon the breach of certain of the said covenants by the appellant.

G. died before the happening of any of the events upon which the power of revocation was exercisable, but after the Finance Act of 1894 had come into effect. The annual value of the estate at the death of G. was considerably in excess of the rent-charge reserved.

Held (affirming the judgment of the Divisional Court, 46 W. R. 251), that, at the death of G., all the property was liable to estate duty under section 1 of the Finance Act of 1894. It was property which must be deemed to have passed on the death of G. within section 38, sub-section 2, of the Act of 1881, as amended by section 11, sub-section 1, of the Act of 1889 and section 2, sub-section 1 (c), of the Finance Act, 1894.

Per Vaughan Williams, L J.—That there was a sufficient interest and power of revocation reserved in the property so as to bring it within section 11, sub-section 1, of the Act of 1889, for the appellant had not assumed *bonâ fide* possession and enjoyment "to the entire exclusion of the donor," G.—ATTORNEY-GENERAL *v.* GREY (EARL), *C.A.*, 37; [1898] 2 Q. B. 534; 79 L. T. 235.

3. *Estate duty—Jointure payable "without any deduction whatever, except income tax"—Incidence of duty on jointures—Assessment of duty—Capital value of jointure—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (b); *s.* 4; *s.* 7, *sub-section* 7 (b); *s.* 8, *sub-section* 4; *s.* 9, *sub-sections* 1, 5, 6, 7; *s.* 14, *sub-section* 1.—For the purposes of the Finance Act, 1894, a jointress who is entitled to her jointure "free from any deduction whatever, except income tax," is not liable to bear any burden in respect of estate duty. A jointress who is not so entitled must be charged with estate duty upon so much of the estate as is represented by the jointure, but is entitled to throw the duty so charged upon the whole estate, she keeping down the interest on the duty during her life. The better way to ascertain the capital value of the jointure is to assess it at a sum equivalent to the capitalized value of the jointure at the same number of years' purchase as the estate as a whole is capitalized for the purposes of duty, rather than to adopt the actuarial value of the jointure.—PARKER-JERVIS, RE. SALT *v.* LOCKER, *Ch.D. Kekewich, J.*, 147; [1898] 2 Ch. 643; 79 L. T. 403.

4. *Estate duty—Jointure—"Free from all taxes and deductions except property tax and legacy or succession duty"—Assessment of duty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-section* 1.—A testator, who died in October, 1857, by his will, dated in September, 1856, empowered any tenant for life to charge on the estates thereby settled a jointure, not exceeding £3,000 a year, for his widow "free from all taxes and deductions except property tax and legacy or succession duty."

Held, that this was an "express provision to the contrary" within the meaning of section 14, sub-section 1, of the Finance Act, 1894, the testator's intention clearly being that the jointure should be paid to the widow of the tenant for life free from all taxes and deductions except those specified by him.—FITZHARDINGE (LORD), RE. FITZHARDINGE *v.* JENKINSON, *C.A.*; 80 L. T. 376.

5. *Estate duty—Property passing on death—Mortgage created by tenant for life and remainderman—Annuity charged on estates in favour of remainderman during life of tenant for life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.—The tenant for life and the remainderman in tail of certain property duly barred the entail, reserving to themselves a joint power of appointment over the fee. They subsequently joined in mortgaging the fee simple to secure £230,000, part of which was applied for the benefit of the tenant for life, and the rest was paid to, or for the benefit of, the tenant in tail. A resettlement was afterwards executed, whereby the property was charged with an annuity of £3,000 for the tenant in tail during the life of the then life tenant, who died in 1895.

Held, that what passed on the death of the tenant for life was the equity of redemption, and, in determining its value, the £230,000 should be deducted, but not the capitalized value of the annuity, which ceased to be payable.

Decision of the Court of Appeal (46 W. R. 222, [1898] 1 Q. B. 355) reversed on the main contention.—COWLEY *v.* INLAND REVENUE COMMISSIONERS, *H.L.*, 525; [1889] A. C. 198; 68 L. J. Q. B. 435; 80 L. T. 361.

6. *Estate duty—Property passing on death—Settlement—Surrender of life estate to remainderman—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (*sub-section* 1 (b)), 5, 7 (*sub-section* 7).—A tenant for life (who died in 1896), more than twelve months before her death, surrendered her life interest in certain trust property, so as to merge her life estate in the immediate reversioner, who then became absolutely entitled.

Held, that, upon the death of the tenant for life, no property passed on her death within the meaning of section 2, sub-section 1 (b), of the Finance Act, 1894, and estate duty was not payable.

Decision of the Court of Appeal (46 W. R. 435, [1898] 2 Q. B. 147) affirmed.—ATTORNEY-GENERAL

v. BEECH, *H.L.*, 257; [1899] A. C. 53; 68 L. J. Q. B. 130; 79 L. T. 565.

7. *Estate duty — Property passing on death — Surrender of life interest to remainderman—Death of tenant for life within twelve months—Finance Act*, 1894 (57 & 58 *Vict. c.* 30) *s.* 2, *sub-section* 1 (c); *s.* 7, *sub-section* 7.—Where a tenant for life of settled property has released the life interest in favour of the remainderman and dies within twelve months of such release, estate duty is payable by the remainderman on the principal value of the property under section 2, sub-section 1 (c) and section 7, sub-section 7, of the Finance Act, 1894.—ATTORNEY-GENERAL *v.* DE PREVILLE, *Q.B.D.*; 2 Q. B. 238; 68 L. J. Q. B. 832.

8. *Estate duty — Residuary legatee — Title of originating summons—Practice—Costs—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 6 (2) (4), 8 (4), 9 (1), 14 (1)—*R. S. C., ord.* 55, *r.* 9 (c).—Estate duty payable on death of tenant for life to be borne rateably by the shares into which the estate became divisible and by the residuary devisee.—POWER, RE, POWER *v.* HOWELL, *Ch.D. Kekewich, J.*, 183.

9. *Estate duty—Reversionary interest—Settlement—Disposition of property during settlement—Finance Act*, 1894, *s.* 2, *sub-section* 1 (b); *s.* 5, *sub-section* 2.—The owner of an absolute reversionary interest in settled personal property, who during the lifetime of the tenant for life settles his reversionary interest, reserving a life interest to himself, is a person who was, "during the continuance of the settlement, competent to dispose of" the property within the meaning of section 5, sub-section 2, of the Finance Act, 1894, and therefore upon his death estate duty is payable upon the value of his interest, notwithstanding that estate duty has previously been paid upon it at the death of the original tenant for life.—ATTORNEY-GENERAL *v.* HAY, *Q.B.D.*; [1898] 2 Q. B. 245; 68 L. J. Q. B. 557; 80 L. T. 712.

10. *Estate duty—Settled property—Fund charged with specific sum—Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-section* 1.—A settlor assigned a policy of assurance for £5,000 on his own life to the trustees of his marriage settlement upon trust to raise out of the policy-moneys the sum of £4,000, to be held on the trusts therein mentioned, and upon further trust as to the residue of such moneys for the settlor's executors. The policy had been sold, and the proceeds of sale were now represented by a fund in court. The settlor died in 1898.

Held, that sub-section 1 of section 14 of the Finance Act, 1894, was intended as a protection to the person paying the estate duty, not as a provision for the incidence of that duty; and that the estate duty on the fund must be borne by the part remaining after payment of the £4,000.—WADE *v.* WADE, *Ch.D. Kekewich, J.*, 43; [1898] 2 Ch. 276.

11. *Estate duty—Settlement estate duty—Bequest of annuity — Succession — Settled Land Act*, 1882, *s.* 2, *sub-section* 1—*Finance Act*, 1894, *s.* 5, *sub-section* 1; *s.* 22, *sub-section* 1.—Testatrix bequeathed an annuity to A. and directed that a portion of her estate should be set aside therefor, and subject thereto she bequeathed said portion to B.

Held, that the portion so set aside was property "standing limited . . . by way of succession" within the meaning of section 2, sub-section 1, of the Settled Land Act, 1882, and that settlement estate duty was consequently payable in respect of it.—ATTORNEY-GENERAL *v.* OWEN, *Q.B.D.*; [1899] 2 Q. B. 253.

12. *Estate duty—Settlement estate duty—Portions for children—Succession—Finance Act*, 1894, *s.* 5, *sub-section* 1; *s.* 22, *sub-section* 1.—Testator bequeathed his residuary estate to trustees on trust to pay the income to his wife for life, and after her death to pay an annuity to each of his four daughters for life, and after the death of each daughter to raise certain specified sums in trust for the children of such daughter who should attain twenty-one, or being females, should marry under that age.

Held, that this amounted to a limitation in favour of testator's grandchildren to take effect upon the death of each daughter, and that there was a succession in respect of such portions, and that settlement estate duty was payable in respect of them. — ATTORNEY-GENERAL *v.* COULSON, *Q.B.D.*; [1899] 2 Q. B. 253; 68 L. J. Q. B. 779.

13. *Estate duty—Settlement estate duty—Incidence—Property settled by instrument outside will—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 2, 4, 5, 6, 8—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.—Where property given by the will of a testator is settled, not by the will itself, but by an instrument outside the will, settlement estate duty must be borne, not by the testator's general residue, but by the settled property.—MARYON-WILSON, RE, *Ch.D. Kekewich, J.*, 635.

14. *Income tax—Annual profits or gains—English company—Business carried on abroad through foreign company—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, 5th case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—An English company formed under the Companies Acts and registered in London had power by its memorandum of association to acquire the whole or part of the capital stock of an American incorporated association, then carrying on a brewing business in the State of Missouri, in the United States, and to allow the legal estate and interest in any business or property acquired by the company to be vested in and carried on by any American company upon trust for, or as agents or nominees of, the English company. The English company acquired the whole of the share capital of the American association except fourteen shares. The brewing operations were carried on in the State of Missouri exclusively, and under the immediate management of the directors of the American association, and the breweries and other property were vested in that association, and the officers and employees were appointed by the American directors. At the end of each financial year copies of the balance-sheet and profit and loss account of the American association were sent to the English company, and, after considering them, the directors of that company informed the American association as to what dividend they thought ought to be declared, and the American association habitually declared a dividend at the rate mentioned. In the reports and accounts of the English company the breweries business and profits were treated as being the property and under the control of the English company, and the directors of the American association were referred to as "the board of management in St. Louis." The accounts of the breweries were audited annually by an English accountant sent for the purpose by the English company. The amount of the dividend on the shares held by the English company was transmitted to England for distribution amongst the shareholders.

Held, that the brewing business was in substance the business of the English company, and that they were liable to be assessed to income tax under section 2, Schedule D, of the Income Tax Act, 1853,

in respect of the annual profits or gains arising from that business.—ST. LOUIS BREWERIES *v.* APTHORPE, *Q.B.D.*, 334; 79 L. T. 551.

15. *Income tax—Company registered in England—Business carried on and profits made abroad—Profits partly transmitted to England—Power of control in England—Liability to income tax on whole profits—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—An English company, registered under the Companies Acts, and having its registered office in London, was formed for the purpose of acquiring the shares in an American brewery company, and for the purpose of carrying on a brewery business. The vendors of the American company sold to the English company all the shares, except three, in the the American company, and all the personal property of the American company was transferred to the English company. In order to avoid any difficulties with regard to the American laws of real property, the American company was kept on foot. The English company found the capital for carrying on the brewery business, which was wholly carried on in America. All the profits were earned in America. The directors of the English company had the entire right of control of the affairs of the American company, and of the staff and business in America, with full power to appoint or dismiss any of the managers or officials of the business in America. In fact, the directors of the English company delegated these powers to the managers of the brewery in America, who were also the directors of the American company, and appointed them managers of the business in America. A portion of the profits earned was transmitted to England for the expenses incurred in England and for distribution amongst the English shareholders. The rest of the profits remained in America, and were distributed among American shareholders.

Held, that the business was in fact partly carried on in England, and therefore the English company was liable to pay income tax upon the whole of the profits earned by the business, and not merely upon that part of the profits which was transmitted to England.

The San Paulo Brazilian Railway Co. (*Limited*) v. *Carter*, 73 L. T. Rep. 538, [1896] A. C. 31, followed.—APTHORPE *v.* SCHOENHOFEN BREWING CO., *C.A.*; 80 L. T. 395.

16. *Income tax—Deduction of tax from interest or annuities—Income Tax Act*, 1842, *Schedules A and D—Inland Revenue Act*, 1888, *s.* 24, *sub-section* 3.—A county council had deducted income tax under section 24, sub-section 3, of the Inland Revenue Act, 1888, from the interest paid by them on their consolidated stock. The fund from which such interest was paid consisted partly of interest received by them on loans made to other local authorities and from which, in accordance with the section, income tax under Schedule D had been deducted before payment; and partly of the rent of lands on which income tax under Schedule A had been paid.

Held, that the county council were entitled to retain a portion of the income tax which they had deducted corresponding to the proportion in which interest on the consolidated stock had been paid out of moneys on which income tax under Schedule D had been already paid; but were not entitled to retain the proportion of the deducted income tax which corresponded to the proportion in which interest on the consolidated stock had been paid out of moneys charged with income tax under Schedule A.—ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL, *Q.B.D.*; [1899] 2 Q. B. 226; 68 L. J. Q. B. 823; 80 L. T. 767.

17. *Income tax—Deductions under Schedule D—5 per cent. on original cost—6 per cent. on diminishing value—Question of fact—Income Tax Act*, 1843 (5 & 6 *Vict. c.* 35), *s.* 100, *First Case, r.* 3—*Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 12.—The appellant company claimed under section 12 of the Inland Revenue Act, 1878, to be allowed a deduction of £253,893 on the ground that the same was a just and reasonable allowance as representing the diminished value by reason of wear and tear during the year. They arrived at this figure as being 5 per cent. on the original cost of the ships in their fleet.

The commissioners found that the average duration of the service of ships in the fleet was seventeen years, though the average duration of life of the ships was twenty-eight years; and that an allowance at the rate of 6 per cent. on the diminished value of the fleet for the year of assessment, arrived at by taking the original cost of each vessel and writing it down year by year at the rate of 6 per cent. on the diminishing value, was a sufficient allowance to cover the diminished value by reason of wear and tear during the year, and they fixed the figure at £185,440.

The company appealed.

Held, that the commissioners had dealt with all that was properly before them, and that the questions were substantially questions of fact.—PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. *v.* LEE, *Q.B.D.*; 79 L. T. 118.

18. *Income tax—Life assurance company—Annual profits and gains—Mutual assurance—Returns of premium as "rebate or discount"—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Schedule D.*—A life assurance company by its charter limited the interest payable to the holders of its capital stock to 7 per cent., and the earnings and receipts of the company over and above this fixed dividend, and the losses and expenses on the year's trading were to be accumulated. The insurance business of the company was expressed to be conducted upon the mutual plan, and every five years each policy-holder was to be accredited with a share of the accumulated surplus to be applied by him either in the purchase of an additional amount of insurance payable at his death, or at his option to the purchase of an annuity in reduction of his future premiums. The amount of the surplus funds to be so divided at these quinquennial distributions was to be entirely a matter for the discretion of the directors of the company.

Held, that the accumulated funds of the company were not the property of the policy-holders, and that the returns from surplus did not pass to them by the constitution of the company, but were payments made them arising out of the "profits" earned by the company, and the money so to be divided had rightly been assessed to income tax under Schedule D.

Last v. *London Assurance Co.*, 34 W. R. 233, 10 App. Cas. 438, followed; *New York Insurance Co.* v. *Style*, 14 App. Cas. 381, 38 W. R. Dig. 89, approved and distinguished.—EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* BISHOP, *Q.B.D.*, 556; 68 L. J. Q. B. 772; 80 L. T. 728.

19. *Income tax—Profits of trade—Deduction for depreciation of machinery or plant—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 12.—The Commissioners of Income Tax, when esti-

mating the deductions to be allowed from the profits of a trade under section 12 of the Customs and Inland Revenue Act, 1878, "as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern," are not bound to take an average of the depreciation during the three preceding years, but may adopt as their estimate the amount of the depreciation during the year immediately preceding that of assessment.—CUNARD STEAMSHIP CO. *v.* COULSON, *Q.B.D.*; [1899] 1 Q. B. 865; 68 L. J. Q. B. 554; 80 L. T. 326.

20. *Income tax — Special Act — Salary payable without deduction or abatement for taxes—Right to deduct income tax—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102, *Schedule E, rr.* 1, 6—*Special Act* (10 *Geo.* 4, *c. xv.*), *ss.* 22, 26.—An officer of a charity was entitled under a special Act of Parliament to receive a salary of not less than £300, nor exceeding £500, without deduction or abatement for taxes. At the date of the special Act no income tax was payable.

Held, with regard to a person appointed to the office after the passing of the Income Tax Act, 1842, that the persons liable to pay the salary were bound to deduct the income tax therefrom.—LUND *v.* LIVERPOOL SCHOOL FOR INDIGENT BLIND, *Ch.D. Byrne, J.*, 6; [1898] 2 Ch. 669; 79 L. T. 68.

21. *Inhabited house duty—Artizans' dwellings—Separate dwelling — Exemption.* — The owner of houses, originally built or adapted for artizans' dwellings and used for the sole purpose of separate dwellings, is entitled to exemption from inhabited house duty under section 26, sub-section 2, of the Inland Revenue Act, 1890, as amended by section 4 of the Inland Revenue Act, 1891, notwithstanding the existence of a common entrance and staircase, and that the inmates have the use of a common washhouse on certain days.—SEAMAN *v.* LEE, *Q.B.D.*; 68 L. J. Q. B. 593.

22. *Inhabited house duty—Hall—Library—Liability to be assessed*—48 *Geo.* 3, *c.* 55, *Schedule B, r.* 5—*House Tax Act*, 1851 (14 & 15 *Vict. c.* 36), *s.* 1.—The dining hall and offices of the Middle Temple, which are used and occupied during the daytime only, in which no one sleeps or resides, and which have no communication with any premises in which anyone sleeps or resides, are liable to inhabited house duty, as coming within the words "hall or office" in rule 5 of Schedule B of 48 Geo. 3, c. 55; but the library is not a "hall" within the meaning of that rule, and is not liable to inhabited house duty.—STYLES *v.* MIDDLE TEMPLE SOCIETY, *Q.B.D.*, 383; 68 L. J. Q. B. 157; 79 L. T. 700.

23. *Male servant—Steward of working men's club—Customs and Inland Revenue Act*, 1869 (32 & 33 *Vict. c.* 14), *ss.* 18, 19.—By section 18 of the Customs and Inland Revenue Act, 1869, there shall be paid for every male servant 15s. By sub-section 3 of section 19 "the term 'male servant' means and includes any male servant employed either wholly or partially in any of the following capacities; that is to say, . . . house steward . . . or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called."

The respondents, the committee of a working men's club, had power to discharge the steward, who had to be a member of the club, and was paid by the committee 38s. a week. He served at a bar at a window, but did not leave such bar to wait on the members, but passed what was ordered through the window.

Besides accounting for moneys he received, this was the only service rendered by him.

No licence had been taken out by the defendants in respect of such steward.

Held, that such steward was a "male servant" within the Act, and that the respondents should have taken out a licence in respect of him.—SOLOMON *v.* CROPPER, *Q.B.D.*; 79 L. T. 301.

24. *Probate Duty — Testator foreign subject domiciled abroad—Company—Executor* de son tort—*Intermeddling with estate—Liability to pay probate duty—Penalties—55 Geo.* 3, *c.* 184, *s.* 37—*Crown Suits Act*, 1865 (28 & 29 *Vict. c.* 104), *s.* 57—*Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 40.—Upon the death of a testator, a foreign subject domiciled in America, shares and debentures in an English company, of which he was the registered holder in the books of the company in London, passed by his will to his executors in America, according to the law of his domicil. At their request the company paid to them the dividends and interest payable upon the testator's shares and debentures and transferred into their names in the company's books in London two shares and a debenture. The executors to the knowledge of the company had not obtained and did not intend to obtain probate in England.

Held, that the company had made themselves executors *de son tort*; that they had "taken possession of and administered" part of the testator's estate (see 55 Geo. 3, c. 184, s. 37; 28 & 29 Vict. c. 104, s. 57), and were liable to penalties, and to deliver an account and pay such duty as would have been payable if probate had been obtained in England.

The decision of the Court of Appeal, [1898] 1 Q. B. 205, affirmed.

Semble by Lord Davey, that the company were persons who "ought to obtain probate or letters of administration" in England within the meaning of the Customs Act, 1881 (44 Vict. c. 12), s. 40 (although they were not entitled to do so), because under the Probate Act, 1857, s. 73, the court had power in its discretion to appoint them administrators.—NEW YORK BREWERIES CO. *v.* ATTORNEY-GENERAL, *H.L.*; [1899] A. C. 62; 68 L. J. Q. B. 135; 79 L. T. 568.

25. *Stamp duty—Agreement in consideration of fixed annual payments — "Bond, contract, or instrument, being the only or principal or primary security"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *First Schedule.*—By an agreement in writing, not under seal, one S. R. agreed to pay a telephone company the sum of £12 per annum for the use of a telephone wire and apparatus which the company was to affix to his house. The rent was to be payable every year in advance, and either party might put an end to the agreement by giving the other party three months' notice.

Held, that this instrument was liable to an *ad valorem* duty under the head "Bond, Covenant, or Instrument of any kind whatsoever" in the first schedule to the Stamp Act, 1891, as being "the only or principal or primary security for any . . . sum or sums of money at stated periods for an indefinite period."

Jones v. *Commissioners of Inland Revenue*, 43 W. R. 318, [1895] 1 Q. B. 484, approved.—NATIONAL TELEPHONE CO. *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 247; [1899] 1 Q. B. 250; 68 L. J. Q. B. 222; 79 L. T. 514.

26. *Stamp duty—Conveyance on sale—Agreement for sale*—Ad valorem *duty—Leasehold interest in licensed house—Goodwill—"Legal or equitable*

transfer"—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39) *s.* 59, *sub-section* 1.—By an agreement under seal a vendor agreed to sell to the West London Syndicate (*inter alia*) the goodwill of a hotel proprietor and licensed victualler; the lease of the hotel and premises and the vendor's interest therein; all the household furniture, fixtures, fittings, and other effects (other than stock-in-trade); all cash in hand and at the bank to which the vendor was then entitled; and all the book and other debts due to the vendor in connection with the business. The consideration for the sale was the discharge by the syndicate of the debts and liabilities of the vendor then due in relation to the business, and the sum of £4,250, of which £1,462 16s. 3d. was the apportioned consideration for the furniture, stock-in-trade, and cash.

The amount of the debts and liabilities forming part of the consideration was found to be £1,335 8s. 4d., so that the purchase consideration amounted to £5,585 8s. 4d. It was agreed that the vendor should show a good title to the premises and assign the lease thereof and the goodwill of the business to the syndicate, and that, in the event of the landlords not consenting to the assignment of the lease, that the vendor would execute a declaration of trust in favour of the syndicate. The consent of the landlords was not obtained, and a declaration of trust was therefore executed and was stamped with the fixed duty of ten shillings.

Held, by A. L. Smith and Vaughan Williams, L.JJ., that there was not an agreement for the sale of an equitable interest in any property whatsoever within the meaning of section 59, sub-section 1, of the Stamp Act, 1891.

Held, by Rigby, L.J., that, though on the face of the agreement it was not for the sale of an equitable interest in property within that section, yet, looking at the facts of the case, it ought to be inferred that the agreement was only for the sale of an equitable interest.

Held, further by A. L. Smith and Rigby, L.JJ., that the goodwill was capable of being sold separately and independently of the leasehold premises, and that, in respect of the goodwill, the agreement was liable to an *ad valorem* duty, as such goodwill was property other than lands.

Held, by Vaughan Williams, L.J., dissenting, that the goodwill could not be separated from the leasehold premises, and that, consequently, the agreement was not liable to an *ad valorem* duty upon that part of the consideration apportioned to the sale of the goodwill and lease of the hotel.—WEST LONDON SYNDICATE *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 125; [1898] 2 Q. B. 507; 79 L. T. 289.

27. *Stamp duty—Conveyance on sale—Contract for sale of equitable interest—Reconstruction of company in course of winding up—Agreement for transfer to new company of shares in old company—Declaration of trust of shares in old company—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 59 (1).—By an agreement under seal, made between all the shareholders in an unlimited company (which was in course of being voluntarily wound up) and a new limited company, it was agreed that the shareholders in the old company should "exchange" their shares in that company for certain numbers and amounts of stock and shares in the new company, and that the new company should also pay certain sums of cash to the shareholders. The agreement also provided that, upon the allotment to the shareholders of the old company of the shares and stock in the new company, the shareholders should "hold their respective shares in the old company in trust for the new company."

Held, that the agreement was a "conveyance on sale" of the shares in the old company within the meaning of section 54 of the Stamp Act, 1891, or a "contract for the sale of an equitable interest" in those shares within section 59 (1) of that Act, and was chargeable with *ad valorem* duty on the cash paid and the shares and stock allotted.

Dictum of Channell, J., in *West London Syndicate* v. *Commissioners of Inland Revenue*, [1898] 1 Q. B. 226, at p. 240, 46 W. R. Dig. 74, approved.—CHESTERFIELD BREWERY CO. *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 320; [1899] 2 Q. B. 7; 68 L. J. Q. B. 204; 79 L. J. 559.

28. *Stamp duty—Conveyance on sale—Consideration—Conveyance of property subject to the payment of money—Assignment of leaseholds—Rent—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 56, 57; *Schedule I.*—On a conveyance on sale of leasehold property subject to the rent reserved by the original lease, or (in the case of such a conveyance of a part only of the demised property) subject to an apportioned part of the rent so reserved, such rent is not a part of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty under section 57 of the Stamp Act, 1891.—SWAYNE *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 300; [1899] 1 Q. B. 335; 68 L. J. Q. B. 234; 80 L. T. 56.

29. *Stamp duty—Debenture—Right to redeem debenture on paying a premium—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Schedule I.*—A limited company issued a series of debentures of £100 each, and each debenture stated that the company would, at certain specified dates, pay to the registered holder the sum of £100, with interest at £5 10s. per cent., and one of the conditions indorsed on the debentures was that the company might, after the 1st of July, 1900, on giving six months' notice to the registered holder, redeem any debenture at £103, before the time fixed for payment. The debentures were marketable securities not transferable by delivery within the meaning of Schedule I. of the Stamp Act, 1891.

Held, that each debenture was a security for £103, and not for £100 only, and ought, therefore, to be stamped as a mortgage for £103, as required by Schedule I. of the Stamp Act, 1891.

In a second case—*The Knights Deep* (*Limited*) (*No.* 2) (*Appellants*) v. *The Commissioners of Inland Revenue* (*Respondents*)—where the conditions of the debenture were in all respects the same as in the previous case, except that the debenture was payable to "bearer," the court held that the same principle applied.—KNIGHTS DEEP (LIMITED) *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 415; [1899] 1 Q. B. 345; 68 L. J. Q. B. 125; 79 L. T. 704.

30. *Stamp duty—Foreign security issued in the United Kingdom—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (6) (i.).—The bond of an American railway company, payable to bearer, contained a clause on the face of the bond: "This bond shall not be valid for any purposes unless authenticated by the certificate hereon indorsed of the trustee. . . ." This instrument had been executed in the United States and delivered to a trust company, which was to act as trustee; but the certificate was unsigned, and the instrument was transmitted in that state to London, where the certificate was signed as required, and the bond issued to the holders.

Held, that the bond was a marketable security both made and issued in the United Kingdom within the meaning of section 82, sub-section 1 (6) (*i.*), of the Stamp Act, 1891.

Decision of the Court of Appeal (48 W. R. 98, [1898] 1 Q. B. 78) affirmed.—REVELSTOKE *v.* INLAND REVENUE COMMISSIONERS (BARING *v.* INLAND REVENUE COMMISSIONERS), *H.L.*, 210; [1898] A. C. 565; 79 L. T. 227.

31. *Stamp duty—Mortgage—Covenant—Agreement under seal to execute mortgage when required—Stamp Act*, 1881 (54 & 55 *Vict. c.* 39), *s.* 86, *Schedule I.*—By an instrument under seal a company agreed, in consideration of a sum of money then advanced to them by a building society, to execute, whenever called upon by the society, a mortgage or charge of the company's interest in certain lands in such form as the society should request, to secure the repayment of the sum so advanced and interest; and, by the same instrument, the company agreed to pay interest on the sum advanced until repayment, and appointed a person receiver of the rents and profits of the lands so long as any money remained due to the society, such receiver not to take possession until default had been made in payment after demand of the principal and interest.

Held, that the instrument was a "mortgage" or a "covenant" within the meaning of the Stamp Act, 1891, and was chargeable with *ad valorem* duty under the head "Mortgage, Bond, Debenture, Covenant," in the first schedule to that Act.—UNITED REALIZATION CO. *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 381; [1899] 1 Q. B. 361; 68 L. J. Q. B. 218; 79 L. T. 556.

32. *Stamp duty—Mortgage—Security for the repayment of money to be thereafter lent or paid—Additional or substituted security—Trust deed for securing debenture stock—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *sub-section* 1; *s.* 88, *sub-section* 1; *Schedule.*—A trust deed of 1897 for securing irredeemable 3½ per cent. debenture stock of a company provided as follows: That the issue of the stock should in the first instance be limited to £300,000; that a further issue might be made of £540,000, making altogether £840,000; that such further issue should only be made for the purpose of redeeming or paying off an already existing 4 per cent. debenture stock secured by a trust deed of 1892; and that the 4 per cent. debenture stock to be redeemed or paid off should be transferred to the trustees of the deed of 1897.

Held, first, that the deed of 1897 was a security for the repayment of money to be thereafter paid within the meaning of section 86, sub-section 1, of the Stamp Act, 1891, and that, by virtue of section 88, sub-section 1, it was chargeable with duty on the total amount of £840,000; secondly, that it was chargeable (under the heading Mortgage, Bond, Debenture, Covenant) with *ad valorem* duty at the rate of 2s. 6d. per cent., as being a principal or primary security, and not merely with *ad valorem* duty at the rate of 6d. per cent. as being an additional or substituted security.—CITY OF LONDON BREWERY CO. *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 216; [1899) 1 Q. B. 121; 62 L. J. Q. B. 62; 79 L. T. 648.

33. *Stamp duty—Policy of insurance against accident—Employers' liability policy—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 98.—A policy of insurance by which an insurance company agrees to pay for and on behalf of the assured such sums as the assured shall become liable to pay in respect of personal injury caused in his business to workmen in his employment is not a "policy of insurance against accident" within the meaning of section 48 of, and the schedule to, the Stamp Act, 1891, but requires to be stamped, if under seal, as a deed, and if under hand only, as an agreement.—LANCASHIRE INSURANCE CO. *v.* INLAND REVENUE COMMISSIONERS; VULCAN BOILER AND GENERAL INSURANCE CO. *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 396; [1899] 1 Q. B. 353; 68 L. J. Q. B. 143; 79 L. T. 731.

34. *Stamp duty—Receipts—Penalties—Entries of sums in book—Payment of sums—Entries initialled by person receiving money—Liability of entries to stamp duty as receipts—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 101, 103.—A bank, which was a limited company carrying on a moneylending business, engaged a solicitor under an agreement which made him an officer of the bank, for the purpose of carrying on the legal business of the bank and collecting debts due from customers. When the solicitor recovered sums of money for the bank he wrote down the amount in a book kept by him for that purpose, and he then took the money, with the book, to the bank and handed the amount over to one of the officers of the bank, who, in the margin opposite the amount paid, generally wrote the word "Received," with the amount and the date, and sometimes simply put his initials with the date, and in one case wrote the word "Entered," with the amount and initials.

Held, that these entries were all receipts within the meaning of section 101 of the Stamp Act, 1891; that there was no distinction in the form of the receipts, and that all the entries in respect of £2 or upwards required to be stamped as receipts; and that the bank were liable in penalties, under section 103, for the act of its officers in not stamping them.—ATTORNEY-GENERAL *v.* CARLTON BANK, *Q.B.D.*, 650; [1899] 2 Q. B. 158; 66 L. J. Q. B. 788.

35. *Stamp duty—Receipt—Scrip certificate—Instalment.*—A receipt upon a duly stamped scrip certificate for a sum of stock acknowledging an instalment due thereon, is within the exemption 11 under the title "receipt" in the first schedule to the Stamp Act, 1891, and is not liable to stamp duty.—LONDON AND WESTMINSTER BANK *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*; 68 L. J. Q. B. 787.

36. *Stamp duty—Sale of business—Goodwill—"Property locally situate out of the United Kingdom."*—The parties to an agreement in writing were M., N., W., a syndicate, and a company. The agreement recited that M. carried on business in the United Kingdom, and that N. had acquired the right to purchase the business on trust for W.; that N. with the sanction of W. had agreed to make over that right to the syndicate; and it was provided by the agreement that M. by the direction of N., W., and the syndicate, should sell to the company the goodwill and premises of the business.

The agreement was executed by the syndicate and the company in England, but by the other parties out of the United Kingdom.

Held, that the agreement was "made in England" within section 59 of the Stamp Act, 1891; that the "goodwill" was "property," but not "property locally situate out of the United Kingdom," and that the agreement was chargeable with *ad valorem* duty in respect of the value of the goodwill.—MULLER *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*; 68 L. J. Q. B. 797.

37. *Succession duty—Alienation—New succession—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 18.—Under the provisions of the will of the

second Baron Wolverton, who died in 1887, the whole of his residuary estate, subject to the widow's life interest, was held in trust for the person who might, at the time of the widow's death, answer the description of the testator's right heir at common law. At the testator's death his nieces became his co-heiresses, and the appellant, a nephew, succeeded to the title.

Under a deed of arrangement, dated the 31st of December, 1888, the co-heiresses under this will and the appellant assigned their contingent interests, and the widow her life interest, in the testator's residuary estate to trustees upon trust to pay thereout, upon Lady Wolverton's decease, an annuity of £15,000 to the appellant, and certain accumulations and payments were also provided for.

The testator's widow died on the 4th of January, 1894. the co-heiresses surviving her, when the Commissioners of Inland Revenue received legacy duty at the rate of 3 per cent. on the whole of the testator's residuary estate. In addition the commissioners claimed succession duty upon the annuity of £15,000 at 6½ per cent. from the appellant as upon a succession coming to the appellant from the testator's widow or from the co-heiresses, or from both.

Held, that no new succession was created in the annuity of £15,000 to which the appellant became entitled, and that he was not liable to duty.

Decision of the Court of Appeal (45 W. R. 236, [1897] 1 Q. B. 231) reversed.—WOLVERTON (LORD) *v.* ATTORNEY-GENERAL, *H.L.*, 97; [1898] A. C. 535; 79 L. T. 58.

38. *Succession duty—Partnership between father and son—Death of father—Sale—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51).—The father of the appellant, who had carried on a business for a long time, entered into partnership with his son, the appellant, for a term of years. The son brought no capital into the business, but, by the deed of partnership, it was agreed that one-third of the capital was to be deemed to be the son's, and that the profits were to be divided accordingly. It was also agreed that, if the partnership continued for the stipulated term, or was terminated by any other cause than the death of one partner, the son's share of the capital was to be one-half; and, if the father died during the term, the son was to have the whole business and pay £10,000 to the father's executors; and, if the son died during the term, the father was to have back the whole business and pay £15,000 to the son's executors. The father died during the term, and the Crown claimed succession duty from the son.

Held (affirming the judgment of the court below), that the partnership deed was of the nature of a family arrangement, and not a sale of the business to the son upon the footing of a commercial transaction, and that the duty was payable.—BROWN *v.* ATTORNEY-GENERAL, *H.L.*; 79 L. T. 572.

See also Bankruptcy, 17.

INSURANCE:—

1. *Burglary and housebreaking—"Actual forcible and violent entry"—Entry by opening unlocked door—Breaking open inner door of shop-front.*—A policy of insurance on a jeweller's stock-in-trade recited that the assured was desirous of effecting an insurance against "loss or damage by burglary and housebreaking as hereinafter defined," and in its operative part it insured him against loss of the property therein described "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." In the proposal for the insurance the assured stated that the premises were a shop, warehouse, and dwelling, and that they were protected by wood shutters and iron bars, and iron plates inside. The policy contained a condition that the assured should take all due precautions for the safety of the property insured as if the same were not insured as regards, *inter alia*, securing all doors, windows, and other means of entrance. During the temporary absence of the porter, who was taking down the shop shutters in the morning, the front door being shut, but neither locked nor bolted, a thief opened the door by turning the handle and entered the shop, and, having forcibly wrenched an iron plate and padlock off an inner door of the shop-front, stole therefrom part of the insured jewellery.

Held, that the loss was not covered by the policy.

Decision of Wills and Kennedy, JJ. (46 W. R. 557, [1898] 2 Q. B. 136), reversed.—GEORGE AND GOLDSMITHS, &c., BURGLARY INSURANCE ASSOCIATION, RE, *C.A.*, 474; [1899] 1 Q. B. 595; 68 L. J. Q. B. 365; 80 L. T. 248.

2. *Deposit—Bank—Liquidation—Reconstruction—Second liquidation—Purchase of assets by new company—"Final dividend on liquidation."*—Plaintiff insured certain sums deposited in the M. Bank with the defendants who undertook to pay him interest on such deposits should default be made by the bank "until the principal was paid by the bank and (or) the undertakers; and the principal sums, less any portion of the principal previously received from the bank when the final dividend in bankruptcy or liquidation is declared." A few days after the policy was entered into the M. Bank went into liquidation. It was reconstructed, and subsequently again went into liquidation. Under this second liquidation dividends to the extent of 5s. 7d. in the pound were paid to the plaintiff. The last of such dividends did not purport to be a final dividend, but practically the assets were exhausted, and what remained had been taken over by a new company for realisation. This new company offered shares to the plaintiff in payment of the balance of his deposits which he in accordance with the provisions of the insurance policy rejected. The plaintiff then sued the defendants for payment of the balance of the deposits. The defendants contended that they were not liable to repay until the final dividend was paid on liquidation of the M. Bank, and that the last paid dividend was not final, and the liquidation was not yet completed.

Held, that they were liable. — MURDOCK *v.* HEATH, *Q.B.D.*; 80 L. T. 50.

3. *Guarantee of solvency — Doctrine of concealment* — Uberrima fides. — The doctrine as to the concealment of material facts applies to all contracts of insurance, and not merely to marine, fire, and life insurances.

Per Romer, L.J.—Where a contract may with equal propriety be called a contract of insurance or a contract of guarantee, the question whether it is a contract requiring *uberrima fides* depends upon its substantial character and how it came to be effected. —SEATON *v.* HEATH; SEATON *v.* BURNAND, *C.A.*, 487; [1899] 1 Q. B. 782; 68 L. J. Q. B. 631; 80 L. T. 579.

4. *Marine—Arms and ammunition shipped to foreign country in time of peace—Capture—Alleged prohibition of foreign country against importation of such goods—Alleged concealment of fact material for calculating risk—Alleged illegal venture—Validity of policy.*—The plaintiffs insured with the defendants arms and ammunitions for delivery at certain ports in the Persian Gulf, under a policy which covered

"capture at sea." The goods were seized and confiscated by an English man-of-war, acting, it was alleged, on behalf of the Persian Government, under an edict passed in 1881 (but which had never been enforced so long as the duty demanded for import of such goods was paid) prohibiting the importation of arms and ammunition in Persia.

Held, that the plaintiffs could recover on the policy, because there had been in fact no wilful concealment on their part from the underwriters of the risk of seizure; for, if they knew of the edict, they had no reason to suppose that it would be enforced so long as the duty payable was forthcoming. Nor was the policy void, as being on goods shipped for an illegal venture, for the importation of such goods into Persia was neither contrary to the law of Persia as that law was in practice administered, nor illegal by the law of the country of the assured, England being at the time in amity with Persia.—FRACIS *v.* SEA INSURANCE CO., *Q.B.D.*, 119; 79 L. T. 28.

5. *Marine—Collision—Loss by detention during repairs—Damages—Remoteness—Construction of policy.*—Barges were insured against loss or damage, which the insured should sustain, or become liable to others for, by reason of the collision of the barges with any other vessel. The barges having been damaged by collision, the insured claimed damages for loss in consequence of detention of the barges during repairs.

Held, that, in order to be recoverable, the loss must be proximately caused by the perils insured against, and that the damages claimed were too remote, and could not be recovered under the policy.—SHELBOURNE & CO. *v.* LAW INVESTMENT AND INSURANCE CORPORATION (LIMITED), *Q.B.D.*; [1898] 2 Q. B. 626; 79 L. T. 278.

6. *Marine—Lump chartered freight—Cesser clause—Charterers' liability to cease on cargo being loaded—Lien for bill of lading freight—Absence of lien for chartered freight—Loss of goods by perils of the sea—Bill of lading freight payable less than chartered freight.*—By a charter-party a ship was chartered for a voyage at the lump freight of £3,000 payable on delivery of the cargo. The master was to sign bills of lading at any rate of freight the charterers might require, but not under chartered rates, or difference to be settled in cash on signing bills of lading; the charterers' liability to cease on shipment of the cargo provided it was worth the freight, dead freight, and demurrage on arrival at the port of discharge, but the vessel to have a lien thereon for the recovery of all freight, dead freight, and demurrage. The charterers loaded a full cargo under bills of lading which made the goods comprised in each bill of lading deliverable to the consignee thereof on payment of the bill of lading freight. The shipowners effected a policy against perils of the sea on the chartered freight. During the voyage part of the cargo was lost by a peril of the sea, and on the ship's arrival at the port of discharge the bills of lading freights payable to the shipowners upon that part of the cargo which arrived was less by £645 than the chartered freight, though the cargo which arrived was worth the chartered freight. In an action by the shipowners upon the policy to recover the £645 as being a loss of chartered freight by a peril of the sea,

Held, that the loss was not caused by a peril of the sea, but by the master not having signed bills of lading giving the shipowners a lien upon the goods comprised in each bill of lading for the whole chartered freight.—BRANKELOW STEAMSHIP CO. *v.* CANTON INSURANCE OFFICE (LIMITED), *C.A.*, 611; [1899] 2 Q. B. 186; 68 L. J. Q. B. 811.

7. *Marine—Policy—Valued policy—Constructive total loss.*—Where a ship has been sunk in deep water, the underwriters cannot escape liability as for a total constructive loss by gratuitously intervening and taking upon themselves, between the date of notice of abandonment and the time when legal proceedings are commenced under the policy, the expenses of raising the insured vessel and saving her from being a constructive total loss. And such a gratuitous expenditure will not relieve the underwriters from their contractual liability.

The test whether a ship has become a constructive total loss is the same in English as in Scottish law, although these laws may differ in regard to the date at which the test ought to be applied. In considering whether a constructive total loss has occurred, the question is whether a shipowner of ordinary prudence and uninsured would have gone to the expense of raising a sunken ship and repairing her.

A ship insured under a valued policy was struck by a squall and sunk in harbour. The underwriters received notice of abandonment from the insured; but before action brought they, by a large expenditure of their own, raised the ship and claimed that, as the ship could at the date of the action have been repaired by the expenditure of less money than her total value, the loss was not a total but a partial one.

Held, reversing the decision of the Second Division of the Court of Session, [1897] 24 R. 893, that the underwriters could not change a constructive total loss into a partial loss by intervening and raising the ship at their own expense.—"BLAIRMORE" STEAMSHIP CO. *v.* MACREDIE, *H.L.* (*Sc.*); [1898] A. C. 593; 79 L. T. 217.

8. *Marine—Policy on ship—Cargo rendered worthless by sea peril—Cost of discharging cargo—Liability of underwriters on ship.*—A ship, while insured by a time policy on hull and machinery against perils of the sea and all other perils which might come to her hurt, detriment, or damage, was injured by collision. She was carrying a cargo of cotton seed, which was so damaged by sea water and mud in consequence of the collision that it became rotten and worthless, and the consignees refused to accept it.

Held, that the shipowners were not entitled to recover from their underwriters the cost of discharging the worthless cargo at the port of destination.

Judgment of Bigham, J. (46 W. R. 490, [1898] 1 Q. B. 821), affirmed.—FIELD STEAMSHIP CO. *v.* BURR, *C.A.*, 341; [1899] 1 Q. B. 579; 68 L. J. Q. B. 426; 80 L. T. 445.

9. *Marine — Reinsurance — Lapse of original policies—New policy—Alteration of risk—Liability under policy of reinsurance.*—An underwriter who had subscribed two time policies on a ship valued therein at £5,600 effected a reinsurance by a time policy which was expressed to be a policy on the same ship, "being a reinsurance of policy or policies, and subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon." The first of the original policies having expired, the second original policy was cancelled, and the underwriter subscribed a new time policy on the same ship, which was valued therein at £5,000.

Held, that risk undertaken by the new policy was not covered by the reinsurance.

Judgment of Kennedy, J. (46 W. R. 380, [1898] 1 Q. B. 739), reversed.—LOWER RHINE, &c., INSURANCE CORPORATION *v.* SEDGWICK, *C.A.*, 261; [1899] 1 Q. B. 179; 68 L. J. Q. B. 186; 80 L. T. 6.

10. *Marine—Steamers "sailing on or after the 1st of March"—"Sailing," what constitutes—Attachment of risk.*—The plaintiff company were reinsured on flour in steamers "sailing on or after the 1st of March." A steamer completed her loading alongside a wharf in a river about 10 p.m. on the 29th of February. The steamer was then moved a short distance out into mid-stream, where she anchored till 8 a.m. on the 1st of March, when she proceeded down the river on her voyage. By leaving the wharf on the previous evening the steamer was placed in a more advantageous position for making a start, but the master's sole intention in moving the steamer was to prevent the crew from leaving the steamer during the night. The steamer and her cargo having become a total loss,

Held, that the steamer sailed on the 1st of March, and not on the 29th of February, and that the loss was covered by the policy.—SEA INSURANCE CO. *v.* BLOGG, *C.A.*, 71; [1898] 2 Q. B. 398.

INTEREST.—See Company, 4; Trustee, 1.

JERSEY, LAW of:—

Deed of settlement by wife's father—Rights of husband and wife in settled estate—Claim of husband's heir.—By the law of Jersey a conveyance of real estate by a husband to his wife, *stante matrimonio*, to the prejudice of his lawful heirs is invalid.

Where, by a deed of family arrangement, it appeared that a husband and his wife, separated *quant aux biens*, each took from her father (subject to a charge of an annuity in his favour) a conjoint interest in the settled lands during their joint lives, with the chance of the fee on survivorship,

Held, that the deed was in no sense a conveyance by the husband of any interest acquired by him thereunder; and that on his death before his wife his interest ceased and could not pass to his heirs.—BROOMER *v.* ARTHUR, *P.C.*; [1898] A. C. 777.

JUSTICES:—

1. *Carriage licence—First offence—Second offence—7 & 8 Geo. 4, c. 53, s. 78—42 & 43 Vict. c. 49, s. 4—32 & 33 Vict. c. 14, s. 27.*—Section 4 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), as far as reduction of fines is concerned applies only to first offences. Fines for second and subsequent offences are regulated by 7 & 8 Geo. 4, c. 53, s. 78, under which such fines cannot be reduced below one-fourth of their full amount as imposed by statute.

To constitute a second offence under 32 & 33 Vict. c. 14, s. 27, it is not necessary to be convicted twice in the same year of keeping a carriage without having a licence for that year. A conviction in one year of keeping a carriage without a licence for that year following a conviction in a previous year for keeping a carriage without a licence for that year is a second conviction for the same offence. — PHILLIPS *v.* STEPHENS, *Q.B.D.*; 79 L. T. 280.

2. *Jurisdiction — Wilful damage to property — "Fair and reasonable supposition" of right—Bona fides—The Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52.—By section 52 of the Malicious Damage Act, 1861, "whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatever either of a public or private nature," may be convicted before a justice of the peace, and imprisoned and fined, "provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of," &c.

The appellants pulled down a hedge bounding Fernworthy Down, which was held in undivided shares by the respondents. They had done so on several previous occasions. Both of them lived in houses near the down, and under leases granted by the predecessors of one of the respondents. They had committed the acts complained of in pursuance of a supposed right of pasture on the down which they contended was a common, and, although for many years they had attempted to carry out their supposed rights, they had always been disputed. There was no mention in any of the leases of any grant.

The justices were of opinion that the rights that they claimed could not exist in law, and that their jurisdiction was not ousted, and they convicted the appellants.

Held, that the conviction was right, as there was no fair and reasonable claim of right.

White v. *Feast*, 26 L. T. Rep. 611, followed.—BROOKS *v.* HAMLYN, *Q.B.D.*; 79 L. T. 734.

3. *Lunacy—Court of summary jurisdiction—Power to state case—Order to seize money in lunatic's name in savings bank—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 35—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 54—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 299.—Justices acting under section 299 of the Lunacy Act are not a court of summary jurisdiction, and have therefore no power to state a case.

An order under that section can be made to seize money standing in the lunatic's name in the Post Office Savings Bank.—BETHEL, RE, *Q.B.D.*; 80 L. T. 492.

4. *Married woman—Desertion.*—A husband and wife married in 1890, parted by mutual agreement in 1892, in order to find work, they being domestic servants. The husband obtained work, and made his wife an allowance up to 1897. In 1899 he wrote to her: "I am not going to have any more to do with you as man and wife." Upon a summons by the wife under the Summary Jurisdiction Act, 1895,

Held, that the husband had deserted the wife.—HUXTABLE *v.* HUXTABLE, *P.D. & Ad.D.*; 68 L. J. P. 83.

5. *Married Women (Summary Jurisdiction) Act*, 1895—*Appeal—R. S. C., ord.* 59, *rr.* 4a *and* 7.—B. and his wife resided at W. On various occasions the wife left B. and went to her father at P. For some time husband and wife lived apart, and the husband gave the wife an allowance, but no definite agreement for separation was arrived at. The wife took out a summons at W. against B. for desertion under section 4 of the Summary Jurisdiction (Married Women) Act, 1895. The summons was dismissed. The wife subsequently returned to the husband's house, and the husband after several days' absence informed her that he was giving up the house and she must find a home for herself. The wife's furniture was removed from the house on the 14th of May. The wife went to P., and took out a similar summons there against B.

Held, that the magistrates were justified in deciding that the facts constituted desertion by B.

Held also, that desertion being a continuing offence, and the wife having been driven to P. by B.'s acts, the magistrates at P. had jurisdiction to make an order against B. The order of the magistrates contained no finding that B. had been guilty of desertion.

Held, that though the order was irregular, the court had power to make a fresh order under ord. 59, rr. 4a and 7, and that a fresh order ought to be made in the terms of the order appealed against.—BROWN *v.* BROWN, *P.D. & Ad.D.*; 79 L. T. 102.

6. *Poor law—Maintenance—Sum due under maintenance order—Recoverable as a civil debt—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 6—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35.—Money due under an order of justices made upon a person for the maintenance of his father under 43 Eliz. c. 2, s. 6, is recoverable before a court of summary jurisdiction as a civil debt and not as a penalty; and an order of justices for the payment of the money so due cannot be enforced by imprisonment in default of distress, unless it be proved that the person in default has since the date of the latter order had the means to pay the sum in respect of which he has made default — GAMBLE, RE, *Q.B.D.*; [1889] 1 Q. B. 305; 68 L. J. Q. B. 195; 79 L. T. 642.

7. *Public health—Infectious disease—Removal order—Public Health Act*, 1874 (38 & 39 *Vict. c.* 55), *s.* 124.—The validity of an order for removal to hospital of a person suffering from a dangerous infectious disorder, made *ex parte* by a single justice under section 124 of the Public Health Act, 1875, cannot be inquired into upon the hearing of a summons for obstructing the execution of the order.—REG. *v.* DAVEY, *Q.B.D.*; [1899] 2 Q. B. 301; 68 L. J. Q. B. 675; 80 L. T. 798.

8. *Public health — Infectious disorder — Proper lodging or accommodation—Removal order—Public Health Act*, 1875, *s.* 124.—Where it was proved that a person suffering from a dangerous infectious disorder had proper lodging and accommodation so far as he himself was concerned at his father's house, but that he could not be properly isolated there, and that there was danger of infection to the other inmates,

Held, that there was evidence that he was "without proper lodging and accommodation" within section 124 of the Public Health Act, 1875, and that the justices had jurisdiction to order his removal to a hospital.—WARWICK *v.* GRAHAM, *Q.B.D.*; [1899] 2 Q. B. 191; 80 L. T. 773.

9. *Public health—Summons under Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3 — *No previous notice — Second summons* — Res judicata.—An urban district council served a summons on J. under section 3 of the Public Health (Buildings in Streets) Act, 1888. No previous notice had been given to J. by the urban authority as required by the section, and the stipendiary magistrate dismissed the summons upon the ground that it was defective in that no offence to which a penalty was attached was set out. Notice was then served on J., and a second summons taken out, under which the magistrate convicted. J. appealed upon the plea that, as the first summons has been dismissed, the matter was *res judicata*.

Held, that, as the matter had not been decided at all on the first summons, it was not *res judicata*, and that, therefore, the magistrate was entitled to convict.—JENKINS *v.* MERTHYR TYDVIL COUNCIL, *Q.B.D.*; 80 L. T. 600.

10. *Summary proceedings—Commencement of proceedings—Limitation of time—Salmon Fisheries Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 62—*Summary Jurisdiction Act*, 1848 (*Jervis' Act*) (11 & 12 *Vict. c.* 43), *s.* 11.—Section 62 of the Salmon Fisheries Act, 1873, enacts that all penalties imposed by the Salmon Fisheries Acts "may be recovered within six months after the commission of the offence before two justices" in manner directed by the Summary Jurisdiction Act, 1848.

Section 11 of the latter Act provides that, where no time is specially limited for making a complaint or laying an information on the Act relating to each particular case, the complaint shall be made and the information laid within six months from when the matter arose.

Held, that section 11 of Jervis' Act applied to proceedings for the recovery of a penalty under section 62 of the Salmon Fisheries Act, 1873.—MORRIS *v.* DUNCAN, *Q.B.D.*, 96; [1899] 1 Q. B. 4; 68 L. J. Q. B. 49; 79 L. T. 379.

See also Adulteration, 2; Bankruptcy, 9; Licensing Law, 1-3, 5, 6, 10, 12; Local Government, 18, 21; Vaccination.

LANDLORD and TENANT:—

1. *Agricultural holding—Compensation for improvements—Special bargain—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 57.—By an agreement between the tenant of a farm and his landlord it was agreed that the tenant should quit the farm on a day named within the space of two months, and that, in consideration thereof, the landlord should pay him reasonable compensation in respect of certain unexhausted improvements under four heads, one of them being a matter for compensation under the Agricultural Holdings Act, 1883, the other three being outside the Act.

Held, that, notwithstanding anything contained in the Agricultural Holdings Act, such agreement was valid, and the tenant might maintain an action against the landlord to recover compensation thereunder.—NEWBY *v.* ECKERSLEY, *C.A.*, 245; [1899] 1 Q. B. 465; 68 L. J. Q. B. 261; 80 L. T. 314.

2. *Away-going crop—Deductions under lease—Deductions by custom of the country—Inconsistency.*—The following proviso was in a lease made between the landlord and the tenants: "Provided, lastly, that on the determination of his tenancy the tenant shall, in the event of having duly performed the several stipulations and agreements hereinbefore contained and to be performed on his part, be entitled to have and take a following or away-going crop of corn not exceeding one-third of the arable land hereby demised, such crop to be taken from land summer fallowed or from which turnips or rape have been eaten, or from land sown in the regular course with seeds and depastured by sheep, and which said away-going crop shall be taken at a valuation to be ascertained by two disinterested persons, one to be named by the on-coming, the other by the off-going tenant or their umpire (in case they cannot agree), such umpire to be appointed by such valuers before proceeding upon such valuation, and the decision of such two arbitrators or of their umpire shall be final and binding on both parties. And it is further agreed that one-half of the value of such away-going crop shall be paid at Christmas next after the determination of this demise and the remaining half at Lady Day following; subject, nevertheless, to such deductions as the same may be liable to under any of the covenants and agreements hereinbefore contained on the part of the tenant, and which the landlord is hereby authorized to deduct accordingly, and also subject to such of the rents hereinbefore reserved as shall be due and owing, to the payment of which it shall be primarily liable, and for which rents the said landlord shall be entitled at any time to distrain the same away-going crop before or after severance as for rent in arrear."

The covenants thereinbefore referred to were inserted for the benefit of the landlord as to cultivation and repairs to buildings, and gave him in certain cases a right of lien on the valuation of the away-going crop in respect of his claim for damages against the tenant for breaches of covenant committed by him. There were no stipulations, however, as to the mode of ascertaining the value of such crop.

Held, that there was nothing to prevent the application of the custom of the country, and that the tenants were entitled to the away-going crop and manurial value of the straw, but that the landlord was entitled to deductions for standage, rateable proportion of the rates and taxes, and cost of labour.—CONSTABLE AND CRANSWICK'S ARBITRATION, RE, *Q.B.D.*; 80 L. T. 164.

3. *Compensation for improvements—Counter-notice of claim by landlord—Arbitration—Award to landlord of amount in excess of tenant's claim—Enforcement of award—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 6-9, 22—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12—An outgoing tenant of a farm gave due notice of intention to claim from the lessor compensation for improvements under the Agricultural Holdings (England) Act, 1883, and the lessor gave due notice of intention to counter-claim against the tenant for breaches of covenant. After the expiration of the time for giving notices of claim prescribed by the Act, both parties gave notices of further claims, some of which were in respect of matters not within the Act. Referees and an umpire having been appointed in pursuance of the Act, before the reference proceeded, an agreement in writing was made between the parties by which all matters in difference as stated in the claims and counter-claims were referred to the referees and umpire already appointed under the Act, and it was agreed that all the said matters shall be dealt with in one award only of the said referees or umpire. The referees disagreeing, the umpire made an award by which he found that a certain amount was due from the lessor to the tenant, and a larger amount was due from the tenant to the lessor, and awarded that the tenant should pay the balance to the lessor. The amount not being paid,

Held, that leave might be given to the lessor to enforce the award in the same manner as a judgment or order to the same effect under section 12 of the Arbitration Act, 1889.—LLOYD AND TOOTH, RE, *C.A.*; [1889] 1 Q. B. 559; 68 L. J. Q. B. 376; 80 L. T. 394.

4. *Distress—Pound breach—Possession—Abandonment*—11 *Geo.* 2, *c.* 19, *s.* 10.—To maintain an action for pound breach or rescue of goods distrained for rent it is not necessary, even as against the true owner thereof, that the plaintiff should retain actual possession of the goods.—JONES *v.* BEIRNSTEIN, *Q.B.D.* 239; [1899] 1 Q. B. 470; 68 L. J. Q. B. 270; 80 L. T. 157.

5. *Distress—Pound breach—Treble damages—Proof of damage*—2 *Will & M. c.* 5, *s.* 4.—An action for treble damages for pound breach or rescous of goods distrained for rent, under section 4 of 2 Will. & M. c. 5, is maintainable by the landlord without proof of any special damage suffered by him.—KEMP. *v.* CHRISTMAS, *C.A.*; 79 L. T. 233.

6. *Easement—Right of way over passage—Signboard—Expenditure—Acquiescence.*—Where a passage was not included in demised premises, but the lessee had a right of way over it to his shop, the lessor, who knew that the lessee was repairing the passage, and by his conduct had encouraged the lessee to spend money on the passage under the mistaken belief that he had a right to do so, and also allowed the lessee to put up a signboard before the execution of the lease, was held not to be entitled, after all the work had been completed, to set up his legal right to the passage, and compel the lessee to restore the passage to its original state, and to remove the signboard.—CIVIL SERVICE MUSICAL INSTRUMENT ASSOCIATION *v.* WHITEMAN, *Ch.D. Kekewich, J.*; 68 L. J. Ch. 484; 80 L. T. 685.

7. *Lease—Assignment—Indemnity against breaches of covenant—Covenant to repair—Premises out of repair at date of assignment—Liability of assignee.*—A lease, which contained a covenant by the lessee and his assigns to keep the houses comprised therein in repair, became vested in the defendants as the executors of the assignee of the lease. The houses were out of repair, and the defendants agreed to sell them to a purchaser for the residue of the term. On the same day the plaintiff, who was entitled to the reversion on the determination of the lease, served notice upon the defendants that the houses were out of repair, giving particulars of the breaches of covenant complained of. The defendants subsequently executed, as trustees, an assignment of the lease of the houses to the purchaser, who knew of their condition and of the service of the notice, and the purchaser covenanted that he would thenceforth pay the rent reserved by the lease, and observe and perform the lessees' covenants therein contained, and from the payment and performance thereof respectively would keep indemnified the defendants and the estate and effects of their testator. The houses not having been put into repair, the plaintiff brought an action against the defendants to recover damages for breaches of the covenant to repair specified in the notice, and the defendants served a third-party notice on the purchaser claiming indemnity from him under his covenant to indemnify.

Held, that the defendants were entitled to an indemnity from the assignee against their liability for the breaches of the covenant to repair.—GOOCH *v.* CLUTTERBUCK, *C.A.*, 609; [1899] 2 Q. B. 148; 68 L. J. Q. B. 808.

8. *Lease—Assignment—Sub-lease by way of mortgage—Original lessee compelled to pay rent—Right of original lessee to recover from sub-lessee of assignee.*—The plaintiffs, being the lessees of premises, assigned their term to P., who sub-let the premises to the defendants for the residue of the term, except the last day, by way of mortgage. The mortgage contained a covenant on the part of the defendants that, if they entered into possession of the premises under their powers, and received the rents and profits, they would pay the rent reserved by the original lease. The defendants entered into possession, and P. became bankrupt. The defendants did not pay the rent reserved by the original lease, and the lessor compelled the plaintiffs to pay it.

Held, that the plaintiffs were not entitled to recover from the defendants the amount so paid for rent.

Moule v. *Garrett*, 18 W. R. 697, 20 *Ibid.* 416, L. R. 5 Ex. 132, 7 *Ibid.* 101, explained.—BONNER *v.* TOTTENHAM, &c., BUILDING SOCIETY, *C.A.*, 161; [1899] 1 Q. B. 161; 68 L. J. Q. B. 114; 79 L. T. 611.

9. *Lease — Construction* — False demonstratio.—The defendants, who were the occupiers and owners for a term of years of two houses, Nos. 13 and 14.

Old Bond-street, by underlease demised to the plaintiff rooms on the second floor of Nos. 13 and 14, "together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages of No. 13 to and from the demised rooms." There was a staircase in No. 14 leading to and from the said rooms, and not in No. 13, and no other way to which the above grant could apply. There was, however, a lift in No. 13, the use of which by the plaintiff was provided for by the deed.

Held, by Romer, J., that, the above grant containing a grant of a right of way over the staircase and passages leading to and from the demised rooms, the way granted was sufficiently certain for the court to reject the words "of No. 13," as being a *falsa demonstratio*, notwithstanding their position in the description of the way; and the deed must be construed as giving a right of way over the staircase in No. 14, that being the only access which could have been referred to by the grant.

Held, by the Court of Appeal, that as the rejection of the words "of No. 13" would not leave a description applicable to the staircase in No. 14, the doctrine of *falsa demonstratio* did not apply; but that it was the intention of the parties that the plaintiff should have access over the staircase in No. 14, and that the underlease should be rectified accordingly.

Decision of Romer, J., *ante*, p. 29, affirmed on this ground.—COWEN *v.* TRUEFITT, *C.A.*, 661.

10. *Lease—Construction—Lessee's covenants—Payment of "impositions and outgoings" charged on demised premises—"Fair share and proportion" of expenses paid by lessor in reparation or otherwise by virtue of any Act of Parliament—Factory and Workshop Act*, 1891 (54 & 55 *Vict.* c. 75), *s.* 7.—A lease contained (*inter alia*) two covenants by the tenant, one was to pay "all rates and taxes, sewers rate, and main drainage rate, parish dues, and all other rates, taxes, and impositions and outgoings whatsoever," which might be in any wise imposed upon, or in respect of, the demised premises or upon the landlords in respect thereof by authority of Parliament or otherwise howsoever; the other was to pay a fair share and proportion of all costs and expenses which the lessors, in respect of being the owners of the demised premises, might, during the continuance of the term, be called upon to pay in or about "any reparation . . . or in or about any drainage or sewerage or otherwise by virtue of any Act or Acts of Parliament already made," or thereafter to be made. During the continuance of the term the landlords were compelled, under the Factory and Workshop Act, 1891, to spend money in making structural alterations on the demised premises. In an action by the landlord to recover from the tenant the whole of the amount so spent,

Held, that, upon the true construction of the two covenants the tenant was liable to pay, not the whole, but only a fair share and proportion of the amount so spent.—ARDING *v.* ECONOMIC PRINTING Co., *C.A.*; 79 L. T. 622.

11. *Lease—Covenant against assignment—Assignments of lessee's whole estate for benefit of creditors—Conveyancing Act*, 1881, *s.* 14.—A tenant of leasehold property who executes a deed of assignment for the benefit of his creditors of all his property, and as to the leasehold property thereby covenants to stand possessed thereof in such manner as the creditors' trustee shall direct, commits a breach of a covenant against assignment contained in the lease, and the landlord is entitled to re-enter without giving the notice required by section 14 of the Conveyancing Act, 1881.—GENTLE *v.* FAULKNER, *Q.B.D.*; 68 L. J. Q. B. 848.

12. *Lease—Covenant to bear charges—Charge upon landlord in respect of premises—Expenses of paving new street—Claim by district board—Payment by landlord—Right to recover from tenant—Metropolis Management Acts*, 1855, 1862 (18 & 19 *Vict.* c. 120, *ss.* 105, 250; 25 & 26 *Vict.* c. 102, *ss.* 77, 96).—By a covenant in a lease of land in the metropolis the tenant was liable to bear, pay, and discharge, charges, duties, assessments, and impositions, charged, assessed, or imposed, upon the premises, or upon the landlord in respect thereof. The lease was determinable by six months' notice. The landlords gave notice to determine it, and contracted to sell the property. The district board of works gave notice to the landlords of apportionment of expenses of paving a new street, under the Metropolis Management Act, 1855, s. 77, fixing no date for payment. The landlords paid the amount claimed. The work was commenced after the notice to determine the lease had expired.

In an action by the landlords to recover under the covenant the amount paid by them to the district board,

Held, that the words of the covenant included the expenses of paving the new street, and that, when the district board gave notice to the landlords of the apportionment and charge, the charge became operative, and the landlords became liable to pay the amount, and were entitled to recover it from the tenant under the covenant;

Held, also, that the landlords were owners of the premises, within the meaning of the Metropolis Management Act, 1855, s. 250, until the date fixed by the contract of sale for completion.

Thompson v. *Lapworth*, [1868] L. R. 3 C. P. 149, followed.—WIX *v.* RUTSON, *Q.B.D.*; [1899] 1 Q. B. 474; 68 L. J. Q. B. 298; 80 L. T. 168.

13. *Lease—Forfeiture—Proviso for re-entry—"Act or thing whereby the premises become vested in another"—Sub-letting.*—A lease of a public-house for twenty-seven years contained a proviso for re-entry "if the lessees or their assigns should do or suffer any other act, matter, or thing whereby or by reason or means whereof the demised premises, or any part thereof should either directly, or by operation of law, or otherwise howsoever indirectly become or be rendered liable to become vested, either for the whole or any part of the term thereby created, in any person other than the lessees." The lessees sub-let to a tenant from year to year.

Held, that the lessees had done an act whereby the demised premises became vested for part of the term in the sub-tenant, within the meaning of the proviso, and that a forfeiture had been incurred.—DYMOCK *v.* SHOWELL'S BREWERY Co., *C.A.*; 79 L. T. 329.

14. *Lease—Forfeiture—Proviso for re-entry—Covenant against assigning or underletting—Liquidation of lessee company—Notice—Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 14—*Conveyancing Act*, 1892 (55 & 56 *Vict.* c. 13), *s.* 2, *sub-section* 2.—A lease granted by the plaintiffs' predecessors contained a covenant against assigning or underletting without the consent of the lessors, and also a proviso for re-entry if the lessees should commit any breach of covenant, or if (*inter alia*) the lessees, being a company, should enter into liquidation, whether compulsory or voluntary. The lease was, with the consent of the lessors, assigned to the defendants, who were an individual and a limited company. The defendant company went into liquidation, not in consequence of insolvency, but for the purpose of

being reconstructed, and, having agreed to sell the lease to a new company, let the new company into possession pending the completion of the purchase, the new company undertaking to pay all rents, rates, and outgoings. Within a year of the liquidation the plaintiffs commenced an action to recover possession under the proviso for re-entry.

Held, (1) that the proviso for re-entry if the lessee company should enter into liquidation was a condition running with the land; (2) that the defendant company had entered into liquidation within the meaning of the proviso; (3) that, by virtue of section 2, sub-section 2, of the Conveyancing Act, 1892, notice under section 14 of the Conveyancing Act, 1881, was necessary before the plaintiffs could enforce a forfeiture on the ground of the liquidation of the defendant company; and (4) that the letting the new company into possession did not constitute a breach of the covenant against assigning or underletting.—HORSEY ESTATE *v.* STEIGER, *C.A.*, 644; [1899] 2 Q. B. 79; 79 L. T. 116.

15. *Lease—Landlord's rates and taxes—Tramway—Covenant by tenant to keep free from all expenses whatever—Valuation of Lands (Scotland) Act*, 1854 (17 & 18 *Vict. c.* 91), *s.* 6.—By section 6 of the Valuation of Lands (Scotland) Act, 1854, it is enacted that a tenant whose name has been entered in the valuation roll as proprietor "shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments laid on upon the valuations of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation."

The Corporation of Glasgow agreed to borrow money and to construct certain tramways in Glasgow and lease the undertaking to the Glasgow Tramway Co. for twenty-three years. The company agreed to make various payments to the corporation, and then agreed as follows: "And the company shall also pay to the corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways." The lease exceeding twenty-one years, the company, under the Valuation of Lands (Scotland) Act, 1854, s. 6, became primarily liable to pay, and did pay, during the whole term of the lease, "owner's assessments, rates, and taxes," amounting in the aggregate to over £14,000. During the currency of the lease the company intimated to the corporation that they had a claim in this respect, but did not make any deduction from the rent when paid. The company contended that the corporation ought to reimburse them these outgoings, or such other sum as might be ascertained to be the amount of owner's assessments, rates, and taxes paid by the company during the lease.

Held, reversing the decision of the First Division of the Court of Session, [1897] 24 R. 628, that the assessments, rates, and taxes, whether imperial or local, levied on the owner in respect of a tramway or other erection *in solo*, were an expense connected with the tramway or erection, and that the company were bound by their lease to relieve the corporation from these expenses, and were not entitled to claim reimbursement.—GLASGOW CORPORATION *v.* GLASGOW TRAMWAY AND OMNIBUS CO., *H.L.* (*Sc.*); [1898] A. C. 631.

16. *Lease—Lessor owner of whole block—Covenant not to allow certain trade on adjoining premises—Meaning of "adjoining."*—In a covenant by a lessor not to allow a certain trade to be carried on in the "adjoining premises," the word "adjoining" was confined to the two houses on either side of the demised premises, although the lessor was at the time of the lease the owner of a block of buildings of which these formed part only.—VALE *v.* MOORGATE-STREET, &c., BUILDINGS, *Ch.D. Cozens-Hardy, J.*; 80 L. T. 487.

17. *Lease—Option to purchase freehold—Equitable assignee—Waiver of notice of exercise of option.*—Held, by Romer, J. (*ante* p. 93), that an equitable assignee of the legal owner of a lease is not an "assign" within the meaning of a covenant therein giving a right of pre-emption of the freehold to the lessee, his executors, administrators, or "assigns"; and, therefore, that the plaintiff, as such assignee, was not entitled in equity, as against the lessor or his assigns, to enforce such right of pre-emption.

Cox v. *Bishop*, 5 W. R. 437, 8 De G. M. & G. 815, followed.

Walsh v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9, distinguished.

Held, on appeal, that, upon the facts, the defendant (an assignee of lessor) had waived his right to receive notice of the plaintiff's option to purchase the freehold, and, therefore, was precluded from taking the objection that the plaintiff was not entitled to exercise the right of pre-emption.

Decision of Romer, J. (*ante*, p. 93), reversed on this ground.—FRIARY *v.* SINGLETON, *C.A.*, 662.

18. *Premises let to tenants—Damage to tenant's goods by overflow from landlord's cistern—Employment of plumber—Negligence of plumber—Liability of landlord for damage.*—The plaintiffs took from the defendant the ground floor of premises of which the defendant was the owner, and at the top of which the defendant had a cistern from which the premises were supplied with water. The water had been laid on when the plaintiffs became tenants, and the plaintiffs took their supply of water from the cistern. The plaintiffs discovered a leakage from the cistern, and gave the defendant notice of it, and requested him to remedy it. The defendant employed a competent plumber to remedy the defect; but, through the negligence of the plumber, the defect in the cistern was not remedied, the result being that the water overflowed, flooded the plaintiffs' rooms, and damaged their goods.

Held, that in the absence of negligence or wilfulness on the part of the defendant, the defendant was not responsible for the negligence of the plumber whom he had employed, and that he was therefore not liable to the plaintiffs.—BLAKE *v.* WOOLF, *Q.B.D.*, 8; [1898] 2 Q. B. 426; 79 L. T. 188.

19. *Rent—Agreement to take house for a year—Rent payable on certain dates—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 2.—By the Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2: "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day and shall be apportionable in respect of time accordingly."

E. let to R. a house for a year, the rent to be paid in four instalments on fixed dates. The first two were paid, and, default being made with the third, E. took possession of the premises. In an action to recover the third instalment,

Held, that under the contract there could be no apportionment, for this sum was to be paid on a fixed date, and E. was entitled to the sum on that date, it being then due.—ELLIS *v.* ROWBOTHAM, *Q.B.D.*; 80 L. T. 328.

20. *Tenancy from year to year—Estoppel—Bankruptcy—Disclaimer—Mortgage—Rent.*—A tenancy from year to year is created by estoppel between the mortgagee of an assignee of a lease disclaimed by the trustee in bankruptcy of the assignee, and the original lessor, where the mortgagee has entered into possession of the premises, and continued to pay quarterly the original rent reserved by the lease to the lessor.—JUMP *v.* PAYNE, *Q.B.D.*; 68 L. J. Q. B. 607.

21. *Lease—Tenant occupies additional close belonging to landlord—No presumption.*—H. demised an island to E. Subsequently E. occupied two other plots of H.'s land. These plots were situate on the mainland, and were something between half a mile and a mile from the island demised to E. They were inclosed land. There was no evidence that they were occupied by E. as an addition to his holding under H., and no rent was paid in respect of them. After more than twelve years had elapsed, when E.'s tenancy of the island had determined, H. brought an action against E.'s successor in title to obtain possession of the two plots. The county court judge held that there was a presumption that E. had occupied them as H.'s tenant, and in the absence of evidence to rebut this presumption H. was entitled to recover possession. On appeal,

Held, that there was no such presumption.

Semble: The presumption that a tenant who occupies more land than is demised to him occupies it for the benefit of his landlord is confined to encroachment on waste.—HASTINGS (LORD) *v.* SADDLER, *Q.B.D.*; 79 L. T. 355.

22. *Tenant at will—Determination of tenancy—Entry by landlord in order to repair—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 7—*—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.—Where a tenant at will remains in possession of a house rent-free for more than twelve years after the expiration of the first year of the tenancy, the fact that the landlord enters from time to time in order to effect repairs, if it is not against the will of the tenant, does not operate as a taking possession so as to determine the tenancy at will, and therefore the tenant acquires a statutory title to the house by virtue of section 7 of the Real Property Limitation Act, 1833, and section 1 of the Real Property Limitation Act, 1874.

Per Channell, J.—After a final judgment has been delivered, but before it has been entered, new plaintiffs may be added by the judge under ord. 16, rr. 2, 11.—LYNES *v.* SNAITH, *Q.B.D.*, 411; [1899] 1 Q. B. 486; 68 L. J. Q. B. 275; 80 L. T. 122.

23. *Lease—Written document—Licence or lease—Construction.*—The owners of a house and shop, in September, 1890, wrote a letter to the person who was then in occupation, in the following terms: "We hereby agree to let you keep peaceable possession of your present house and shop in Strand-lane for a term of ten years, on condition that you commit no nuisance, and pay us the sum of 9s. 3d. per week for rent thereof. You to pay local board rates and we to pay poor rates and water rates as hitherto."

Held, that there was a demise of the premises for a term of ten years.—DUXBURY *v.* SANDIFORD, *C.A.*; 80 L. T. 552.

See also Bankruptcy, 31; Frauds, Statute of, 3.

LAND TRANSFER ACTS.—See Probate, 2, 6.

LEASE.—See Landlord and Tenant, 7-17; Vendor and Purchaser, 7; Will, 21, 22.

LIBEL:—

1. *Business—Disparagement of goods—Imputation of misconduct.*—In an action of libel the statement of claim alleged that the defendants, who were manufacturers of typesetting machines, published of the plaintiffs, who were rival manufacturers, the following written words: "The Empire Typesetter in America. The *Union Printer and American Craftsman*, the most wide-awide and spirited of America trade journals, has recently contained several references to the Empire" (the plaintiffs') "composing machines, which were installed in the office of the *New York Evening Sun* with such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in the month of Feburary last, the other four commencing operations on the 9th of March last. So short-lived, however, does this installation appear to have been that we learn the machines were discontinued on Wednesday, the 29th of April, and now the Empire Co." (the plaintiffs) "is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine." There was no allegation of special damage.

Held, that these words, besides being a disparagement of the plaintiffs' machines which would not be actionable without proof of special damage, were also, when taken in their natural and ordinary meaning, capable of being understood by men of ordinary intelligence as conveying an imputation upon the plaintiffs in the way of their trade, and the question of libel or no libel was therefore rightly left to the jury.—EMPIRE TYPESETTING MACHINE CO. OF NEW YORK *v.* LINOTYPE CO., *C.A.*; 79 L. T. 8.

2. *Defamation—Absolute privilege—Lunacy proceedings—Petition for reception order—Judicial proceedings—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 4, 5, 6, 9, 28.—Proceedings instituted by petition under the Lunacy Act, 1890, ss. 4 and 5, for a reception order are judicial proceedings, and therefore a defamatory statement made in the statement of particulars accompanying the petition is absolutely privileged.—HODSON *v.* PARE, *C.A.*, 241; [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13.

3. *Defamation—Trader—Disparagement of goods—Slander of goods—Comparison of plaintiff's goods with those of defendant—Cause of action—Rules of Supreme Court, ord.* 25, *rr.* 2, 4.—H., a manufacturer of zinc paint, by his statement of claim alleged that the defendant W. was "falsely and maliciously" publishing in China and Japan copies of a report of experiments testing the zinc paints of H. and W., in which report the experimenter certified that W.'s paint had a slight advantage over H.'s, but that for all practical purposes they could be regarded as equal. The statement of claim went on to allege that the report, and each statement in it, was untrue, that H.'s paint was not equal or inferior, but superior to W.'s, and that H. had by reason of the premises been injured in his business and credit. W. applied to strike out the statement of claim as showing no reasonable cause

of action. The master made an order for striking out the statement of claim unless within a limited time H. amended it by alleging special damage with full particulars. Kennedy, J., discharged this order.

Held, on appeal, that a statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss to the other trader, gives no cause for action; that the allegation that the statement was made maliciously could not convert a statement *primâ facie* lawful into one *primâ facie* unlawful; that the allegation and proof of special damage would not improve the plaintiff's case; and that judgment in the action must be entered for the defendant under ord. 25, r. 4.—HUBBUCK & SONS (LIMITED) *v.* WILKINSON, HEYWOOD, & CLARK (LIMITED), *C.A.*; [1899] 1 Q. B. 86; 68 L. J. Q. B. 34; 79 L. T. 429.

4. *Defamation—Unauthorized use of a man's name—Injury to property, or in business or profession—Cause of action—Injunction.*—A doctor, whose name has been used without his authority in an advertisement to puff the sale of a medicine, has no cause of action, either for damages or for an injunction, unless the publication is defamatory or injures him in his property, business, or profession.—DOCKRELL *v.* DOUGALL, *C.A.*; 80 L. T. 556.

LICENSING LAW:—

1. *Justices—Jurisdiction—Police—Transfer*—2 & 3 *Vict. c.* 82—*County Police Act*, 1839 (2 & 3 *Vict. c.* 93), *s.* 27—*County Police Act*, 1840 (3 & 4 *Vict. c.* 88), *s.* 2.—A transfer of a part of a county to another county by agreement between the justices of the two counties in pursuance of section 2 of the County Police Act, 1840, does not affect the jurisdiction to administer the licensing laws within the transferred district.—REG. *v.* WARWICKSHIRE JUSTICES; REG. *v.* WORCESTERSHIRE JUSTICES, *C.A.* 134; [1899] 1 Q. B. 59; 68 L. J. Q. B. 109; 79 L. T. 393.

2. *Justices—Renewal—No objection served before date of general meeting—Objection taken by justices in court—Adjournment—Notice of objection—Notice by justices to attend—Sufficiency of notices—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.—The applicant for renewal of a licence attended on the day fixed for the general annual licensing meeting and applied for the renewal. No notice to attend, or notice of objection had been served upon the applicant prior to that day, but at the meeting an objection was taken by the justices themselves, who thereupon adjourned the case, and more than seven days before the date of the adjourned meeting a written notice to attend by the authority and on behalf of the justices, was served upon the applicant, and a written notice of objection was served by objectors stating the grounds of objection, which included the objection taken by the justices, but this notice of objection did not purport to be served by the authority of the justices.

The licensing justices heard the objections and refused to renew the licence.

Held, that it was competent for the licensing justices, under section 42, sub-section 2, of the Licensing Act, 1872, to raise an objection themselves at the licensing meeting and then adjourn the case; that the notices served were sufficient under the section, and that the justices had jurisdiction at the adjourned meeting to refuse the renewal.—BAXTER *v.* LECHE, *Q.B.D.*; 79 L. T. 138.

3. "*Keeping open for sale*" *of liquors after closing hours—Doors closed and locked—Customers afterwards seen to leave the premises—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.—The respondent was summoned for "keeping open" his licensed premises after closing hour, contrary to section 9 of the Licensing Act, 1874. The evidence in support of the summons was that the house was duly closed and the doors locked at 11 p.m., but that two customers remained inside drinking until 1.30 a.m., when they were seen to leave the premises by the back door.

The justices dismissed the summons, on the authority of *Tennant* v. *Cumberland*, 7 W. R. 161, 1 E. & E. 401, 23 J. P. 51, and *Jefferson* v. *Richardson*, 35 J. P. 470.

Held, on appeal, that the justices were right, since the evidence did not prove that the house was "kept open" within the meaning of section 9.—JEFFERY *v.* WEAVER, *Q.B.D.* 638; 68 L. J. Q. B. 817.

4. *Licence—Beer licence—*"*Real resident holder and occupier*"*—Beerhouse Act*, 1840 (3 & 4 *Vict. c.* 61), *s.* 1.—By section 1 of the Beerhouse Act, 1840, "No licence to sell beer or cider by retail . . . shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed."

Held, that the fact that the applicant for a beer licence in respect of a dwelling-house is paid a salary by brewers, and has to pay over to them the profits made upon the sale of the beer, does not of itself in law prevent him from being the "real resident holder and occupier" of the house.—NIX *v.* NOTTINGHAM JUSTICES, *C.A.*, 628; [1899] 2 Q. B. 294; 68 L. J. Q. B. 854.

5. *Licence—Order for new licence on condition of surrendering other licence—Removal—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.—The appellant was the holder of an off-licence of a public-house, and duly applied for a renewal at the general annual licensing meeting, and this was granted. He also duly applied for and obtained a new licence of an adjoining house, on the condition of giving up the licence of which he had just obtained the renewal.

Held, that the justices had not exceeded their jurisdiction, as this was not a removal of a licence, and therefore section 50 of the Licensing Act, 1872, requiring notice to the owner of the premises, had no application.

Decision of the Court of Appeal (*Reg.* v. *Thornton, Ex parte Lacon & Co.*, 46 W. R. 241, [1898] 1 Q. B. 334) reversed.—LACKBY *v.* LACON & CO. (LIMITED), *H.L.*, 497; [1899] A. C. 222; 68 L. J. Q. B. 480; 80 L. T. 473.

6. *Licence to sell beer—Certificate of residence and occupation — Jurisdiction of justices* — Certiorari—Mandamus—*Beerhouse Act*, 1840 (3 & 4 *Vict. c.* 61), *s.* 1.—The licensing justices have no power to grant a certificate, under section 2 of the Beerhouse Act, 1840, for a licence to sell beer or cider by retail, unless the applicant sleeps upon the premises in respect of which he applies to be licensed.—REG. *v.* MANCHESTER JUSTICES, *Q.B.D.*, 410; [1899] 1 Q. B. 571; 68 L. J. Q. B. 358; 80 L. T. 531.

7. *Public entertainment — Singing and music — Pianoforte in hotel smoking-room—User by customers —Public Health Act Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 51.—The appellant, who was the occupier of a fully-licensed inn, kept a pianoforte in the smoking-room of the inn. Pianoforte music and singing was frequently performed in the room, the performers being the ordinary customers of the inn giving their services gratuitously, and performing for the entertainment of their friends and the other customers of the inn then using the smoking-room.

No charge was made for admission to the room. The room was not licensed for public singing or music.

Held, that the room had not been "kept or used" for public singing or music within the meaning of section 51, sub-section 1, of the Public Health Act Amendment Act, 1890.—BREARLEY *v.* MORLEY, *Q.B.D.*, 574; [1899] 2 Q. B. 121; 68 L. J. Q. B. 722; 80 L. T. 801.

8. *Sale of beer—Sale at unlicensed place—Office opened for the receiving of orders—Orders transmitted to licensed place—Appropriation at licensed place—Offence—Excise Act*, 1860 (23 & 24 *Vict. c.* 113), *s.* 37.—Brewers having a retail off-licence for the sale of beer in respect of premises in P.-street, Cardiff, occupied an office in M.-street, Cardiff, for which they held no licence and at which no beer was kept. This office was opened merely for the purpose of receiving orders, which were then sent on to the licensed premises in P.-street, where they were accepted or rejected. No orders were accepted and no payments were made at this office, and there was no appropriation of the beer there, but the orders were simply forwarded to the licensed premises, where, if the order were accepted, the beer was appropriated to the purchaser, and the beer so appropriated was afterwards delivered at the purchaser's residence, where payment was made.

Held, that what took place in the office in M.-street, where the orders were merely received and forwarded, was not a sale of the beer at that place within the meaning of section 37 of the Excise Act, 1860, and that the brewers could not be convicted under that section of selling the beer "at any other house or place than the house or place specified in their licence."

Per Channell, J.: To bring a case within the section it is not necessary that there should be an actual sale and the passing of the property in the liquor sold; it is sufficient if there be a binding executory contract for a sale to be carried out at a future time, though no property passes at the time. —STEPHENSON *v.* ROGERS, *Q.B.D.*; 80 L. T. 193.

9. *Sale of intoxicating liquor without licence—Sale by innocent servant of unlicensed person—House of Commons—Exemption—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 72.—An attendant at a refreshment bar situate within the precincts of the House of Commons, acting under the orders of the Kitchen Committee of that House, whose servant he was, supplied a person (not a member of the House) with intoxicating liquor, and received the price on behalf of the Kitchen Committee.

Held, that he had not committed the offence under section 3 of the Licensing Act, 1872, of selling intoxicating liquor without being duly licensed.

Semble, the Houses of Parliament are not exempt from the provisions of the Licensing Act, 1872, so as to enable liquor legally to be sold there without a licence.—WILLIAMSON *v.* NORRIS, *Q.B.D.*, 94; [1899] 1 Q. B. 7; 68 L. J. Q. B. 31; 79 L. T. 415.

10. *Spirits—Sale of spirits without licence—Second conviction—Disqualification to hold licence—Application by owner to carry on business—Justices—Jurisdiction to entertain application—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 15.—A beerhouse-keeper was upon the same day twice convicted under section 3 of the Licensing Act, 1872, of selling spirits without a spirit licence, and upon such second conviction he was disqualified for two years from holding any licence, and by the operation of the section he also, upon such second conviction, forfeited his licence to sell beer. Upon an application being made after the second conviction by the owner of the premises under section 15 of the Licensing Act, 1874, for an authority to carry on the business until the next special sessions,

Held, that the justices had jurisdiction to entertain the application, although made after the second conviction, as the words "for the first time" in section 15 were to be construed as governing the latter part of the section as well as the former, and that the application could be made after the first conviction which caused a personal disqualification or a forfeiture of the licence, which, in the case of selling spirits without a spirit licence was the second conviction.—FLINN & SONS, EX PARTE, *Q.B.D.*, 697; [1899] 2 Q. B. 154; 68 L. J. Q. B. 777.

11. *Spirits—"Sending out, delivery, or removal" —Spirits over one gallon—Spirits Act*, 1880 (43 & 44 *Vict. c.* 24) *ss.* 105, 107.—By section 105 of the Spirits Act, 1880 (43 & 44 Vict. c. 24): "Except as in this section provided, no spirits exceeding the quantity of one gallon of the same denomination at at a time for the same person may be sent out, delivered, or removed from any one place to another place unless accompanied by a permit." And by section 107 of the same Act: "If any person sends out, delivers, or removes, or receives any spirits required to be accompanied by a permit without a permit; . . . he shall, in addition to any other penalty or forfeiture, incur a fine of £500."

In 1897 one J. B. gave the respondent, who was licensed to sell beer only and had no spirit licence, an order, to forward to his brother, who had such a licence, for two gallons of rum.

The rum was delivered by a carman at the respondent's house and sent to J. B. by his potman.

The spirits were not accompanied by any permit or certificate.

Held, that the respondent was guilty of sending out, delivering, and removing spirits within the Act.—LEESE *v.* JENNINGS, *Q.B.D.*; 79 L. T. 300.

12. *Transfer—Notice — Insufficiency*—Mandamus —*Alehouse Act*, 1828, *s.* 14.—Upon an application for the transfer under section 14 of the Alehouse Act, 1828, of an existing licence to premises not heretofore licensed, the same notices must be given as are required by section 40 of the Licensing Act, 1872, in the case of an application for a new licence. Where the justices have granted such a transfer upon the supposition that the notices were in order, no *mandamus* lies to compel them to hear the application afresh by reason of its being subsequently discovered that the notices were not sufficient. — REG. *v.* NICHOLSON, *Q.B.D.*; 68 L. J. Q. B. 715.

13. *Traveller—Sale during prohibited hours—Travelling in order to obtain refreshment—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 25—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 10—*Sunday Closing (Wales) Act*, 1881 (44 & 45 *Vict. c.* 61), *s.* 4.—A person cannot be convicted under section 25 of the Licensing Act, 1872, of falsely representing himself to be a traveller and obtaining intoxicating liquor at a railway station refreshment room during the hours when licensed premises are closed if, at the time he obtains the drink, he has taken a ticket and intends to travel by railroad, and does so travel, even though he only took such ticket and travelled so as to be able to obtain such drink.—WILLIAMS *v.* MACDONALD, *Q.B.D.*, 701; [1899] 2 Q. B. 308; 68 L. J. Q. B. 678; 80 L. T. 758.

See also Gaming, 5.

LIGHT:—

Ancient light—Prescription—Greenhouse—"Building"—Injunction—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.—A greenhouse is a "building" within section 3 of the Prescription Act (2 & 3 Will. 4, c. 71), and, therefore, if it has ancient lights, may be protected by injunction against interference with the access of light.

Harris v. *De Pinna*, 33 Ch. D.[238, considered.—CLIFFORD *v.* HOLT, *Ch.D. Kekewich, J.*; [1899] 1 Ch. 698; 68 L. J. Ch. 332; 80 L. T. 48.

LIMITATION STATUTES:—

1. *Concealed fraud—Submission to arbitration—Exclusion of statute.*—In order to exclude the Statute of Limitations there must be not only fraud, but an intentional concealment of that fraud.

Dictum of Malins, V.C., in *The Ecclesiastical Commissioners* v. *North-Eastern Railway Co.* (36 L. T. 174) not followed.

By a submission to arbitration, after reciting that differences had arisen, the parties referred to the arbitrator (1) what encroachment, if any, had been made by one on the other; (2) how one party had been damaged, and what compensation was payable to the other.

Held, that this submission did not preclude the raising of the defence of the Statute of Limitations. —ASTLEY *v.* TYLDESLEY COAL CO., *Q.B.D.*; 68 L. J. Q. B. 252; 80 L. T. 116.

2. *Conditional promise to pay—Sufficient acknowledgment.*—In October, 1898, a debt then being statute-barred, A. wrote to M.: "You may be quite sure I shall do all I can, and as soon as I can, but it is not much use making promises without some pretty good prospect of keeping them."

On the 17th of November following he wrote to the plaintiff: "I had a letter from you four or five weeks ago, and wrote you in reply that I would do all in my power, but that it was useless for me to make promises I could not be fairly sure of keeping, and I really cannot say anything more definite."

Later, in answer to a demand from M.'s solicitors, he wrote asking for particulars, and concluded: "Legal proceedings . . . would only result in my losing my present employment and the small salary I am able to earn, which would still further delay the possibility of payment. I trust your client will agree to accept some comparatively reasonable amount, and if you can give me the option of repayment by instalments I shall be glad."

The required particulars were supplied by M.'s solicitors, and he was asked to state with what sum and in what manner he would settle the claim.

Held, that these letters did not constitute a promise to pay absolutely and unconditionally, and therefore did not amount to sufficient acknowledgment to take the debt out of the Statute of Limitations.—MOWBRAY *v.* APPLEBY, *Q.B.D.*; 80 L. T. 805.

3. *Debt—Letter—Admission—Conditional or not.*—The statement in a letter "I am really sorry to keep you so long waiting for your money, but I shall be taking some money next month, I think, without fail, and will then try and settle with you," is sufficient admission to take a debt out of the Statute of Limitations, and is not conditional.—PRYKE *v.* HILL, *Q.B.D.*; 79 L. T. 738.

4. *Guarantee—Banking account—Principal advanced six years before action—Interest accrued within six years—Appropriation of payments on account.*—The defendant gave a guarantee to the plaintiff bank, whereby, in consideration of the bank making advances to one of their customers, the defendant undertook to guarantee the payment of all moneys from time to time owing to the bank in account with the customer, with interest, commission, and other banking charges. The customer's account was made up every half-year, the amount which had become due for interest, commission, and banking charges during each half-year being added to the principal and carried forward to the next half-year. The bank made advances to the customer during four years. More than six years after the last advance, the bank brought an action on the guarantee. The customer had from time to time made payments on account down to a short time before action brought.

Held, that the bank's claim under the guarantee in respect of the advances was barred by the Statute of Limitations; but that they were entitled to recover in respect of interest, commission, and banking charges which had become due within six years before action.

Held, also, that the rule by which payments on account are appropriated to interest before principal did not apply to such a banking account as that in question.—PARR'S BANKING CO. *v.* YATES, *C.A.*, 42; [1898] 2 Q. B. 460; 79 L. T. 321.

5. *Mine—Trespass—Fraudulent working of mine—Concealed fraud—Account.*—Where a colliery company wilfully and secretly took coal from an adjoining property, and the fact was not brought to light for many years afterwards, and no *laches* could be attributed to the adjoining owner in not discovering the existence of the wrongful workings,

Held, that the Statute of Limitations had no application, and that the adjoining owner was entitled to recover from the wrongdoers the value of the coal so wrongfully taken, and, in the case of a winding up, then to prove for that amount.—BULLI COAL MINING CO. *v.* OSBORNE, *P.C.*, 345; [1899] A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430.

6. *Simple contract debt chargeable upon land—Trustee debtors—Retirement of one trustee—Payment of interest by co-debtor—Claim after six years—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—Section 3 of 21 Jac. 1, c. 16, is not repealed by section 8 of the Real Property Limitation Act, 1874; the effect of the two Acts, read together, is that no action for a simple contract debt, whether chargeable on land or not, shall be brought after six years, and that no action for a specialty debt chargeable on land shall be brought after twelve years.

Sutton v. *Sutton*, 31 W. R. 569, 21 Ch. D. 511, distinguished.

Firth v. *Slingsby*, 58 L. T. Rep. 481, 36 W. R. Dig. 135, approved.

In 1882 the plaintiffs advanced money to the defendants, who were the three trustees of a will, the loan being secured by a transfer to the plaintiffs of mortgage securities belonging to the estate of the defendants' testator, but the defendants entered into no covenant to repay the loan. In 1883 L., one of the defendants, retired from the trusts of the will, and the other two trustees continued to pay interest on the loan until 1896.

In 1897 the plaintiffs brought an action against L. and the continuing trustees to recover the loan.

Held, that the action, being for a simple contract debt, although chargeable upon land, was barred as against L. by section 3 of 21 Jac. 1, c. 16—being brought more than six years after the accrual of the plaintiffs' right of action—and that section 14 of the Mercantile Law Amendment Act, 1856, pro-

vented the payment of interest by the continuing trustees operating against L.

Decision of Lord Russell of Killowen, C.J., *ante*, p. 13, [1898] 2 Q. B. 223, reversed.—BARNES *v.* GLENTON, *C.A.*, 435; [1899] 1 Q. B. 885; 68 L. J. Q. B. 502; 80 L. T. 608.

7. *Tenancy at will — Determination — Realty — Mortgage—Creation of fresh tenancy—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 2, 7. —A tenancy at will is determined by a legal mortgage of the premises by the owner, and knowledge of the mortgage by the tenant at will.

After the mortgage a new tenancy at will may be created between the parties so as to cause the Statute of Limitations, 3 & 4 Will. 4, c. 27, to begin to run.—JARMAN *v.* HALE, *Q.B.D.*; [1899] 1 Q. B. 994; 68 L. J. Q. B. 681.

8. *Will—Charitable gift—Freeholds and leaseholds —Charitable Uses Act*, 1735 (9 *Geo.* 2, *c.* 36)—*Charge of annuities—No trust for payment—Executor—Possession by executor—Real Property Limitation Act*, 1874 (37 & 38 *Vict.* c. 57)—*Executors Act*, 1830 (11 *Geo.* 4 & 1 *Will.* 4, *c.* 40)—*Law of Property Amendment Act*, 1860 (23 & 24 *Vict.* c. 38), *s.* 13.—The Royal Theatrical Fund Association is a charity.

Spiller v. *Maude*, 13 W. R. 69, 32 Ch. D. 158*n*, approved.

An executor is not regarded as an express trustee of residue undisposed of by the will.

A testator, who died in 1873, gave real and impure personal property to the trustees of the Royal General Theatrical Fund, charged with certain annuities, and appointed an executor, who entered into possession and received the income of the property on behalf of the trustees of the fund for nearly twenty years.

Held, that the claims of the heir and next-of-kin were barred.

Salter v. *Cavanagh*, 1 Dr. & Wal. 668, and *Patrick* v. *Simpson*, 24 Q. B. D. 128, 38 W. R. Dig. 113, distinguished.—LACY, RE, ROYAL THEATRICAL FUND ASSOCIATION *v.* KYDD, *Ch.D. Stirling, J.*, 664; [1899] 2 Ch. 149; 68 L. J. Ch. 488; 80 L. T. 706.

See also Administration, 6; Company, 21; County Court, 6; Landlord and Tenant, 22; Mortgage, 4, 6, 11, 12; Poor Law, 1.

LIS PENDENS.—See Company, 36.

LOCAL GOVERNMENT:—

1. *Boundaries—Alteration of union boundaries—Transfer of part of a parish—Adjustment of property, debts, and liabilities—Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *ss.* 36, 68.—Where an alteration is made in the boundaries of two poor law unions by the transfer, by an order of the county council, under section 36, sub-section 6, of the Local Government Act, 1894, of part of a parish from one union to another, an adjustment of the property, debts, and liabilities can be claimed under section 68, as between the two unions, and not as between the union from which the transfer is made and the part of the parish so transferred.—ROCHDALE AND HASLINGDEN ARBITRATION, RE, *C.A.*, 322; [1899] 1 Q. B. 540; 68 L. J. Q. B. 531; 80 L. T. 146.

2. *Bye-law—Depositing offensive matter in a place —Truck of manure in goods yard—Liability of railway company.*—Bye-law No. 2 of the respondent council was as follows:

"No person shall deposit, throw, or allow to run, lodge, or accumulate upon the surface of any street, square, court, highway, or place, or on any waste or unoccupied ground, or on any uncovered drain, ditch, watercourse, sink, pond, or other collection of water, or expose or cause to be exposed in any other manner whatever within the district any animal or vegetable matter, fish, offal, ordure, blood, bones, manure, shells, broken glass, china, or earthenware, dust, ashes, house refuse, waste, or runnings from any manufactory, or other offensive or noxious matter whatever."

The appellants received in their goods yard at H. H. a truck of manure which had been carried by them in the ordinary course of their business.

It arrived on the Sunday, and notice was at once given to the consignee, who proceeded to remove it on the Monday, and on being emptied it gave forth a very offensive smell.

The magistrates convicted the appellants of a breach of the bye-law.

Held, that the magistrates were wrong.—LONDON, BRIGHTON, AND SOUTH COAST RAILWAY CO. *v.* HAYWARD'S HEATH DISTRICT COUNCIL, *Q.B.D.*; 80 L. T. 266.

3. *Bye-laws—No power to set aside—Buildings.*—A local authority empowered to make bye-laws is bound by those bye-laws, and has no power to sanction building plans not in accordance with them. They have no dispensing power, and any purported approval of plans contravening such bye-laws is inoperative and invalid. The approval must be a lawful, and not a mere actual, approval.—YABBICOM *v.* KING, *Q.B.D.*, 318; [1899] 1 Q. B. 444; 68 L. J. Q. B. 560; 80 L. T. 159.

4. *County council — Costs of quarter sessions—Boroughs having population under* 10,000—*Salary of recorder and clerk of the peace—Salary of clerk to borough justices in petty sessions*—12 & 13 *Vict.* c. 18, *s.* 1—*Local Government Act*, 1888 (51 & 52 *Vict.* c. 41), *ss.* 35, 38, 84.—Where a borough, with a population of less than 10,000, has a separate court of quarter sessions and a separate commission of the peace, the Local Government Act, 1888, has not transferred the obligation of paying the salaries of the recorder, of the clerk of the peace, and of the clerk to the borough justices in petty sessions, from the borough to the county council.

Ex parte Kent County Council and Borough of Sandwich, [1891] 1 Q. B. 389, 39 W. R. Dig. 114, and *In re Herefordshire County Council*, [1895] 1 Q. B. 43, 43 W. R. Dig. 101, overruled.—THETFORD CORPORATION *v.* NORFOLK COUNTY COUNCIL, *C.A.*, 1; [1898] 2 Q. B. 468; 79 L. T. 315.

5. *County council — Troops summoned to preserve the peace — Expenses of maintenance — Liability —* Mandamus.—Troops were brought into a county, on the application of the county magistrates, for the purpose of suppressing riots, and preserving peace and order in the county. By agreement with the magistrates certain tradesmen supplied the troops with food and lodging while quartered in the county.

On an application for a *mandamus* to the county council to pay for the food and lodging supplied,

Held, that no duty was imposed by law on those who administered the county funds to pay the expenses of the maintenance of the troops, and a *mandamus* could not be granted.—REG. *v.* GLAMORGAN COUNTY COUNCIL, MILLER, EX PARTE, *Q.B.D.*; [1899] 2 Q. B. 26.

6. *Highway—Maintenance and repair—Sea wall—Esplanade—Works necessary for protection of road—Annual payment—Local Government Act*, 1888 (51 & 52 *Vict.* c. 41), *s.* 11, *sub-section* 2.—A local authority under an obligation to keep up a road is chargeable

with the cost of works necessary for the preservation of the road, even though they may not actually form part of it, such as a sea wall and groynes necessary to prevent a road running along the sea shore from being periodically injured by inroads of the sea.

The fact that a footpath along the top of such sea wall is, besides being part of the highway, used as a promenade or esplanade for the purposes of pleasure, does not affect the liability to repair.

The words "annual payment towards the costs of maintenance and repair" in section 11, sub-section 2, of the Local Government Act, 1888, mean a payment to be made annually in respect of the expenditure of the particular year, not a fixed sum to be arrived at by taking the average expenditure over a series of years.—SANDGATE COUNCIL *v.* KENT COUNTY COUNCIL, *H.L.*; 79 L. T. 425.

7. *Lighting-up time for bicycles—"Sunset"—Greenwich mean time—Statutes (Definition of Time) Act*, 1880 (43 & 44 *Vict. c.* 9), *s.* 1.—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 85.—By section 85 of the Local Government Act, 1888, bicycles and other similar machines are required to carry a light "during the period between one hour after sunset and one hour before sunrise."

By section 1 of the Statutes (Definition of Time) Act, 1880, whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred to shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time.—GORDON *v.* CANN, *Q.B.D.*, 269; 68 L. J. Q. B. 434; 80 L. T. 20.

8. "*New street*"—*Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 63—*Public Health Act*, 1875, *s.* 157.—The decisions under section 157 of the Public Health Act, 1875, as to what is a new street apply in considering what constitutes a "new street" in section 63 of the Towns Improvement Clauses Act, 1847.

Elements constituting a "street" considered.—ATTORNEY-GENERAL *v.* RUFFORD & Co., *Ch.D. North, J.*, 405; [1899] 1 Ch. 537; 68 L. J. Ch. 179; 80 L. T. 17.

9. *Overseers—Assistant overseer—Right to rate-books—Appointment—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 5, *sub-section* 1.—When the overseers of a parish have expressed their intention of collecting the rates themselves, but the parish council have by resolution appointed an assistant overseer, the court will grant a *mandamus* to the overseers to deliver to the assistant overseer the rate-books and all other books in their custody as overseers, for the purpose of enabling him to perform the duties of his office.

Semble, the appointment of overseers and assistant overseers under section 5, sub-section 1, of the Local Government Act, 1894, is complete by election by the parish council, and no document is required beyond a minute of the appointment.—REG. *v.* POWELL, WILLIAMS, EX PARTE, *Q.B.D.*; [1899] 1 Q. B. 396; 68 L. J. Q. B. 274; 80 L. T. 184.

10. *Parish council—Right to sue—Main roads—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 8, 11, 25.—A parish council cannot sue for an obstruction to a well situate on a main road, from which the inhabitants claim to take water, as main roads are vested in the district council under section 25 of the Local Government Act, 1894. and if the right is a public one, the Attorney-General must be joined as plaintiff.—STOKE PARISH COUNCIL *v.* PRICE, *Ch.D. North, J.*, 663; 68 L. J. Ch. 447; 80 L. T. 643.

11. *Parish councils—Parish meetings—Poor law rating—Appeal—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 5 (1) (2) (a) (b), 6 (1) (c) (i), 19 (5) (6), 52 (5).—The L.C. & D. Railway Co. appealed to quarter sessions against the assessments for the poor rate made on their property in eleven parishes in the county of K. Seven of these parishes had parish councils, and the remaining four had parish meetings. When the appeal came before the justices, the respondents raised the point that the company had not served notice of appeal against the rate within proper time on the parish councils, and the justices refused to enter and respite the appeal with a view to proper notice being served. Nothing was said about the parishes which had parish meetings only. A rule *nisi* was then obtained for a *mandamus* calling on the justices to show cause why they should not enter and respite the appeal in order to enable notices to be properly served on the parish councils.

Held, that the parish councils should be served with notice, and that, as notices had not been served in proper time upon them, there was no appeal that could be entered and respited.

Held also that, as the rule *nisi* only mentioned parish councils, it was not necessary to decide whether parish meetings should be served with notice of appeal or not.—REG. *v.* KENT JUSTICES, *Q.B.D.*; 80 L. T. 622.

12. *Public health—Deposit of plans of building described otherwise than as a dwelling-house—Subsequent deposit of revised plans for domestic conversion—Building used for the purposes of habitation—Prosecution—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 158, 159—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 33.—Plans of a new building were deposited with a sanitary authority in May, 1894, describing the building otherwise than as a dwelling-house, and were duly approved and passed. On the 28th of March, 1898, plans of alterations to the building described as "revised plans of proposed domestic conversion," were also deposited with the borough surveyor, but were never either approved or disapproved in writing by the sanitary authority. The proposed alterations were carried out before the 3rd of October, 1898. Between the 24th of October and the 8th of November the occupier's wife and child lived on the premises. On the 14th of December, 1898, the occupier was charged before the magistrates with wilfully using within the above-mentioned dates the premises for the purpose of habitation by a person other than a person placed therein to take care thereof and the family of such person, contrary to section 33 of the Public Health Acts Amendment Act, 1890. It was contended on behalf of the defendant that the alterations of the premises set out in the plans deposited on the 28th of March were for the conversion into dwelling-houses of buildings not originally constructed for human habitation within the meaning of section 159 of the Public Health Act, 1875; that the sanitary authority within one month should have signified in writing their approval or disapproval of the same pursuant to section 158 of that Act; and that the sanitary authority not having signified such approval or disapproval no proceedings could be taken against the defendant under section 33 of the Act of 1890. The magistrates upheld that contention, and dismissed the case.

Held, that section 33 of the Public Health Acts Amendment Act, 1890, had been contravened, and that the case must go back for a conviction.—FULFORD *v.* BLATCHFORD, *Q.B.D.*; 80 L. T. 627.

13. *Public health — District council—Riparian owner—Water rights—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 53, 327, 332.—The owner of a corn-mill sought to restrain a district council from interfering with the natural flow of the stream working his mill. The council owned land on one side of the lake from which the stream flowed, and proposed to construct a dam there so as to increase the storage of water to be supplied for their district, thereby diminishing the stream flowing down to the mill.

Held, that a riparian owner was entitled to an uninterrupted flow of water as in the past; Public Health Act, 1875, s. 332, did not enable the council to "injuriously affect" the plaintiff's right to an uninterrupted flow of water without his consent, nor was there a statutory power enabling them to interfere with the plaintiff's common law rights. Injunction granted.—ROBERTS *v.* GWYRFAI DISTRICT COUNCIL, *Ch.D. Kekewich, J.*, 376; [1899] 1 Ch. 583; 68 L. J. Ch. 233; 80 L. T. 107.

14. *Public health—Nuisance—Liability of owner—Want of structual convenience—Sewer—Right to drain into—Obligation to provide—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 21, 94.—The slop and scullery water of twelve houses owned by the appellants, but occupied separately by their tenants, flowed into a drain constructed for the purpose of carrying away the surface water from the street upon which the houses abutted. The slop and scullery water flowed thence into an open ditch, where a nuisance arose. No cesspool or other means of dealing with the drainage was provided upon the premises themselves, nor was there an available sewer constructed for the purpose of carrying away sewage. The appellants were summoned by the local authority under sections 94 and 95 of the Public Health Act, 1875, for non-compliance with a notice to abate the nuisance, and an order was made upon them by the justices before whom the summons was heard.

Held (Channell, J., *dubitante*), that the appellants were the proper persons to be proceeded against, since the nuisance arose from the "want of a structural convenience" within the meaning of the first proviso of section 94.

Held, also, that, though the surface water drain was a "sewer" within the meaning of section 4 of the Act, the appellants had no right, by virtue of section 21, to turn into it matter which it was not intended to receive, and that the obligation of the local authority under section 15 to provide sewers in their district was discretionary.—KINSON POTTERY (LIMITED) *v.* MAYOR, &c., OF POOLE, *Q.B.D.*, 607; [1899] 2 Q. B. 41; 68 L. J. Q. B. 819.

15. *Public health—Offences—Unsound meat—Condemnation by justice — Compensation to owner — Arbitration — Award — Jurisdiction of arbitrator—Costs and expenses—"Full compensation" — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.—Meat was seized by an inspector of the local authority as unsound, and condemned by a justice under sections 116 and 117 of the Public Health Act, 1875. The owner of the meat was thereupon summoned for an offence under section 117, but the magistrates dismissed the summons upon an objection to its form, without inquiring into the merits. The owner of the meat claimed compensation, to be settled by arbitration, under section 308 for damage sustained by him by reason of the exercise by the local authority of the powers of the Act; and the arbitrator found that the meat was, at the time of its condemnation, sound and fit for the food of man, and he included in the damage sustained by the owner of the meat the loss of the carcase and the expenses of and incident to the seizure and in defending himself before the magistrates. In an action on the award the judge refused to admit evidence that the meat was unsound at the time it was condemned, and gave judgment for the amount claimed.

Held, that the question of the soundness of the meat at the time of its condemnation was a question of fact for the arbitrator to determine, and his finding could not be reviewed in the action.

Held, also, that the "full compensation" to which the owner of the meat was entitled would include the value of the meat and the expenses incurred by him in connection with the seizure and in defending himself before the magistrates.—WALSHAW *v.* MAYOR, &C., OF BRIGHOUSE, *C.A.*, 600; [1899] 2 Q. B. 286; 68 L. J. Q. B. 828.

16. *Public health—Privies—Cleansing by sanitary authority—Becoming a nuisance—Notice to owner to abate—Liability—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 42, 43, 94, 95, *and* 96.—The appellant was the owner of certain cottages which were built in 1888, and which he purchased in May, 1897.

Between the months of March and October, 1896, typhoid fever occurred in some of these cottages, which were fitted with double privy middens. During the time that elapsed between the time that the patients were attacked and the notification to the authorities, the excreta of the patients were put in the privy middens to the knowledge of the authorities, which authorities had undertaken the cleansing of these privy middens under section 42 of the Public Health Act, 1875.

Upon the notification of the disease the local authorities supplied covered pails, and superintended the disinfecting of the places infected by such excreta; but these measures failed to get rid of and destroy the typhoid germs, and would never do so, though they might have been destroyed when the excreta were first placed there. The presence of these germs constituted a nuisance, and the local authorities then caused a notice to be served upon the appellant, under section 94 of the Public Health Act, 1875, to abate this nuisance.

Upon non-compliance with this notice an order was made by the petty sessions requiring the appellant to comply with the notice.

Held, that the appellant was not liable under the Public Health Act to abate this nuisance, and the complaint therefore must be discharged.—BARNETT *v.* LASKEY, *Q.B.D.*; 68 L. J. Q. B. 55; 79 L. T. 408.

17. *Public health — Privies—Power to require sufficient water-closet to be provided in place of a privy — Injunction — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 35, 36, 268.—Section 36 of the Public Health Act, 1875 — which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, earth-closet, or privy, and an ashpit, or either of them, and, in case of non-compliance, empowers the local authority to do the necessary works and recover the expenses—does authorize the local authority to order a sufficient water-closet to be provided in place of a privy, where the existing accommodation is insufficient.—NICHOLL *v.* EPPING URBAN DISTRICT COUNCIL, *Ch.D. Stirling, J.*, 457; [1899] 1 Ch. 844; 68 L. J. Ch. 393; 80 L. T. 515.

18. *Public health — Water - closets — Entry on premises—Order for—Justices—Jurisdiction—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 36, 305.—Where an application is made under section 305 of the Public Health Act, 1875, to a court of summary

jurisdiction for an order authorizing a local authority to enter upon premises for the purpose of making a sufficient water-closet there in pursuance of the powers given by section 36, the court has no jurisdiction to entertain an objection by the owner of the premises that such entry is unnecessary because they are already provided with sufficient sanitary appliances.—ROBINSON *v.* SUNDERLAND CORPORATION, *Q.B.D.*; [1899] 1 Q. B. 751; 68 L. J. Q. B. 330; 80 L. T. 262.

19. *Quarter sessions borough with population over* 10,000—*New county bridges—Liability for costs of—Special and general expenses of county—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 6, 35 (1) (2). —A quarter sessions borough with a population over 10,000 is not liable under the Local Government Act, 1888, to contribute rateably to the costs incurred by the county in erecting, maintaining, or repairing new county bridges—*i.e.*, county bridges taken over or newly erected since the passing of that Act.—BURY ST. EDMUNDS (MAYOR) *v.* WEST SUFFOLK COUNTY COUNCIL, *Q.B.D.*, 16; [1898] 2 Q. B. 246.

20. *Rating—Asylums board—Proportion between county and county boroughs—Assessable value—Rateable value—Principles of apportionment—Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16).—An asylums board in estimating the apportionment of the total amount necessary to be raised for the purposes of an asylums fund by contributions from the county and the county boroughs respectively, must do so in proportion to the assessable values of the county and county boroughs as ascertained by the Agricultural Rates Act, 1896, and the regulations the Local Government Board issued under that Act; and not as formerly, in the proportion to the rateable value of the county and county boroughs as ascertained in accordance with section 33 (2) of the Local Government Act, 1888.—LANCASHIRE ASYLUMS BOARD *v.* MANCHESTER CORPORATION, *Q.B.D.*, 361; [1899] 1 Q. B. 759; 68 L. J. Q. B. 320; 80 L. T. 533.

21. *Rating—General district rates—"Land covered with water"—Reservoir—Assessment at one-fourth of the net annual value—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55) *s.* 211, *sub-section* 1 (b)—*Practice—Appeal—"Criminal cause or matter"—Justices—Order for payment of general district rates—Case stated by justices—Civil debt—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Public Health Act*, 1875, *s.* 256—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35.—The judgment of the Queen's Bench Division upon a case stated by justices on summary proceedings taken before them under section 256 of the Public Health Act, 1875, for the recovery of general district rates, is not a judgment in a criminal cause or matter within section 47 of the Judicature Act, 1873, inasmuch as such rates are, by sections 6 and 35 of the Summary Jurisdiction Act, 1879, enforceable only as civil debts; and an appeal, therefore, lies to the Court of Appeal.

Seaman v. *Burley*, 45 W. R. 1, [1896] 2 Q. B. 344, distinguished.

A reservoir of a water company held to be "land covered with water" within the meaning of section 211 (1) (*b*) of the Public Health Act, 1875, and therefore assessable to general district rates at one-fourth of its annual value.

Reg. v. *Birmingham Waterworks Co.*, 1 B. & S. 84, 9 W. R. C. L. Dig. 76, approved.—SOUTHWARK AND VAUXHALL WATER CO. *v.* HAMPTON DISTRICT COUNCIL, *C.A.*, 177; [1899] 1 Q. B. 273; 68 L. J. Q. B. 207; 80 L. T. 1.

22. *Rating—Improvement commissioners—Limit of rate imposed by local Act—Alteration of boundaries by Local Government Board—Extension of jurisdiction of commissioners under local Act—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55) *s.* 207.—By the Crediton Improvement Act, 1836, after defining the limits of the town of Crediton for the purposes of the Act, the commissioners appointed thereunder were authorized to levy an annual rate on the occupiers of dwelling-houses within the limits of the Act not exceeding 2s. 1d. in the pound, and all persons assessed under the Act were released from liability for the repairs of highways without the limits of the Act.

By the Public Health Act, 1872, the district within the local Act became an urban district, and the commissioners became the urban authority.

The expenses incurred by them in the execution of the Sanitary Acts were, at the time of the passing of the Public Health Act, 1875, payable out of rates in the nature of general district rates leviable by them throughout the whole of their district.

At the time of the passing of the Local Government Act, 1894, the parish of Crediton was partly within and partly without the urban district of Crediton, but by a Confirmation Order of the Local Government Board in 1894 the urban district was extended so as to include the part of the parish outside the former urban district, and it was provided that the district should be deemed to have been extended before the passing of the Act of 1894.

The appellant was the occupier of a dwelling-house within the limits of the improvement Act of 1836.

In 1896 the Crediton Urban District Council made a rate for the whole district, including the added area, headed the "Crediton Improvement Rate for the year ending Midsummer, 1897."

The rate exceeded the amount in the pound limited by the improvement Act. It was made to defray expenses to be incurred by the council under the Public Health Act, 1875, including the purposes for which rates were leviable under the improvement Act; and was for the repair of highways, both within the limits of the improvement Act and also in the added area.

Held, by Smith and Romer, L.JJ. (Williams, L.J., dissenting), reversing the decision of the Queen's Bench Division (78 L. T. 351), that the rate was a good one, and was rightly headed.—HILL *v.* CREDITON DISTRICT COUNCIL, *C.A.*; 80 L. T. 861.

23. *Rating—Limit and exemption under local improvement Act—Limit removed by public Act—Effect on exemption—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 227.—By section 40 of the Bingley Improvement Act, 1867, the amount of the improvement rates that may be made by the commissioners without the consent of the ratepayers should not exceed 4s. in the pound, and with their consent 5s., provided that in respect of so much of any rate which might be made without the consent of the ratepayers as exceeded 2s. 6d. in the pound, or with their consent 3s. 6d., the occupier of any land used as a canal or towing-path for the same or as a railway, should be assessed in the proportion of one-fourth part only of the net amount of the annual value thereof.

By section 227 of the Public Health Act, 1875, it is enacted that any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by an urban authority in the execution of this Act.

Held, that this did not affect the rights of canal and railway owners to be rated in respect of one-fourth of the annual value only.—BINGLEY DISTRICT COUNCIL *v.* MIDLAND RAILWAY CO., *Q.B.D.*; 80 L. T. 725.

24. *Sewer constructed by landowner for his own profit—Vesting in local authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-section* 1.—By section 13 of the Public Health Act, 1875, "all existing and future sewers within the district of a local authority . . . except (1) sewers made by any person for his own profit . . . shall vest in and be under the control of such local authority."

Held, that a sewer constructed by quarry owners for the purpose of preventing surface water entering their quarry was not a sewer made by them for their profit.—SYKES & SON *v.* SOWERBY DISTRICT COUNCIL, *Q.B.D.*, 560; [1899] 1 Q. B. 979; 68 L. J. Q. B. 652; 80 L. T. 392.

25. *Sewers — Sanitary authority — Unauthorized connection of sewage drains—Private nuisance—Liability of sanitary authority—Form of injunction Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 21.—A householder has, under section 21 of the Public Health Act, 1875, an absolute right to connect his drains with the public sewers, and the local authority cannot legally prevent him.

Where householders have connected their sewage drains with the public sewers which, without any legal right so to do, discharge upon the land of a private owner, and thereby cause a nuisance to him, the local authority will not be restrained, at the suit of the owner, from "permitting," although they will be from "directing or authorizing" future connections of the kind complained of, to be made.

Ainley v. *Kirkheaton Local Board*, 60 L. J. Ch. 734, 40 W. R. Dig. 133, followed, in preference to *Charles* v. *Finchley Local Board*, 31 W. R. 717, L. R. 23 Ch. D. 867.—BROWN *v.* MAYOR, &c., OF DUNSTABLE, *Ch.D. Cozens-Hardy, J.*, 538; 68 L. J. Ch. 498; 80 L. T. 650.

26. *Sewers—Vesting in local authority—Sewer made by landowner "for his own profit"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-sections* 1, 15, 16, 17, 144—*Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 67, 68.—The word "profit" in section 13, sub-section 1, of the Public Health Act, 1875, is not to be restricted to a direct money payment. Accordingly a sewer which is not made for ordinary drainage purposes, but to enable the land on which it is made to be occupied more profitably, or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, is made for the "profit" of the owner within the meaning of the section, and does not vest in the local authority.

So held, in the case of a line of pipes laid down by the owner of a field adjoining a highway from a ditch bordering the highway to a disused gravel-pit in the field for the purpose of supplying water to the cattle fed in the field.

Minehead Local Board v. *Luttrell*, [1894] 2 Ch. 178, and *Ferrand* v. *Hallas Land and Building Co.*, [1893] 2 Q. B. 135, followed and applied.

Held, also, that as on the authority of *Croft* v. *Rickmansworth Highway Board*, [1888] 39 Ch. D. 272, the pit did not form part of the drainage system vested in the local authority, they had no power under section 67 of the Highway Act, 1835, to discharge surface water from the road into the pit, and were not entitled to enter upon the field in order to keep open the existing drain, or to make any other for the same purpose.—CROYSDALE *v.* SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL, *Ch.D. Stirling, J.*, 46 W. R. 667; [1898] 2 Ch. 515; 79 L. T. 26.

27. *Street—Plans, &c. — Amendment — Adjournment—Jurisdiction of justices—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.—When justices are asked to amend the plans, &c., submitted under the Private Street Works Act, 1892, by a local authority, they have, under section 8, jurisdiction to do so without expressly amending the original resolution of the local authority, and also without directing further notices to be given to persons affected who have had notice of the original scheme and have not given notice of objection. An order made in such circumstances, declaring the local authority entitled to a charge on the property of such persons for their proportion of the expenses, is therefore valid.

Semble, though section 6 gives the justices a discretion in such cases as to adjourning and directing further notices to be served, it is desirable, in cases of importance, that an adjournment should take place, and that notice should be given to persons affected who are not before the court.

Decision of Stirling, J. (*ante*, p. 328), affirmed.—TWICKENHAM DISTRICT COUNCIL *v.* MUNTON, *C.A.*, 660.

28. *Transfer—Transfer of part of one county to another county — Adjustment of liabilities — Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 62.—By an order made under the Local Government Act, 1888, part of the county of B. was transferred to the county of H. The portion so transferred contained no county bridges and no main roads.

Held, that the arbitrator appointed by the Local Government Board under section 62 had power to award to the county of B. a sum of money in respect of the loss to that county of an area which contributed to expenditure on bridges and main roads without involving the county in any corresponding outlay on its own account.—BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, RE, *Q.B.D.*; 68 L. J. Q. B. 417; 80 L. T. 85.

29. *Vestry — Qualification — Residence for twelve months—Temporary absence—Intention to return—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73).—Temporary absence, with an intention and right to return, does not prevent a qualification for vestryman being obtained by residence during twelve months. — STANFORD *v.* WILLIAMS, *Q.B.D.*; 80 L. T. 490.

30. *Water—Supply brought to reasonable distance from dwelling-house—Cost of communicating supply to house—Limit of cost—Liability of owner of house —Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 62 —*Public Health (Water) Act*, 1878 (41 & 42 *Vict. c.* 25, *s.* 3.—A rural sanitary authority brought a supply of water into a certain district and within a reasonable distance of a dwelling-house, and then required the owner of the house to make a communication of the supply to his house. The owner not complying, the local authority made the communication of the supply to the house at a cost exceeding the scale of charges which had been fixed by the Local Government Board under section 8 of the Public Health (Water) Act, 1878, for the compulsory supply of water within the district. The owner of the house having refused to pay to the authority in respect of the communication of the supply to his house more than the limit fixed by the Local Government Board,

Held, that the owner was bound to pay the whole

of the cost, as the provisions of section 3 of the Public Health (Water) Act, 1878, applied only to the bringing of the supply to a reasonable distance from the house, but did not apply to the communication of the supply to the house, and that, as to the latter, there was no limit of cost.—WEST LANCASHIRE RURAL COUNCIL *v.* OGILVY, *Q.B.D.*, 363; [1899] 1 Q. B. 377; 68 L. J. Q. B. 215; 80 L. T. 162.

See also Charity, 1; Highway, 1.

LOCKE-KING'S ACT:—

See Administration, 6; Mortgage, 9.

LONDON:—

See Metropolis, 1, 16.

LOTTERY:—

Prize competition—Prediction of number of births and deaths in London in a given week—Chance—Skill.—A newspaper proprietor advertised in his paper that a prize of £1,000 would be given to a person who correctly predicted the number of births (male and female) and deaths in London, as disclosed by the Registrar-General's returns, during the week in which the particular number of the paper was published. Each prediction had to be written on a voucher printed in the paper, and forwarded to the proprietor.

Held, that the competition was not a lottery.—HALL *v.* COX, *C.A.*, 161; [1899] 1 Q. B. 198; 68 L. J. Q. B. 167; 79 L. T. 653.

LUNACY:—

1. *Lunatic—Directing committee to accept a devise to lunatic upon condition of resettling other property—Jurisdiction of court—Benefit of lunatic—Pecuniary benefit—Statute* Prerogativâ Regis (17 *Edw.* 2, *stat.* 1, *c.* 10)—*Lunacy Act*, 1890 (53 *Vict. c.* 5).—The court has jurisdiction to order that the committee of a lunatic shall accept a devise made to the lunatic upon condition of resettling certain other property, and shall execute the resettlement. This jurisdiction arises from the inherent authority of the court, and is not affected by the Statute *Prerogativâ Regis* or by the Lunacy Act, 1890.

The court, in exercising its jurisdiction, ought to be guided by a consideration of what is for the benefit of the lunatic, but, *semble*, is not bound to regard only his pecuniary benefit.—SEFTON (EARL), RE, *Lun.*, 49; [1898] 2 Ch. 378.

2. *Practice—Receiver—Order appointing—Person of unsound mind not so found—Person "lawfully detained"—Expiry of period of detention—Effect of—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-section* 1 (c).—An order made by a Master in Lunacy under section 116, sub-section 1 (c), appointing a receiver and manager of the property of a person of unsound mind not so found, who at the date of the order was "lawfully detained" under a reception order, does not necessarily come to an end when the reception order expires and the person to whom it refers ceases to be lawfully detained; but a further order of the court is required to discharge it, and the court will not make such order unless satisfied that the person in question is no longer subject to the delusions which may have led to the detention.—S——, RE, *C.A.*; [1898] 2 Ch. 392; 67 L. J. 453.

3. *Property—Transfer of Consols—Form of order—Lunatic sole trustee—Stock—Vesting order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 136, *sub-sections* 1, 4; *ss.* 137, 142.—A person of unsound mind not so found being sole trustee of a sum of Consols, the Judge in Lunacy, upon the application of A. B., made an order under the Acts of 1890 and 1891, that the right to call for a transfer of, and to transfer into his own name the Consols standing in the name of the lunatic, and to receive the dividends thereon, should vest in A. B., and that he should transfer the Consols into his own name to be held by him upon the trusts applicable thereto. The Bank of England refused to act upon an order in this form upon the ground that, under section 137 of the Lunacy Act of 1890, some proper officer of the bank should have been appointed to make the transfer.

Held, that the order made by the Judge in Lunacy was right, and that the bank must act upon it, and must allow the Consols to be transferred accordingly.

In re Gregson, [1893] 3 Ch. 233, approved.

Per Chitty, L.J.—The 137th section of the Lunacy Act, 1890, applies, so far as the 136th is concerned, only to sub-section 4 thereof.—G——, RE (No. 1), *C.A.*; [1898] 2 Ch. 324.

See also Justices, 3; Libel, 2; Trustee, 10.

MANDAMUS.—See Patent, 6.

MARRIED WOMAN:—

1. *Policy under Married Women's Property Act*, 1870—*Appointment of trustees—Title of petition.*—Where a husband effected a policy in favour of his wife under the provisions of the Married Women's Property Act, 1870, a petition for the appointment of trustees need not be entitled "In the Matter of the Married Women's Property Act, 1882."

In re Turnbull, 46 W. R. 3, [1897] 2 Ch. 415, and *In re Adams' Policy Trusts*, 31 W. R. 810, 23 Ch. D. 525, followed.—KUYPER'S POLICY TRUST, RE, *Ch.D. North, J.*, 236; [1899] 1 Ch. 38; 68 L. J. Ch. 10; 79 L. T. 486.

2. *Separate estate—Contract made during coverture—Liability after death of husband—Form of judgment—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.—A married woman entered into a contract before the passing of the Married Women's Property Act, 1893, and was sued upon it after the death of her husband.

Held, that the form of the judgment against her must limit the execution to such property as during her coverture was her separate property not subject to any restriction against anticipation.—SOFTLAW *v.* WELCH, *C.A.*, 626.

3. *Will—Assent of husband—Husband proving will—Practice of Probate Division.*—Where a married woman, who had no power of disposition by will except with the assent of her husband, bequeathed all her property to her husband, subject to the payment of a legacy of £10,000, and appointed him sole executor,

Held, that, as probate of a married woman's will is now granted only in general terms, the husband did not by merely proving the will thereby assent to the dispositions it contained.

Held, also, on the construction of the will, that, whether or not the husband had assented, it did not dispose of the property, which would have gone to the husband if the testatrix had not made a will.

Decision of Stirling, J. (46 W. R. 439), affirmed.—ATKINSON, RE, WALLER *v.* ATKINSON, *C.A.*, 469; [1899] 2 Ch. 1; 68 L. J. Ch. 404; 80 L. T. 505.

4. *Will—General power—Appointment in discharge of debt—Erroneous statement of indebtedness—Administration—Assets—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 4.—Where a married woman, having under a settlement a general power of appointment by will, made a will and

directed her trustees to pay legacies, including one of £1,100 to D. in satisfaction of a debt due from testatrix to D., and subject thereto, the testatrix, in exercise of the power under the settlement, appointed a life interest in the trust funds to her husband; and where the testatrix's estate was insolvent, and the debt of £1,100 was not due from the testatrix to D., but from her husband to D., and the husband, after the wife's death, paid the debt of £1,100 to D.,

Held, (1) that, the debt of £1,100 being the husband's, the legacy of £1,100 was perfectly effective at date of testatrix's death, and payment of the debt by the husband did not make any difference; (2) that a valid appointment was made of the £1,100, and, by section 4 of the Married Women's Property Act, 1882, the other property not being sufficient to pay debts, that the legacy must go for that purpose.—HODGSON, RE, DARLEY *v.* HODGSON, *Ch.D. North, J.*, 443; [1899] 1 Ch. 666; 68 L. J. Ch. 313; 80 L. T. 276.

See also Bankruptcy, 18; Justices, 4, 5; Practice, 32; Probate, 7-9.

MASTER and SERVANT—

1. *Contract—Breach—Continuance of employment—Proceedings for damages—Waiver—Employers and Workmen Act*, 1875 (38 & 39 *Vict.* c. 90).—On the hearing of a complaint under the Employers and Workmen Act, 1875, for damages for breach of contract by the appellants against the respondent a miner, it was admitted that the appellants had continued since the date of such breach to employ the respondent upon the terms of such contract.

Held, that that amounted to no waiver or release with regard to the claim for damages.—WYNNSTAY COLLERIES CO. *v.* EDWARDS, *Q.B.D.*; 79 L. T. 378.

2. *Dismissal—Negligence.*—The question whether a single act of forgetfulness on the part of a servant will justify his dismissal without notice depends upon the character of the act.

A workman having the charge of a valuable machine, through forgetfulness, caused damage to the machine to the extent of £30.

Held, that his employer was justified in dismissing him without notice.—BASTER *v.* LONDON AND COUNTY PRINTING CO., *Q.B.D.*, 639; [1899] 1 Q. B. 901; 68 L. J. Q. B. 622; 80 L. T. 757.

3. *Employment—Accident—Arbitration—Jurisdiction of county court judge—New trial—Workmen's Compensation Act*, 1897 (60 & 61 *Vict.* c. 37), *s.* 1, *sub-section* 3; *Schedule II.*, *ss.* 2, 4—*Workmen's Compensation Rules*, 1898, *rr.* 1 (4), 24, 64.—A county court judge has no jurisdiction to grant a new trial in an arbitration under the Workmen's Compensation Act, 1897.—MOUNTAIN *v.* PARR, *C.A.*, 353; [1899] 1 Q. B. 805; 68 L. J. Q. B. 447; 80 L. T. 342.

4 *Employment — Accident — Building — Building exceeding thirty feet in height—Building being constructed or repaired by means of a scaffolding—Alteration of building—Scaffolding inside building—Workmen's Compensation Act*, 1897 (60 & 61 *Vict.* c. 37), *s* 7, *sub-sections* 1, 2.—In an application for compensation under the Workmen's Compensation Act, 1897, it appeared that the employers had undertaken to strengthen the structure of a recently-built stable by the insertion of iron stays, the building being twenty-eight feet high measured to the top of the upright walls and thirty-six feet high measured to the top of the roof, and that the deceased workman, at the time of the accident, was standing on a temporary structure set up inside the building, consisting of three planks placed on two trestles, the planks being eight feet above the ground.

Held, that the stable was a building which exceeded thirty feet in height within the meaning of section 7 of the Act, but that it was not a building which was being either constructed or repaired by means of a scaffolding within the meaning of the section.—HODDINOTT *v.* NEWTON, &C. (LIMITED), *C.A.*, 499; [1899] 1 Q. B. 1018; 68 L. J. Q. B. 495; 80 L. T. 558.

5. *Employment — Accident — Building — Building over thirty feet in height—Building on which machinery is used—Workmen's Compensation Act*, 1897 (60 & 61 *Vict.* c. 37), *s.* 7, *sub-section* 1.—According to the true construction of section 7, sub-section 1, of the Workmen's Compensation Act, 1897, employment on a building on which machinery is used for the purpose of the construction, repair, or demolition thereof, is within the Act, although the building does not exceed thirty feet in height.—MELLOR *v.* TOMKINSON, *C.A.*, 240; [1899] 1 Q. B. 374; 68 L. J. Q. B. 214; 79 L. T. 715.

6. *Employment—Accident—"Building which exceeds thirty feet in height"—Building being constructed to exceed thirty feet in height—Building at time of accident not exceeding that height—Workmen's Compensation Act*, 1897 (60 & 61 *Vict.* c. 37), *s.* 1, *sub-section* 1; *s.* 7, *sub-section* 1.—By section 7, sub-section 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment . . . on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished."

Held, that the Act does not apply to employment on a building in course of erection which, at the time of the accident, does not exceed thirty feet in height, but which, when completed, will exceed that height.—BILLINGS *v.* HOLLOWAY, *C.A.*, 105; [1899] 1 Q. B. 70; 68 L. J. Q. B. 16; 79 L. T. 396.

7. *Employment — Accident — Building being "repaired by means of a scaffolding"—Painting outside of house by means of ladders—Workmen's Compensation Act*, 1897 (60 & 61 *Vict.* c. 37), *s.* 7, *sub-section* 1.—By section 7, sub-section 1, of the Workmen's Compensation Act, 1897, the Act is to apply to employment on, in, or about any building exceeding thirty feet in height which is either being "constructed or repaired by means of a scaffolding."

Held, that painting the outside of a building by means of ladders, including the preparation of the surface for painting, is not "repairing" the building by means of a "scaffolding" within the meaning of section 7, sub-section 1, of the Act.—WOOD *v.* WALSH & SONS, *C.A.*, 504; [1899] 1 Q. B. 1009; 68 L. J. Q. B. 492; 80 L. T. 345.

8. *Employment — Accident — Compensation — "Average weekly earnings"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict.* c. 37), *Sched. I.*, *cl.* 1 (b).—By Schedule I., clause 1 (*b*), of the Workmen's Compensation Act, 1897, the compensation under the Act shall be, "(*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

A workman was injured by an accident arising out of and in the course of his employment.

During the year preceding the accident the workman went out on strike, and his employment was thereupon terminated. After the strike was over he went back into the employment of the same employer under a new contract of employment, and remained there until the accident happened.

Held, that, in ascertaining the average weekly earnings for the purpose of assessing compensation, inasmuch as the employment before the strike was terminated, the period of employment subsequent to the strike could alone be considered.—JONES *v.* OCEAN COAL CO. (LIMITED), *C.A.*, 484; [1899] 2 Q. B. 124; 60 L. J. Q. B. 731; 80 L. T. 582.

9. *Employment—Accident—Compensation—Average weekly earnings—Break in employment—Period of actual employment—Claim to indemnity—Notice—Indemnity as between respondents—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1), (a), (i.)—*Workmen's Compensation Rules*, 1898, *rr.* 19-23.—A workman who was killed by an accident on the 27th of September, 1898, had been originally employed by his employers before the 27th of September, 1895, and from that date till March, 1896, he was earning wages of £2 10s. a week. There was then a break in his employment till February, 1897, when he commenced work again at wages of 30s. a week, and he continued to work at that rate of wages till his death.

Held, that, in calculating the amount of compensation to which his widow was entitled under the Workmen's Compensation Act, 1897, Schedule I. (1), (*a.*), (*i.*), the period of work before the break ought not to be taken into account, and that the award ought to be for 156 times 30s.

Where the respondents in an arbitration under the Workmen's Compensation Act are the undertakers and a person who has contracted with them, and the undertakers claim indemnity against the contractor, it is necessary, under rule 23 of the Workmen's Compensation Rules, 1898, to give notice of such claim in the same way as is required by rule 19 in the case where a claim to indemnity is sought against a third party.—APPLEBY *v.* HORSELEY CO. (LIMITED), *C.A.*, 614; 80 L. T. 853.

10. *Employment — Accident — Compensation — Average weekly earnings—"If he has been so long employed"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1), (*b*).—The words "if he has been so long employed" in Schedule I. (1), (*b*), to the Workmen's Compensation Act, 1897, mean "if he has been so long employed by the same employer," and not "if he has been so long employed in the same grade of employment."—PRICE *v.* MARSDEN, *C.A.*, 274; [1899] 1 Q. B. 493; 68 L. J. Q. B. 307; 80 L. T. 15.

11. *Employment—Accident—Compensation—Weekly payment—Wages the same after as before the accident—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., cl.* 2.—A workman, who lost his thumb in consequence of an accident arising out of and in the course of his employment, was received back after the accident into the employment of the same employer at the same rate of wages as before the accident, though he was not put at the same kind of work. The county court judge awarded him 2s. 6d. a week from the time when he resumed work after the accident.

Held, that, as the wages after the accident were the same as those before, there was no power at that time to award any weekly payment in respect of the period after the workman resumed work.—IRONS *v.* DAVIS & TIMMINS (LIMITED), *C.A.*, 616; [1899] 2 Q. B. 330; 68 L. J. Q. B. 673; 80 L. T. 673.

12. *Employment—Accident — Compensation—Disablement for two weeks from earning full wages—Payment of same wages after accident as before—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 2 (a).—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant was a foreman in the employment of the respondents, who were carpet manufacturers. His main work consisted in supervision, but he used also frequently to set up and adjust the machines. While adjusting a machine he received an injury to his thumb, which had to be amputated. He returned to his work the next day, but after the accident he was unable to set up or adjust the machines, and his work was confined to supervision. He received the same wages after the accident as before.

Held, that he was disabled for two weeks from "earning full wages at the work at which he was employed" within the meaning of section 1, sub-section 2 (*a*), of the Workmen's Compensation Act, 1897.

Held, also, that the proper course was to make a declaration of liability, and to adjourn the question of the amount and duration of compensation.—CHANDLER *v.* SMITH, *C.A.*, 677.

13. *Employment—Accident—Compensation—Dismissal of action under the Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42)—*Subsequent proceedings under the Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37).—Where a workman has brought an action against his employer to recover damages independently of the Workmen's Compensation Act, 1897, for personal injuries caused by accident, and the action is dismissed, the workman cannot subsequently take proceedings to recover compensation under the Act of 1897 in respect of the same injuries, the only remedy being to apply, under section 1, sub-section 4, of the Act of 1887, as soon as the previous action was dismissed, to the court in which the action was tried to assess compensation under the Act of 1897.—EDWARDS *v.* GODFREY, *C.A.*, 551; [1899] 2 Q. B. 333; 68 L. J. Q. B. 666; 80 L. T. 672.

14. *Employment — Accident — Compensation — Persons entitled—"Dependants"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2.—A boy who earned 8s. a week lived at home with his father and mother and five brothers and sisters. The father earned 25s. a week, and two sisters together earned 19s. a week. These earnings were all put together into a common fund.

Held, that there was evidence that the father and mother were "in part dependent" upon the earnings of the boy within section 7, sub-section 2, of the Workmen's Compensation Act, 1897.—DAVIES *v.* MAIN COLLIERY CO., *C.A.*; 80 L. T. 674.

15. *Accident—Compensation—"Serious and wilful misconduct"—Breach of rules of mine—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1 (2) (c).—Breaches of the rules made under the Coal Mines Regulation Act, 1887, committed by a workman employed in a coal mine, do not necessarily amount to "serious and wilful misconduct" within the meaning of section 1 (2) (*c*) of the Workmen's Compensation Act, 1897.—RUMBOLL *v.* NUNNERY COLLIERY CO., *C.A.*; 80 L. T. 42.

16. *Employment—Accident—Dependants—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2; *Sched. I., s.* 1.—"Dependants" within the meaning of section 7, sub-section 2, and Schedule I., s. 1, of the Workmen's Compensation Act, 1897, must have been wholly or in part

dependent upon the earnings of the workman for the ordinary necessaries of life, having regard to the class and position in life of the parties.

The question whether the applicants in any case were dependants in this sense is a question of fact to be decided by the arbitrator.—SIMMONS *v.* WHITE, *C.A.*, 513; [1899] 1 Q. B. 1005; 68 L. J. Q. B. 507; 80 L. T. 344.

17. *Employment—Accident—"Factory"—Unloading ship by means of crane on quay—Injury to workman on ship—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1.—A workman was employed by shipowners on board a ship to assist in unloading cases of cartridges by means of a crane on to a quay. The crane, which was standing on the quay, was worked by means of a chain, at the end of which was attached a basket. The workman placed the cases in the basket, and the basket and its contents were hoisted on to the quay. When one of the cases was being placed in the basket, it exploded and killed the workman. Upon a claim by his widow for compensation under the Workmen's Compensation Act, 1897,

Held, that the workman was killed by an accident arising out of, and in the course of, his employment in or about machinery used in the process of unloading on to a quay within the meaning of the Act; and that, therefore, the Act applied.—WOODHAM *v.* ATLANTIC TRANSPORT CO., *C.A.*, 105; [1899] 1 Q. B. 15; 68 L. J. Q. B. 17; 79 L. T. 395.

18. *Employment—Accident—Factory—Wharf—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2—*Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *s.* 68—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *ss.* 18, 23.—A workman was killed by an accident which happened in a public street just outside his employers' wharf, while he was leading a horse and cart out of the wharf in the course of his employment. The wharf was a simple yard by the side of a canal, and no machinery of any kind was used on it.

Held, that the wharf was not a factory within the meaning of the Workmen's Compensation Act, 1897, for it did not come within the definition of "factory" in section 7, sub-section 2, as being a wharf to which any provision of the Factory Acts was applied by the Factory Act, 1895.

The provisions of section 18 of the Factory Act, 1895, with respect to accidents were not applied to it by section 23 of that Act, for no accident had occurred on the wharf; neither were the provisions of section 68 of the Factory Act, 1878, with respect to the powers of inspectors thereby applied to it.—HALL *v.* SNOWDON, HUBBARD, & CO. (No. 2), *C.A.*, 486; [1899] 2 Q. B. 136; 68 L. J. Q. B. 645; 80 L. T. 554.

19. *Employment—Accident—Employment on or in or about a factory—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—In an arbitration under the Workmen's Compensation Act, 1897, it was proved that the deceased was a carter in the employment of the defendants, who were the occupiers of a timber yard, and that he was accidentally killed while engaged in stowing timber on a cart belonging to the defendants, which was standing immediately outside the defendants' premises.

The county court judge held that the deceased was employed "on or in or about" a factory within section 7, sub-section 1, of the Workmen's Compensation Act, 1897, and made an award in favour of the widow of the deceased.

Held, that the decision of the county court judge must be affirmed.—POWELL *v.* BROWN, *C.A.*, 145; [1899] 1 Q. B. 157; 68 L. J. Q. B. 151; 79 L. T. 631.

20. *Employment—Accident—Employment on or in or about a factory—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, it was proved that the applicant sustained personal injury in the course of his employment as a carter whilst delivering sacks of flour a mile and a-half away from his employers' factory.

The county court judge held that the employment of the applicant at the time of the accident was not "on or in or about a factory" within section 7, sub-section 1, of the Workmen's Compensation Act, 1897.

Held, that the decision of the county court judge must be affirmed.

Powell v. *Brown*, *ante*, p. 145, [1899] 1 Q. B. 157, referred to.—LOWTH *v.* IBBOTSON, *C.A.*, 506; [1899] 1 Q. B. 1003; 68 L. J. Q. B. 465; 80 L. T. 341.

21. *Employment—Accident—Employment on, in, or about a factory—Dock—Employment on ship lying in dock—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—Employment on a ship lying in a dock is not employment on, in, or about the dock so as to come within the Workmen's Compensation Act, 1897.—FLOWERS *v.* CHAMBERS, *C.A.*, 513; [1899] 2 Q. B. 142; 68 L. J. 648; 80 L. T. 834.

22. *Employment—Accident arising out of and in the course of the employment—"Factory"—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7.—A workman, who was employed at a steam-engine in a shed temporarily used in connection with the construction of a building close to, was killed by an accident while so employed. In proceedings to assess compensation under the Workmen's Compensation Act, 1897,

Held, that the shed was constituted a factory by section 23, sub-section 1 (*b*), of the Factory and Workshop Act, 1895, for the purpose of applying thereto the powers of the Act with reference to dangerous machines, and that therefore, by virtue of section 7, sub-section 2, of the Workmen's Compensation Act, 1897, the engine in the shed was itself a factory; and that, consequently, the deceased man was killed while employed "on or in or about a factory" within the meaning of section 7, and the employers were liable to pay compensation.—MCNICHOLAS *v.* DAWSON & SONS, *C.A.*, 500; [1899] 1 Q. B. 773; 68 L. J. Q. B. 470; 80 L. T. 317.

23. *Employment—Accident arising out of and in the course of employment—Questions of law—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, in respect of the death of a railway servant, who was killed in consequence of getting on to the foot-board of a train in motion to speak to a passenger, the county court judge found as facts that the deceased was, on the day of the accident, in the employment of the defendants, and that his day's duty was not finished at the time of the accident, but that he did not get on to the footboard for any object of the defendants, but only for his own pleasure.

Held, that, by section 1, sub-section 1, the Act only applied to accidents arising both out of the employment and in the course of the employment; and that, on the findings of the county court judge,

the accident did not arise out of the employment of the deceased.

In cases under the Workmen's Compensation Act, 1897, the Court of Appeal has jurisdiction to entertain questions of law only.—SMITH *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *C.A.*, 146; [1899] 1 Q. B. 141; 68 L. J. Q. B. 51; 79 L. T. 633.

24. *Employment—Accident arising out of and in course of employment—Workman injured on his way to his work—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37) *s.* 1, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the workman was in the employment of a firm of contractors, who had contracted with a railway company for the construction of a siding. While he was walking to his work, the weather being foggy, he was run over by a train and killed on the main line, about seven minutes before the time for the commencement of work, and at a distance of about 150 yards from the place of work.

Held, by A. L. Smith and Vaughan Williams, L.JJ. (Romer, L.J., dissenting), that there was nothing to justify the county court judge in holding that the accident arose out of and in the course of the workman's employment.—HOLNESS *v.* MACKAY & DAVIES, *C.A.*, 531; [1899] 2 Q. B. 319; 68 L. J. Q. B. 724; 80 L. T. 831.

25. *Employment—Accident arising out of and in the course of the employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the workman, who was a fireman employed in a mine, while in the course of his employment saw a horse belonging to his employer running away, and tried to stop it, and in so doing was knocked over and killed.

Held, that this was a case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master, and as such was within section 1, sub-section 1, of the Workmen's Compensation Act.—REES *v.* THOMAS, *C.A.*, 504; [1899] 1 Q. B. 1015; 68 L. J. Q. B. 539; 80 L. T. 578.

26. *Employment—"Accident arising out of and in the course of the employment"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—A workman was employed in pottery works to make the clay into balls, and to hand them to a woman who was at work at a machine moulding the clay. The workman had nothing to do with the machine, and was expressly told not to interfere with it. The workman, while the woman was temporarily absent from the machine, attempted to clean it, and his hand was caught in the machinery and injured.

Held, that the accident did not arise "out of and in the course of the employment" within section 1, sub-section 1, of the Workmen's Compensation Act, 1897, and that, therefore, the employer was not liable to pay compensation.—LOWE *v.* PEARSON, *C.A.*, 193; [1899] 1 Q. B. 261; 68 L. J. Q. B. 122; 79 L. T. 654.

27. *Employment—Accident to workman—Employment "on or in or about engineering work"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A workman was employed on a steam dredger in a harbour, part of his duty being to take a barge filled with mud which had been dredged up, a mile and a-half out to sea and to deposit the mud there. The workman, while depositing the mud a mile and a-half out at sea, was injured.

Held, that (assuming that the work carried on in the steam dredger constituted "engineering work" within section 7 of the Workmen's Compensation Act, 1897), the workman was not injured "on or in or about" the main locality of the engineering work, and was not, therefore, entitled to compensation.

The words "engineering work" in section 7 indicate locality.—CHAMBERS *v.* WHITEHAVEN HARBOUR COMMISSIONERS, *C.A.*, 533; [1899] 2 Q. B. 132; 68 L. J. Q. B. 740; 80 L. T. 586.

28. *Employment—Accident—Negligence—Common law liability of master—Defect in plant—Servant's knowledge of danger—Risk voluntarily incurred.*—A workman in the employment of the defendants was killed by a fall while descending in the course of his work, from an elevated tramway on the defendants' premises. In an action by his widow under Lord Campbell's Act, the jury found that the defendants did not exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks; that it was dangerous to descend from the tramway without the means of a ladder; that the deceased had the same means of knowing that it was dangerous as the defendants had; that he did know that it was dangerous; and that he had not been guilty of contributory negligence; and they assessed damages.

Held, that the plaintiff was entitled to judgment.—WILLIAMS *v.* BIRMINGHAM BATTERY CO., *C.A.*, 680; [1899] 2 Q. B. 338.

29. *Railway company—Scheme of compensation—Death from accident in course of duty—Disobedience—Accident while coming on duty.*—The Great Eastern Railway under statutory powers established an accident allowance fund. By the rules to regulate the fund it was provided: "The allowances to be paid . . . shall be as follows: . . . In case of the death of an insurer from any accident in the discharge of duties in the company's service . . . there shall be paid to the representative of the of the insurer . . . £130."

The action was brought by the widow of a workman under the following circumstances:

Before commencing work it was, according to the rule of the company, required of every workman to procure from an office at the works a ticket or cheque, which was to be delivered back at the end the day's work, and which operated as a voucher, and showed what wages he was to receive. This office could be approached by two footpaths, and workmen were expressly forbidden to cross the lines of rails. The deceased, on his way to get the ticket before he began his work, crossed the rails, and was knocked down by an engine and killed.

Held, that the death did not result from an accident in the discharge of duties in the company's service, and that the plaintiff could not recover.—VICKERY *v.* GREAT EASTERN RAILWAY CO., *Q.B.D.*; 79 L. T. 121.

30. *Servant hired from another person—Liability for the negligence of hired servant.*—The defendant kept his carriage and horses at a livery stable, and hired a man from the keeper of the livery stable to drive them; the driver being selected by the keeper of the livery stable. One day, when the defendant was out driving, owing to the negligence of the driver, the horse bolted and ran into and did damage to the plaintiff's shop. The driver was one who had driven the defendant continuously for some time, and he wore the defendant's livery, but he had only driven the horse in the shafts at the time of the accident some two or three times.

Held, that there was evidence on which a jury

could find that the driver was the servant of the defendant, so that the defendant was liable for his negligence.—JONES *v.* SCULLARD, *Q.B.D.*, 303; [1898] 2 Q. B. 565; 79 L. T. 386.

31. "*Workman*" — *Person employed in coal mine by contractor — Liability of mine-owner — Working "under a contract with an employer" — Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58) —*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.—By section 8 of the Employers' Liability Act, 1880, the expression "workman" means any person to whom the Employers and Workmen Act, 1875, applies; and by section 10 of the Act of 1875 a "workman" means "any person who, being a labourer, . . . miner, or otherwise engaged in manual labour, . . . has entered into or works under a contract with an employer," whether the contract be express or implied.

By the special rules of a colliery made under section 51 of the Coal Mines Regulation Act, 1887, the manager of the mine was made responsible for the control, management, and direction of the mine, and was to appoint such competent persons as might be necessary for carrying out the provisions of the Act, and all persons employed in or about the mine were to obey his directions; and the chargeman in each shift was to have charge of the sinking operations.

E. entered into a contract with the owners of the colliery to sink a shaft in their coal mine. By the contract E. (who was therein called the contractor) was to provide such sinkers, &c., as might be necessary for the execution of the work, and was to be paid a certain sum per fathom sunk. E. employed and paid the sinkers, he himself acting as "chargeman" in charge of the sinking operations. One of the sinkers, while engaged upon the work, was killed by a block of wood falling upon him, and his administratrix brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death.

Held, that E. was an independent contractor; that the deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the meaning of section 10 of the Employers and Workmen Act, 1875; and that therefore the Employers' Liability Act, 1880, did not apply.

Held, also, that the control given by the Coal Mines Regulation Act, 1887, and by the special rules of the mine, to the manager over all persons in the mine, did not make E. and the sinkers employed by him "workmen" in the employment of the colliery owners within the meaning of section 10 of the Act of 1875.—MARROW *v.* FLIMBY AND BROUGHTON MOOR COAL AND FIRE BRICK CO., *C.A.*; [1898] 2 Q. B. 588; 79 L. T. 397.

See also Contract, 5; Practice, 1.

MEDICAL PRACTITIONER:—

Licentiate of the Society of Apothecaries—Title of physician—Wilfully and falsely taking and using the same—Conviction by justices—Medical Act, 1858 (21 & 22 *Vict. c.* 90), *s.* 40—*Medical Act*, 1886 (49 & 50 *Vict. c.* 41), *s.* 6.—A licentiate of the Society of Apothecaries of London registered since the coming into operation of the Medical Act, 1886, and therefore, by section 6 of that Act, entitled to practise medicine, surgery, and midwifery, is not entitled to describe himself as a physician.—HUNTER *v.* CLARE, *Q.B.D.*, 394; [1899] 1 Q. B. 635; 68 L. J. Q. B. 278; 80 L. T. 197.

MERSEY DOCKS:—

"*Town dues*"—*Upper Mersey Dues Act*, 1860 (23 & 24 *Vict. c. cxxv.*).—By section 17 of the Upper Mersey Dues Act, 1860, the right to collect "town dues" was transferred from the Mersey Docks and Harbour Board to a separate body of trustees in respect of all goods "carried or conveyed upon, over, or along any part of the Upper Mersey," as therein defined.

Held, that the section applied to goods carried over any part of the Upper Mersey in the ordinary course of a voyage, not only to goods landed at some port in the Upper Mersey.—MERSEY DOCKS BOARD *v.* HUNTER, *H.L.*; 80 L. T. 96.

METROPOLIS:—

1. *London — Building — Approaches—Public-house —Partly used as dwelling-house—London Building Act*, 1894, *s.* 74, *sub-section* 2.—A fully-licensed public-house is not a building "used in part for purposes of trade or manufacture and in part as a dwelling-house," within section 74, sub-section 2, of the London Building Act, 1894, so that the means of approach to the part used as a dwelling-house need not be constructed of fireproof materials as required by that section.—CARRITT *v.* GODSON, *Q.B.D.*; [1899] 2 Q. B. 193; 68 L. J. Q. B. 799; 80 L. T. 771.

2. *London—Building—Building owner—Party wall —Notice—Sufficiency—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90.—A party-wall notice, given by a building owner to an adjoining owner under section 90 of the London Building Act, 1894, ought to be so clear and intelligible as to enable the adjoining owner to see what counter-notice he should give under the provisions of the Act.—HOBBS, HART, & CO. *v.* GROVER, *C.A.*; [1899] 1 Ch. 11; 62 L. J. Ch. 84; 79 L. T. 454.

3. *London—Buildings—Commencing to form or lay out a street—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 8.—The owner of a building estate, having erected a row of houses adjoining a street, sold a piece of land on the same side of the street to the respondent, who commenced to erect a row of houses in a line with the first row and fronting the street. A space of forty-feet, the statutory width of a street for carriage traffic, was left between the two rows of houses. In the house adjoining the space the respondent put a doorway and windows looking on to the space, and the sole means of access for carriages to the stables at the back of the premises was across the space. The respondent had no control over the space, which remained the property of the owner of the building estate. The space was marked in the building plan of the estate as "proposed street," but before the respondent erected his houses it had not been laid out as a street.

Held, that the respondent did not commence to form or lay out a street within the meaning of section 8 of the London Building Act, 1894.—LONDON COUNTY COUNCIL *v.* DIXON, *Q.B.D.*, 521; [1899] 1 Q. B. 496; 98 L. J. Q. B. 526; 80 L. T. 232.

4. *London — Building — Dangerous structures — Erection of shores and hoarding—Disturbance of pavement—Duty to restore pavement after hoarding removed—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 106, 107.—Where the London County Council, acting under the powers conferred on them by Part IX. of the London Building Act, 1894, have, for the purpose of securing a dangerous structure, erected shores and a hoarding, and have taken up portions of the pavement to allow of the

shores and the uprights of the hoarding being fixed in the ground, the duty of replacing the pavement after the shores and hoarding have been removed lies upon the owner of the premises and not upon the county council.—CRISP *v.* LONDON COUNTY COUNCIL, *Q.B.D.*; [1899] 1 Q. B. 720; 68 L. J. Q. B. 499; 80 L. T. 654.

5. *London—Building—Wooden structure—Exemption—Structure used in connection with traffic by railway company—London Building Act*, 1894, *s.* 86. —The appellants, coal merchants, were in the habit of having coal consigned to them by railway to London, where it was delivered at a wharf in the coalyard of the railway company. By leave of the railway company the appellants erected there a small wooden structure, which they used as a coal office. The use of this office by the appellants was a matter of convenience to the railway company, as it facilitated the clearing of the coal-trucks from the company's sidings.

Held, that the structure in question was "used in connection with the traffic of the railway company" within the meaning of section 86 of the London Building Act, 1894, and that the sanction of the London County Council to its erection was not required under section 84.—ELLIOTT *v.* LONDON COUNTY COUNCIL, *Q.B.D.*; [1899] 2 Q. B. 277; 68 L. J. Q. B. 837.

6. *London County Council (Improvement) Act*, 1897, *s.* 43, *Part III.—Construction.*—In considering what property is liable to an improvement charge under the London County Council (Improvement) Act, 1897, s. 43, Part III., it is sufficient if part of the property held as a whole abuts on the street to which the improvement applies.—OXFORD MUSIC HALL *v.* LONDON COUNTY COUNCIL, *Ch.D. North, J.*, 297; [1898] 2 Ch. 491; 79 L. T. 22.

7. *Management — County council — Bye-law — Gaming—Betting—Repugnancy between bye-law and statute—Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 23—*Municipal Corporations Act*, 1882, *s.* 23 —A bye-law made by the London County Council prohibiting under a penalty any person from frequenting and using any street or other public place for the purpose of bookmaking, betting, or wagering, is a reasonable bye-law, and one that can properly be made under section 23 of the Municipal Corporations Act, 1882, for the good rule and government of the district; and there is no inconsistency or repugnancy between the bye-law and the statutory provision contained in section 23 of the Metropolitan Streets Act, 1867, which says that "any three or more persons assembled together in any part of a street within the Metropolis for the purpose of betting shall be deemed to be obstructing the street," and shall be liable to a penalty.—WHITE *v.* MORLEY, *Q.B.D.*, 583; [1899] 2 Q. B. 34; 68 L. J. Q. B. 902; 80 L. T. 761.

8. *Management—Highway—Lowering surface of road—Water company—Water pipes left insufficiently covered—Duty of local authority—Injunction—Damages—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 98.—A local authority which, in exercise of the powers conferred by section 98 of the Metropolis Management Act, 1855, lowers the surface of a road so as to leave pipes belonging to a water company insufficiently covered, is not bound to alter the position of the pipes so as to secure to them adequate protection.—SOUTHWARK AND VAUXHALL WATER CO. *v.* WANDSWORTH BOARD OF WORKS, *C.A.*, 107; [1898] 2 Ch. 603; 79 L. T. 132.

9. *Management—New building—Drainage—Building for the use of volunteers—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 75.—The appellants served a summons under section 75 of the Metropolis Management Act, 1855, upon the respondent, a builder, alleging that he had neglected to comply with their order that the lowest floor of a building in course of construction to be used as an armoury, storehouse, and drill hall by the 2nd Volunteer Battalion of Royal Fusiliers, and vested in their commanding officer, should be kept at such a level as would allow it to be drained into the public sewers.

The magistrate dismissed the summons on the ground that the premises were exempted from the provisions of the Act as being property vested in a servant of the Crown to be used exclusively for Crown purposes.

Held, on appeal, that the building was not exempt because it was intended for volunteer purposes, and that the matter must be remitted to the magistrate.—ST. MARGARET'S AND ST. JOHN'S VESTRIES *v.* HOSKINS, *Q.B.D.*, 649; 68 L. J. Q. B. 840.

10. *Management—Paving expenses—New street—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.—The word "street" in the expression "new street" in section 105 of the Metropolis Management Act, 1855, is used in its popular sense —viz., of a road having buildings erected on the adjoining land.

Judgment of the Queen's Bench Division (*ante*, p. 9) affirmed.—ALLEN *v.* FULHAM VESTRY, *C.A.*, 428; [1899] 1 Q. B. 681; 68 L. J. Q. B. 450; 80 L. T. 253.

11. *Management — Sewer — Drain — Injunction.*—The plaintiffs, the Vestry of St. M. L., in the county of L., brought an action against the Urban District Council of H., which is outside the county of L. for an injunction to restrain the defendants from permitting their drains and sewers to be connected with the plaintiffs' sewer; also an injunction to prevent any future connection.

Held, that the court had no jurisdiction to compel the defendants to do their duty; further, if the court were by injunction to compel the defendants to disconnect their drains and sewers from the plaintiffs' sewer, it would create a public nuisance. Action dismissed with costs.—ST. MARY, ISLINGTON, VESTRY *v.* HORNSEY LOCAL BOARD, *Ch.D. Kekewich, J.*; 80 L. T. 746.

12. *Management — Sewer — Drain — Liability to repair—Drainage by combined operation—Deviation from plan sanctioned—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.—A plan for draining a group of houses by a combined operation was sanctioned by the vestry. The course of one of the pipes indicated in the plan, which drained more than one of the houses, was in the laying of it altered so as to run within a few feet of the course indicated in the plan.

Held, that the pipe was a drain and not a sewer within the meaning of section 250 of the Metropolis Management Act, 1855, the number of houses draining into it not being added to or interfered with by the deviation from the plan sanctioned.—GREATER LONDON PROPERTY CO. (LIMITED) *v.* FOOT, *Q.B.D.*, 541; [1899] 1 Q. B. 972; 68 L. J. Q. B. 628; 80 L. T. 390.

13. *Management—Streets—Costermonger—Exposing for sale on carriage-way—Metropolitan Police Act*, 1839 (2 & 3 *Vict. c.* 47), *s.* 60, *sub-section* 7—*Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 *Vict. c.* 5), *s.* 1—*Police Regulations of the 28th of December*, 1869.—By section 60, sub-section 7, of

2 & 3 Vict. c. 47, "Every person who shall expose anything for sale . . . upon or so as to hang over any carriage-way or footway . . . so as to cause annoyance or obstruction in any thoroughfare within the Metropolitan police district, shall be liable to a penalty of not more than forty shillings."

By regulation 6 of the Police Regulations dated the 28th of December, 1869, and made under the Metropolitan Streets Act Amendment Act, 1867, it is provided that costermongers and others and their barrows are thereby made liable to be removed from any street and public way in which they cause an obstruction to the traffic, or where they are an annoyance to the inhabitants.

Held, that section 60 and the above regulation do not cover the same ground, and that section 60 was not impliedly repealed by the regulations, nor was the penalty provided for by the said section superseded by them.—WANDSWORTH BOARD OF WORKS *v.* PRETTY, *Q.B.D.*, 256; [1899] 1 Q. B. 1; 68 L. J. Q. B. 193.

14. *Management—Street—Costermonger — Obstruction—Police.*—Where a costermonger causes an annoyance or obstruction within section 60, subsection 7, of the Metropolitan Police Act, 1839, a private person aggrieved by such annoyance or obstruction may take out a summons to recover the penalty imposed by that section.—REG. *v.* FRANCIS, WALTON, EX PARTE, *Q.B.D.*; 68 L. J. Q. B. 609.

15. *Management — Street — Permanent paving of party by local authority—"New street"—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 98 *and* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.—The fact that the local authority have, under section 98 of the Metropolis Management Act, 1855, permanently paved and channelled the footway before a number of houses fronting a country road will not estop them afterwards when that country road has, by having houses built continuously, and nearly continuously on both sides of it, become a new street, from exercising the powers given by secton 105 of that Act by directing the footways on both sides to be permanently paved and channelled, and apportioning the estimated cost among the frontagers, including among these the owners of the houses before which the footpath was previously paved and channelled under section 98.

"New street" within section 112 of the Metropolis Management Amendment Act, 1862, explained.—CROSSE v. WANDSWORTH BOARD OF WORKS, *Q.B.D.*; 79 L. T. 351.

16. *Management — Street — Subsoil — Extent of ownership—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 96—*Illegal breaking up of street—Mandatory injunction.*—Held, that the decision of the House of Lords in *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, as to the extent to which the soil of a street is vested in a local authority, under section 149 of the Public Health Act, 1875, applies to the similar vesting in a local authority under section 96 of the Metropolis Management Act, 1855, so that the soil of a street is vested in a vestry under section 96 only so far "as is necessary for the control, protection, and maintenance of the street as a highway for public use."

An electric lighting company had illegally broken up the surface of a street within the district of a vestry in the metropolis, and placed their pipes and wires at a depth of about two feet below the surface.

Held, that the vestry were not by virtue of section 96 the owners of the soil of the street at that depth, and that, although the company had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel the company to remove their pipes and wires, there being no continuing trespass upon or interference with any right of the vestry.

Decision of Jeune, P., reversed.—ST. MARY, BATTERSEA (VESTRY OF) *v.* COUNTY OF LONDON AND BRUSH PROVINCIAL ELECTRIC LIGHTING CO., *C.A.*; [1899] 1 Ch. 474; 68 L. J. Ch. 238; 80 L. T. 31.

17. *Management—Streets—Widening—Compulsory purchase—Corporation—Power of corporation to take part of house—Injunction—Owner—Right of owner to retain part not required—Michael Angelo Taylor's Act* (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.—Where the Corporation of the City of London *bonâ fide* adjudged that part of a house obstructed and prevented the widening of a street, and served a notice on the owner to purchase and compulsorily acquire, under sections 80 and 82 of Michael Angelo Taylor's Act, the whole of the house,

Held, that, as the corporation failed to show that the part of the house remaining after they had taken as much as was absolutely required for the widening of the street would be useless to the owner, the owner was entitled to retain that part; and injunction granted restraining the corporation from acting on the notice to take the whole.

Gordon v. *The Vestry of St. Mary Abbotts, Kensington*, 38 SOLICITORS' JOURNAL, 580, [1894] 2 Q. B. 742, considered and explained.—ALDIS *v.* CITY OF LONDON CORPORATION, *Ch.D. Kekewich, J.*, 514; [1899] 2 Ch. 169; 80 L. T. 683.

18. *Management — Street — Widening — Land—Houses—Severance—Right of pre-emption—Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96.—A local authority, on the 27th of January, 1899, requiring about 11ft. from two houses for the purpose of widening a street, agreed to sell such portions of the houses as were not required to the owner of warehouses on the opposite side of the street.

On the 15th of February, 1899, the local authority, by resolution, made an adjudication, and, on the 16th of February, gave the owner of the two houses notice to treat.

The owner brought this action against the local authority.

Held, that the defendants, at the time they gave notice to treat, having a purchaser ready, and not having given the plaintiff the option of purchasing the portions of his houses not required for the widening of the street, the adjudication of the 15th of February, 1899, was wrong, and *ultra vires*, and there must be a perpetual injunction to restrain the defendants from proceeding on their notice to treat dated the 16th of February, 1899.—FEARNLEY *v.* LIMEHOUSE BOARD OF WORKS, *Ch.D. Kekewich, J.*; 68 L. J. Ch. 344; 80 L. T. 351.

19. *Management—Trespass by vestry—Laying of new drain—Compensation—Damages—Consent of London County Council—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 57, 59, 60, 69.—Where a metropolitan vestry acting on the reports of its officers had passed resolutions recorded on its minutes, and, in accordance with such resolutions, but without obtaining the leave of the county council, entered upon the plaintiff's premises and inserted a new system of drainage,

Held, that, on the proper construction of the Metropolis Management Act, 1855, the vestry had

committed a trespass, and had done an illegal act for which they were liable in damages; but, the plaintiff not having suffered injury, and having consented to the work, judgment was given for the vestry, the defendants, with costs.—LONG *v.* FULHAM VESTRY, *Ch.D. Kekewich, J.*, 56.

MIDDLESEX REGISTRY ACT.—See Bankruptcy, 27.

MINE:—

1. *Letting down surface—Right to support—Power to work.*—In the year 1865 Lady W., the plaintiff's predecessor in title, sold and conveyed to J. C. & Sons (Limited), at the price of £26,500, all the mines, veins, and seams of coal, iron, and other ores under certain hereditaments known as the S. Estate, containing 1,178 acres or thereabouts, together with full power to make, sink, and work all such pits, shafts, drifts, levels . . . and do all such other acts as might be deemed necessary or convenient for working, searching for, getting and raising the same and to do all other works and things which might be necessary or convenient for the purposes aforesaid, or any of them, doing as little damage as might be consistent with the due and proper carrying out of the said works. The deed contained a covenant by the company not to sink any shaft or drive any level which should or might weaken or damage any building on the vendor's lands, and to make satisfaction to be assessed as therein-mentioned for the spoil, or damage, or injury done to, in, and upon the said lands by the machinery for getting and raising the said coal, or by the sinking or working of any pit or shaft, or otherwise by virtue of or under the powers aforesaid.

The defendants in this action were lessees of J. C. & Sons (Limited). They were working on the long-wall system some of the deeper seams of coal under the S. Estate, and had caused some subsidence of the surface in places, but no substantial damage was proved.

The plaintiff brought this action for an injunction to restrain the defendants from working the coal so as to cause subsidence of the surface.

The defendants claimed a right to cause subsidence so long as they worked in a proper method. There was a conflict of evidence whether it was possible to work the coal at all without causing subsidence, but it was in effect admitted that it was not possible to do so at a profit.

Held, that the grant of the minerals did not expressly or by necessary implication give power to let down the surface, and the plaintiff was entitled to the injunction.—WESTMORELAND (EARL) *v.* NEW SHARLSTON COLLIERY CO., *Ch.D. North, J.*; 79 L. T. 716.

2. *Reservation from grant—Red rock and coal, neither of immediate commercial value—Injunction.*—The defendants were the lessees of certain lands under a lease dated the 30th of September, 1860, granted by the predecessor in title of the plaintiff, the lease containing the reservation, "except nevertheless and always reserved out of this demise all mines and minerals within or under the said land."

The defendants, in boring for water, had bored through a stratum of red rock and a layer of coal from six to eight inches in thickness, and the plaintiff moved for an injunction to restrain their so doing, on the ground that, although it was admitted that the red rock and coal could not be worked for profit at the present time, these substances were mines and minerals within the reservation.

Held, that the plaintiff was entitled to the injunction on the principle laid down in *Hext* v. *Gill*, 20 W. R. 957, L. R. 7 Ch. App. 699, and explained in *Earl of Jersey v. Guardians of the Poor of Neath Poor Law Union*, 37 W. R. 388, 22 Q. B. D. 555, that the substances in question were such as had "a use and a value of their own independent of and separable from the rest of the soil."—JOHNSTONE *v.* CROMPTON & CO., *Ch.D. Byrne, J.*, 604; [1899] 2 Ch. 190.

See also Inclosure, 1; Limitation Statutes, 5; Master and Servant, 15, 31.

MORTGAGE:—

1. *Equitable mortgage by deposit of title deeds—Subsequent conveyance by mortgagor without notice—Non-investigation of mortgagor's title—Priority.*—The plaintiff was an equitable mortgagee of five houses by deposit of the title deeds, accompanied by a written memorandum of deposit and undertaking by the mortgagor upon request of the plaintiff to execute a legal mortgage. The defendant was a subsequent purchaser for value from the mortgagor of three of the houses without actual notice of the prior charge, and at the time of her purchase she acquired the legal estate. She did not employ a solicitor, and personally took no part in the matter of the purchase, but left it to be carried out by a friend, who was formerly a solicitor's clerk, as her agent. No inquiry of any kind was made by the defendant or her agent as to the title of the vendor, and no abstract of title was called for or supplied. The agent stated that he made some inquiry as to the documents of title, and was told by the vendor that they related to other property as well as to the three houses, and he should not hand them over, but would enter into a covenant to produce them; but the judge was not satisfied that the agent's memory could be relied upon so far as he represented that he made a direct inquiry after the title deeds, and that the vendor replied that he had them. He did not ask and did not know what the documents of title were, and never asked to see them, and no document of any sort was produced before completion or handed over when the purchase-money was paid and the conveyance executed.

Held, that the defendant did not acquire a title to the three houses freed from the plaintiff's charge.—OLIVER *v.* HINTON, *Ch.D. Romer, J.*; 68 L. J. Ch. 94; 79 L. T. 729.

2. *Fictitious security—Knowledge of third party—Duty to disclose—Liability for damages for deceit.*—M. was fraudulently induced to advance money on mortgage to W. on the security of certain leases, which were subsequently proved to be fictitious. The leases had been previously mortgaged to C., who was paid off by M. when the latter advanced the money to W. At this date C. had become aware that the leases were fictitious, and that he had been defrauded by W., but he made no disclosure of this fact to M., and executed a reassignment to him of the so-called leasehold premises as if they had been genuine.

In an action by M. against W. and C., claiming damages against the latter for assisting in the fraud by which M. was induced to advance his money on the security of the fictitious leases, the personal security of W., who was now undergoing penal servitude, being valueless,

Held, that under the circumstances C. was liable to M. for the loss and damage so suffered by him, the amount to be ascertained by an inquiry in chambers.—MARNHAM *v.* WEAVER, *Ch.D. Romer, J.*; 80 L. T. 412.

3. *Foreclosure — Parties — Debenture - holders —*

"*Floating security.*"—The trustees of a company, by its authority, gave a legal mortgage in fee of its land to the plaintiffs. Subsequently the company issued debentures to secure principal sums and interest which were thereby charged on all its undertaking and present and future property. It was also provided that the debentures were "all to rank *pari passu* in point of charge as a floating security on the property" thereby charged. The principal moneys thus charged were only to become payable in certain events, none of which had happened.

The plaintiffs commenced a foreclosure action to which they made not only the trustees and the company, but also all the debenture-holders defendants. At the trial it was objected on behalf of the debenture-holders that they were unnecessarily joined as parties.

Held, that the debenture-holders had an immediate equitable charge; that the working out of a foreclosure decree in their absence was not a dealing with its property by the company in the ordinary course of its business; and that they were properly made parties to the action.—WALLACE *v.* EVERSHED, *Ch.D. Cozens-Hardy, J.*; [1899] 1 Ch. 891; 68 L. J. Ch. 415; 80 L. T. 523.

4. *Limitations, Statutes of* (21 *Jac.* 1, *c.* 16 *and* 3 & 4 *Will.* 4, *c.* 27, *s.* 42)—*Statute-barred arrears of interest—Statute-barred debt—Mortgage of reversion—Mortgagee the tenant for life—Foreclosure and redemption action—Accounts between mortgagor and mortgagee.*—A tenant for life, with the duty of keeping the property in repair, became mortgagee of the reversion. After her death her executors brought an action for foreclosure. The mortgagor counter-claimed for redemption and also for damages for non-repair, and he was held entitled to them. The tenant for life had lent him a sum of money greater than the amount of such damages, but this debt was statute-barred. There were arrears of interest owing under the mortgage deeds for more than six years.

Held, that the executors of the tenant for life could not treat the mortgagor as having been repaid his damages out of the statute-barred debt.

Held, also, that, in taking the accounts between mortgagor and mortgagees, all the arrears of interest must be brought in, and not merely those which had accrued within six years.—DINGLE *v.* COPPEN, *Ch.D. Byrne, J.*, 279; [1899] 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 693.

5. *Loan on faith of promise to transfer mortgage—Misrepresentations to lender—Part payment of mortgage with money lent—Equitable mortgage by deed to lender—Right of lender to charge on other property comprised in first mortgage—Merger.*—C., being entitled to two properties—namely, to No. 1 as trustee for his wife, and to No. 2 beneficially, with her consent mortgaged both to T. for £2,000. Afterwards C. asked M. to lend him £1,200 to pay off an existing mortgage on No. 1, and promised M. a transfer of the above mortgage, but did not disclose that No. 1 belonged to Mrs. C. or inform M. of the amount of, or the securities for, the first mortgage. M. advanced the £1,200, and C. applied £1,000 in paying to T. part of the £2,000 due to him. Later C. executed an equitable mortgage on No. 1 to M. to secure the £1,200.

Held, that, when M. advanced the £1,200 and the £1,000 was applied in payment to T., the charge on both the above properties to the extent of the £1,000 paid to T. was kept alive in equity in favour of M., but so as not to prejudice the rights of T. and Mrs. C.

Patten v. *Bond*, 37 W. R. 373, followed.

Held, also, that M. did not lose the benefit of such charge by taking the equitable mortgage executed by C. on No. 1, the charge thereby given not operating as a release or extinguishment of the prior charge, and there being no reason for presuming merger of the securities.

There is no merger at law, even of a lower in a higher security, if the remedy given by the latter is not co-extensive with that given by the former.—CHETWYND *v.* ALLEN, *Ch.D. Romer, J.*, 200; [1899] 1 Ch. 353; 68 L. J. Ch. 160; 80 L. T. 110.

6. *Personal property—Statutes of Limitations—Equitable mortgagee of shares in a limited company—Foreclosure—Statute-barred debt*—21 *Jac.* 1, *c.* 16, *s.* 3—3 & 4 *Will.* 4, *c.* 27, *s.* 34—37 & 38 *Vict. c.* 57.—One of two brothers (who had carried on business in partnership, and were entitled to shares in a limited company, the certificates of which were deposited with a bank to secure any overdraft on a current account) died in 1891, and the account was then closed, leaving a balance due to the bank. In 1898, no interest having in the meantime been paid and no acknowledgment of the debt given, the bank sued the surviving brother and the executor of the deceased brother to enforce their security; and, while the former defendant did not resist the claim, the latter objected that the debt was barred by analogy by the Statutes of Limitations.

Held, that the bank were entitled to the relief claimed, because there was no provision in any Statute of Limitations affecting the right of a mortgagee of personal property to enforce his security, and the mere fact that the personal claim could not be enforced did not deprive a mortgagee of his right to proceed against the property.—LONDON AND MIDLAND BANK *v.* MITCHELL, *Ch.D. Stirling, J.*, 602; [1899] 2 Ch. 161.

7. *Personalty—Covenant to make further advances—Further advances made by first mortgagee after notice of second mortgage—Priorities.*—In 1895 W. W. mortgaged his interest in personal estate under a will to the plaintiff, but the plaintiff gave no notice of the mortgage to the trustees of the will until 1897. In 1896 W. W. mortgaged his interest to X. and Y. to secure a sum then advanced, and also further advances which X. and Y. covenanted to make. X. and Y. duly gave notice to the trustees of the will of this mortgage, but had no notice of the plaintiff's mortgage until the 15th of February, 1897. They made further advances pursuant to the covenant both before and after the 15th of February, 1897.

Held (reversing Kekewich, J., 46 W. R. 362), that the principle of *Hopkinson* v. *Rolt*, 9 W. R. 900, 9 H. L. Cas. 514, applied, notwithstanding that the further advances were made pursuant to a covenant, and that X. and Y. were entitled to priority over the plaintiff only in respect of such of the further advances as were made prior to the date when they received notice of the plaintiff's mortgage.—WEST *v.* WILLIAMS, *C.A.*, 308; [1899] 1 Ch. 132; 68 L. J. Ch. 127; 79 L. T. 575.

8. *Power of sale—Duty of mortgagee exercising—Purchase of mortgaged property by solicitor of mortgagee—Private contract—Validity of sale.*—The executrix of a mortgagee, some months after his death, sold the property, which was reversionary, under the power of sale in the mortgage, to E., who had acted as solicitor for the mortgagee in regard to the mortgage and in regard to certain negotiations for selling the property and in proving the mortgagee's will. Notice of the sale was given to

N., the owner of the equity of redemption. N. thereupon asserted that he was entitled to the property, but took no step until, more than nine years afterwards, the reversion fell into possession. He then brought an action against the executors of E. to redeem the mortgage and to have the property assigned to him on payment of what was due for principal, interest, and costs.

Held, that, the sale being *bonâ fide* and a sufficient price having been paid, there was no ground for saying the transaction was null and void, and, assuming that it was voidable, there was no ground of which the plaintiff could avail himself for avoiding it.

The rules for a mortgagee exercising his power of sale laid down in *Farrar* v. *Farrars (Limited)*, 37 W. R. 196, 40 Ch. D. 395, and in *Kennedy* v. *De Trafford*, 45 W. R. 671, [1897] A. C. 180, considered and applied.—NUTT *v.* EASTON, *Ch.D. Cozens-Hardy, J.*, 430; [1899] 1 Ch. 873; 68 L J. Ch. 367; 80 L. T. 353.

9. *Public-house — Goodwill — Locke - King's Act*, 1854 (17 & 18 *Vict. c.* 113).—On a mortgage of a public-house the goodwill is not included unless expressly mentioned.—BENNETT, RE, CLARKE *v.* WHITE, *Ch D. North, J.*, 406; [1899] 1 Ch. 316; 68 L. J. Ch. 104.

10. *Real estate—Equitable sub-mortgage by deposit —Priority—Notice—Equitable sub-mortgagees of land.* —An equitable sub-mortgage by deposit of the original mortgage deeds of real estate confers on the equitable sub-mortgagees an interest in the land mortgaged, and, consequently, the doctrine of obtaining priority by the giving of prior notice, does not apply in such case.

In re Richards, Humber v. *Richards*, 39 W. R. 186, 45 Ch. D. 589, considered and followed.—HOPKINS *v.* HEMSWORTH, *Ch.D. Kekewich, J.*, 26; [1898] 2 Ch. 347.

11. *Realty and personalty—Indivisible security—Right to redeem realty barred—No right to redeem personalty—Real Property Limitation Acts*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 40; *and* 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—Where by a mortgage deed realty and a policy of insurance were conveyed and assigned respectively to the mortgagee as one indivisible security for the mortgage debt and subject to one and the same proviso for redemption, then, when the mortgagor's right to redeem the realty has been barred by the Statute of Limitations, his right to redeem the policy is also gone, because the security being one and indivisible, he cannot redeem part without redeeming the whole.

The Statutes of Limitations which refer to legal interests in realty, although applicable by analogy to equitable interests in realty, cannot be applied by analogy to property of an entirely different nature—viz., to personalty.—CHARTER *v.* WATSON, *Ch.D. Kekewich, J.*, 250; [1899] 1 Ch. 175; 68 L. J. Ch. 1; 79 L. T. 440.

12. *Receiver—Appointment by mortgagee of receiver —Extent of agency—Conveyancing Act*, 1881, *s.* 24—*Management of business—Payment of mortgagor's debts—Statute of Limitations.*—A receiver appointed under the terms of a power in a mortgage deed which extends the powers conferred by the Conveyancing Act, 1881, s. 24, to manage and carry on a business, is authorized to pay business debts of the mortgagor. This authority is not affected by the death of the mortgagor, and payment by the receiver of an instalment of a business debt contracted by the mortgagor operates as an acknowledgment of the whole debt by the executrix of the mortgagor, and prevents time running under the Statute of Limitations.

Decision of Byrne, J., *ante*, p. 174, affirmed.

Whether a receiver having no powers except those conferred on him by section 24 of the Conveyancing Act, 1881, could pay off an unsecured debt, *quære.* —HALE, RE, LILLEY *v.* FOAD, *C.A.*, 579; [1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827.

13. *Redemption—Collateral advantage — Covenant for payment of rents to mortgagee after time for payment of last instalment of principal—Notice to pay off —Tender after notice—Withdrawal of notice.*—There is no rule that a mortgagee may not stipulate for a collateral advantage, so that such advantage be fair and reasonable, and so that it do not prevent redemption on payment of principal, interest, and costs.

A provision in a mortgage which has the effect of preventing redemption on payment of principal, interest, and costs, in accordance with the bargain for payment thereof, is invalid, and cannot enable the mortgagee to maintain any action, whether in equity or at law.

A covenant in a mortgage of leaseholds for years, that the mortgagor would, during the residue of the leasehold term, notwithstanding that all principal moneys and interest might have been paid, pay to the mortgagee one-third of the net profit rent, with provisions for continuing the relative positions of mortgagor and mortgagee, and for continuing the mortgage for the purpose of securing the one-third,

Held, to be void as operating to prevent redemption.

A mortgagee who had given the mortgagor notice to pay off the principal moneys and interest owing on the mortgage,

Held, not entitled to withdraw the notice without the consent of the mortgagor.—SANTLEY *v.* WILDE, *Ch.D. Byrne, J.*, 297; [1899] 1 Ch. 747; 80 L. T. 154.

14. *Redemption—Collateral advantage to mortgagee—Restrictive covenant—Injunction.*—A mortgagor can always redeem on payment of principal, interest, and costs, and any bargain which is unconscionable will not be enforced; but a collateral agreement giving the mortgagee some collateral advantage, provided it is not unconscionable and does not clog the equity of redemption, is not invalid.

Jennings v. *Ward*, 2 Vern. 520, and *In re Edwards' Estate*, 11 Ir. Ch. Rep. 367, discussed and explained.

The defendant, being the owner of a public-house, mortgaged it to the plaintiff, with a proviso that the loan should continue for five years, and covenanted during the continuance of the security not to sell on the premises malt liquors other than those supplied by the plaintiff.

Held, that such a covenant was valid, and ought to be enforced by injunction.—BIGGS *v.* HODDINOTT, *C.A.*, 84; [1898] 2 Ch. 307; 79 L. T. 201.

15. *Redemption — Consolidation — Right of sole mortgagee to consolidate prior mortgage vested in him jointly with another.*—The right to consolidate two mortgages arises when the title of the mortgagees in respect to each mortgage can be shown to be vested in one and the same hand, and this fact must be established to bring into operation the doctrine of consolidation; consequently, in the case of a mortgage of freehold hereditaments in which A. and another were mortgagees advancing money on a joint account, and a second mortgage of the same hereditaments and certain leasehold premises in which A. was sole mortgagee, although there is a possibility of the

mortgages becoming vested in one and the same hand, namely, in A. upon his surviving his co-mortgagee, and notwithstanding the fact that A. could give a good receipt for the moneys secured on both mortgages, the doctrine of consolidation does not apply.—RILEY *v.* HALL, *Ch.D. Stirling, J.*; 79 L. T. 244.

16. *Transfer—Notice to mortgagor—Omission to give—Negligence—Collusive sale by mortgagor and mortgagee—Satisfaction of mortgage.*—The doctrine of *Williams* v. *Sorrell*, 4 Ves. 389, and *Norrish* v. *Marshall*, 5 Mad. 475, is not applicable as against a transferee of a mortgage where there has been collusion between mortgagor and mortgagee to pay the debt to the mortgagee.

W. having purchased and mortgaged to D., his vendor, certain land, built houses thereon and sold the houses to the plaintiff. Prior to the sale D. transferred the mortgage to the defendant. The conveyance to the plaintiff, to which both W. and D. were parties, recited (*inter alia*) that D., being seised for an unencumbered estate in fee simple in possession, agreed to sell to W. for £100, but that no conveyance had been executed, which recital was false to the knowledge of W. The purchase-money was paid to D., who retained a sum for principal, interest, and costs, but it was not shown to the satisfaction of the court how the sum was arrived at. The plaintiff had not actual notice of the defendant's security, and W. had not had notice of the transfer of the mortgage given him by the defendant, and denied knowledge of the transfer. D., who had been employed by the defendant to collect the interest on the defendant's mortgage, after paying interest on the mortgage for some years to the defendant, absconded, and nothing could be recovered from him.

Held, that, although payment-off of the mortgage debt to the mortgagee by a mortgagor after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee, as settled by the above-named cases, this doctrine ought not to be extended to a case where the money which was said to have been paid in satisfaction of the mortgage was part of the purchase-money procured by a false recital in the conveyance to the purchaser to the effect that there was not and never had been any mortgage; that the case must be treated as one of collusion between W. and D. to obtain the purchase-money by means of false recitals; and therefore that the retention of part of the purchase-money by D. was not equivalent to payment-off of any part of the mortgage.—DIXON *v.* WINCH, *Ch.D. Cozens-Hardy, J.*, 620.

17. *Undue influence—Presumption of—Parent and child—Absence of independent advice—Advance secured to father in embarrassed circumstances.*—In 1878 a widower, who was living with his four daughters, two of whom had recently attained twenty-one years of age and two were minors, was in embarrassed circumstances. He had mortgaged the life interest to which he was entitled under a certain will, and, his affairs having become more involved, bankruptcy proceedings were threatened. The eldest of the daughters, then about twenty-two years old, became acquainted with the circumstances, and in order to save her father from being adjudicated a bankrupt she was induced to mortgage her reversionary interest under the same will for the purpose of raising some money to pay his debts. She had no independent legal advice in the transaction. The mortgage was prepared by her father's solicitors, one of the firm being also one of the mortgagees. The mortgage was prepared upon the father's instructions alone before the solicitors had any interview with the daughter. The same solicitors also acted for the mortgagees. In 1881 the daughter became of unsound mind, and had ever since remained in that condition.

Upon the direction of the Master in Lunacy an action was brought on behalf of the daughter against A., the survivor of the mortgagees, and her father to set aside the mortgage of her reversionary interest on the ground of undue influence. The father died after the commencement of the action.

Held (*dissentiente* Williams, L.J.), that the transaction was set in motion by the father and was carried out by his influence over his daughter; that A., the mortgagee, had notice of the true position of affairs at the time of the mortgage; that A. could not therefore be regarded as a lender for value without notice; and that consequently the deed must be set aside on the principle established by cases such as *Archer* v. *Hudson*, 7 Beav. 551, at p. 560, and *Wright* v. *Vanderplank*, 2 K. & J. 1, 8 De G. M. & G. 133.

Bainbrigge v. *Browne*, 18 Ch. D. 188, distinguished on the ground that there the lenders had independent solicitors and had no notice of the facts.—DE WITTE *v.* ADDISON, *C.A.*; 80 L. T. 207.

See also Bill of Sale, 1; Inland Revenue, 31, 32; Landlord and Tenant, 20; Limitation Statutes, 7; Practice, 19; Settlement, 5; Trustee, 9.

NATAL, LAW of:—

1. Dolus malus—*Priority of unregistered transfer—Registered transfer set aside.*—In a suit against the executor dative of a deceased registered owner of lands in Natal and his transferee to set aside the transfer, it appeared that the plaintiff had taken a transfer from the owner in his lifetime, paid the purchase-money, and received the title-deeds, but had omitted to complete registration, though he had placed a resident agent in possession and management. It also appeared that the defendants had obtained orders from the court for delivery of certified copies of such title-deeds as having been lost, and for sale by the executor dative by private contract, concealing the fact that the occupier of the lands held under an alleged lawful possession which might possibly be accompanied by possession of the title-deeds, and thereafter effected and registered their transfer.

Held, that this constituted *dolus malus* within the meaning of Roman-Dutch law; that the said transfer must be set aside; and that the plaintiff had a *locus standi* to maintain the suit.—CROWLY *v.* BERGTHEIL, *P.C.*; [1899] A. C. 374; 68 L. J. P. C. 81; 80 L. T. 428.

2. *Practice—Appeal—Right of—Licensing officer—Jurisdiction of Supreme Court—Law* 18 *of* 1897, *ss.* 5 *and* 6—*Construction.*—Under Natal Law 18 of 1897, ss. 5 and 6, an appeal lies to the town council alone from a decision of its licensing officer.

No appeal lies from the decision of the town council. A summons for a writ of review thereof by the Supreme Court issued under Law 39 of 1896, s. 8, cannot in appeal be treated as for a writ of *certiorari* contrary to the plain intention of the parties and of the court below.—VAUDA *v.* NEWCASTLE CORPORATION, *P.C.*; [1899] A. C. 246; 68 L. J. P. C. 39; 79 L. T. 600.

NEGLIGENCE:—

1. *Injury causing death—Alien of British subject—Cause of action outside jurisdiction—Fatal Accidents Acts*, 1846 *and* 1864 (9 & 10 *Vict. c.* 93; 27 & 28

Vict. c. 95).—The provisions of the Fatal Accidents Acts, 1846 and 1864, by which damages can be recovered for death caused by negligence, do not apply for the benefit of aliens abroad, and therefore the representative of an alien whose death has been caused by the negligence of a British subject, outside the jurisdiction of the court, cannot maintain an action to recover damages in respect of the death.—ADAM *v.* BRITISH AND FOREIGN STEAMSHIP CO., *Q.B.D.*; [1898] 2 Q. B. 430; 79 L. T. 31.

2. *Principal and agent—Contractor—Dangerous work on highway—Liability of principal for negligence of contractor.*—The defendants were engaged in laying down wires in tubes under the pavement of a street. After the wires were laid the connections between the tubes were made by a plumber under a contract with the defendants, whereby he agreed to do the work to the satisfaction of the foreman in charge at a fixed sum per connection, the plumber to supply the necessary men and materials. The soldering material used for making the connections was melted in an iron pot on the foot pavement, and it was necessary, for the purposes of the work, to obtain a flare from a benzoline lamp, which was done by applying heat to the lamp. To obtain the flare the plumber's man plunged the lamp into the molten solder (this being a usual, proper, and necessary operation with a lamp in good order), when, in consequence of the safety-valve being out of order, the lamp exploded, and molten solder flew up and injured the plaintiff, who was passing by. The evidence was conflicting as to whether one of the defendants' men was assisting the plumber's man in the work.

In an action in the county court to recover damages for the negligence of the plumber's man in plunging a defective lamp into the metal, the judge found that the defendants had in substance the control of and supervised the work which the plumber did; that the plumber was in the position of a servant; and that the defendants were liable.

Held, that the judgment of the county court judge must be affirmed, because there was evidence that the work was being jointly executed by the defendants and the plumber, and that, therefore, the defendants were liable for the negligence of the plumber's man; and, further, assuming that the plumber was an independant contractor, that the defendants were executing on a highway works likely to cause danger to the public unless precautions were taken, and were, therefore, liable for the negligence of the contractor's workman in the execution of the works, such negligence not being a casual or collateral act of negligence.

Decision of the Divisional Court (*ante*, p. 203, [1899] 1 Q. B. 221) reversed.—HOLLIDAY *v.* NATIONAL TELEPHONE CO., *C.A.*, 658.

3. *Principal and agent—Contractor—Paving road—Liability of local authority—Practice—Payment into court by one defendant—Verdict against both for smaller sum—Ord.* 22, *rr.* 1, 6.—A district council employed a contractor to make up a road, which was being used by the public, under section 150 of the Public Health Act, 1875. In the course of the work the contractor negligently left a heap of earth unfenced and unlighted on the road, over which one of the public, while passing along the road at night, fell and was injured. In an action against the district council and the contractor to recover damages for the personal injuries so sustained,

Held, that as the work which the contractor was employed to do would, unless precautions were taken, cause danger to the public passing along the road, an obligation was thrown upon the district council to see that the necessary precautions were taken, and they were therefore liable for the negligence of their contractor in not taking proper precautions, such negligence not being merely a casual or collateral act of negligence.

The defendants delivered separate defences, both denying liability. The contractor, with a denial of liability, paid £75 into court. The district council did not pay money into court, but pleaded that their co-defendant, while denying liability, had paid £75 into court, and that sum was sufficient to satisfy the plaintiff's claim. The jury found a verdict for the plaintiff for £50.

Held, that as the district council had not paid money into court, the plaintiff was entitled to judgment against them; but, as the £50 had been recovered from their co-defendant, the judgment must be limited to costs.

Judgment of Bruce, J., [1898] 2 Q. B. 212, affirmed.—PENNY *v.* WIMBLEDON URBAN DISTRICT COUNCIL, *C.A.*, 565; [1899] 2 Q. B. 72; 68 L. J. Q. B. 704; 80 L. T. 615.

4. *Ship—Charterer—Liability of, for defective condition of ship—Breach of duty.*—The defendant chartered for a single voyage a vessel which was at the time at sea and in ballast. The charter-party declared that she was in every way fit for the service, and provided that she should be so maintained by the owners. On the afternoon of the 5th of April the vessel was put at the defendant's disposal in dock, and two hours afterwards the loading began, the defendant having contracted with a stevedore for the purpose who had engaged the plaintiff amongst others to carry out the work. Fifteen minutes later the plaintiff, in the course of his work, had to descend a ladder leading into the hold. It came adrift, and the plaintiff fell, sustaining injuries for which he sued the defendant.

Held, that the defendant was liable to the plaintiff, since it was his duty under the circumstances to make some inspection of the vessel before allowing the stevedore and his men to go on board her, and since the slightest inspection would have revealed the defective state of the ladder.—MARNEY *v.* SCOTT, *Q.B.D.*, 666; [1899] 1 Q. B. 986; 68 L. J. Q. B. 736.

See also Landlord and Tenant, 18; Master and Servant, 2, 30; Mortgage, 16; Principal and Agent, 2.

NEWFOUNDLAND, LAW of:—

*Bank—Priority of Crown debts—*58 *Vict. c.* 3—*Debts due to boards of education—Education Acts of* 1892 *and* 1893.—Newfoundland Act 58 Vict. c. 3, passed for the winding-up and liquidation of a bank, provided that priority be given to all debts and claims due to the Crown or to the Government or revenues of the colony.

Held, that balances in the books of the bank to the credit of the various boards of education in the colony were not such debts and claims as aforesaid. It appeared that the boards were not constituted by the Education Acts of 1892 and 1893 mere agents of the Government, but had a discretionary power, independent of the Government, in expending such balances.—FOX *v.* NEWFOUNDLAND GOVERNMENT, *P.C.*; [1898] A. C. 667.

NEW SOUTH WALES, LAW of:—

1. *Civil servant—Civil Service Act*, 1884 (48 *Vict. No.* 24), *ss.* 10, 46—*Abolition of office—Compensation.*—Although New South Wales "Civil Service Act, 1884," deprives the Crown of its right to dismiss its

civil servants summarily without following the procedure prescribed therein, yet it does not take away the right of the Crown to abolish a civil office.

Held, that the holder of an abolished office, unless entitled to a superannuation allowance under the Act of 1884, is not by the true construction of sections 10 and 46 entitled as for breach of contract to any other compensation. It is at the option of the Government whether he should be offered an equivalent office.—YOUNG *v.* WALLER, *P.C.*; [1898] A. C. 661.

2. *Crown Lands Acts*, 1884 (48 *Vict. No.* 18), *s.* 102; 1895 (58 & 59 *Vict. No.* 18), *ss.* 10, 11, 13—*Application for additional conditional purchase—Respondent barred under one Act, in time under the other.*—Under the Crown Lands Act, 1884, the land in suit was reserved for a public purpose by notification on the 4th of July, 1896.

On the 9th of January, 1897, the notification was revoked, and it was notified in the *Gazette* of that day that it was set apart for homestead selections under sections 10 and 13 of the Crown Lands Act of 1895.

Held, that the respondent's application on the 11th of February, 1897, to take the land as an additional conditional purchase, though within the forty days of grace prescribed by section 11 of the later Act, was nevertheless barred as having been made before the expiry of the sixty days' delay prescribed by section 102 of the Act of 1884.

Colles v. *Minister of Lands*, [1899] A. C. 90, followed.—MINISTER FOR LANDS *v.* HARRINGTON, *P.C.* [1899] A. C. 408; 68 L. J. P. C. 60; 80 L. T. 604.

3. *Crown Lands Acts—Reference by Land Appeal Court to Supreme Court—Effect of decision.*—In a suit by the respondent against the appellant to recover certain lands, it appeared that in an appeal to the Land Court to which the respondent and the Minister for Lands were parties, and of which the appellant had notice as a party interested, a reference was made to the Supreme Court, which decided that at the date of the appellant's application for them the lands were not Crown lands, and therefore not open for selection.

Held, that this decision was conclusive, and could not be reopened.—GARNSEY *v.* FLOOD, *P.C.*; [1898] A. C. 687.

4. *Crown Lands Acts—Resumed area—Leasehold area—Leasehold area—Crown Lands Act*, 1895 (58 & 59 *Vict. No.* 18), *ss.* 5, 11.—Under section 5 of the Crown Lands Act, 1895, leasehold area becomes resumed area after notification to that effect in the *Gazette*. A grant to a tenant on the expiry of his lease of a preferential occupation licence in regard to his holding does not under the Crown Lands Acts change its character to that of a resumed area. Nor does a *Gazette* announcement of such licence operate as a notice that the area affected has been resumed.

Held, accordingly, that the appellant had no title to apply before notification under section 5 for a conditional lease of land held under a licence; and that section 11 of the same Act (which only saves existing rights) did not avail him.—COLLESS *v.* MINISTER FOR LANDS, *P.C.*; [1899] A. C. 90; 68 L. J. P. C. 9; 79 L. T. 505.

5. *Income tax—Taxable income—Mortgages—Land and Income Tax Assessment Act*, 1895 (59 *Vict. No.* 15), *ss.* 27, 28, *sub-section* 1—*Construction.*—Under the New South Wales Land and Income Tax Assessment Act, 1895, s. 27, the taxable amount of the respondent's income was limited to the amount of its income derived from mortgages; under section 28, sub-section 1, certain expenses incurred by the taxpayer "in the production of his income" were to be deducted.

Held, that by the true construction of the sub-section the respondent was entitled to deduct all expenses incurred in the production, not merely of its mortgage income, but of its income as a whole. —COMMISSIONERS OF TAXATION *v.* TEECE, *P.C.*; [1899] A. C. 254; 79 L. T. 601.

6. *Practice—Appeal from interim injunction—Trespass—New South Wales Mining on Private Lands Act*, 1894 (57 *Vict. No.* 32), *ss.* 8, 13—*Gold lease application.*—Appeals from interlocutory injunctions, of an essentially temporary kind, will not be encouraged.

Where an interim injunction had been granted restraining the appellant from trespassing or mining upon land covered by the private gold lease application of the respondent, who under section 8 of the New South Wales Mining on Private Lands Act, 1894, had obtained a miner's right and authority, and under section 13 had made application not yet granted at date of suit for a twenty years' lease,

Held, that the respondent, having a definite statutory right to apply for a lease, had a *locus standi* to apply for an injunction which should be maintained till discharged by the court.—RONDACE *v.* ZOBEL, *P.C.*; [1899] A. C. 258; 68 L. J. P. C. 47; 79 L. T. 602.

7. *Probate duty paid under protest—Application for refund—Delay—Stamp Duties Acts of* 1880 (44 *Vict. No.* 3) *and* 1886 (50 *Vict. No.* 10).—Where executors paid probate duty partly under mistake of law and partly with a reservation of their right to have the excess refunded without regard to delay, and it was subsequently decided in another case that no duty at all was payable as claimed,

Held, that an application made nine years later for a *mandamus* to state a case for the full court was not brought within a reasonable time and must be refused.—BROUGHTON *v.* COMMISSIONER OF STAMP DUTIES, *P.C.*; [1899] A. C. 251; 68 L. J. P. C. 36.

NEWSPAPER:—

Publication — Agreement not to "publish" — "Sporting" paper. — A newspaper is published when and where it is offered to the public, and may be published at more than one place at the same time. A newspaper which excludes racing and betting intelligence is not a "sporting paper" within the meaning of an agreement framed to protect the copyright of papers specially connected with horse-racing.—MCFARLANE *v.* HULTON & CO., *Ch.D. Cozens-Hardy, J.*, 507; [1899] 1 Ch. 884; 68 L. J. Ch. 408; 80 L. T. 486.

NEW ZEALAND, LAW of:—

Poututu Jurisdiction Act, 1889 (53 *Vict. No.* 7)—*Effect of proceedings in the Validation Court—Native Land Courts Acts*, 1886 *and* 1888 (50 *Vict. No.* 24), *ss.* 75, 78; (52 *Vict. No.* 37), *s.* 24—*Jurisdiction to rehear—Right of appeal.*—The presumption is that a subsequent general enactment is not intended to interfere with a special enactment, unless the intention so to do is very clearly manifested.

Held, that current proceedings in the Native Land Court under a specially enabling Act called the New Zealand Poututu Jurisdiction Act, 1889, were not stayed by the commencement of proceedings in the Validation Court; notwithstanding the general

provision contained in the Act establishing the latter court to the effect that commencement of proceedings therein shall operate as a stay of proceedings in any other court in respect of the same matters,

Held, also, that the jurisdiction to rehear—that is, to entertain an appeal—given by the Native Land Courts Acts of 1886 and 1888 is not confined to cases where the title to particular land has been the only question decided by the court of first instance; but extends to cases where the decision is embodied in the same decree with other matters not of an appealable nature.

Under the special Poututu Act orders as to title to land are also appealable in the same way; and held accordingly that the appellant was entitled thereunder to a rehearing of judgments concerning the title to Poututu lands, and that the Native Land Court had jurisdiction to grant such rehearing, proceedings therein not being stated by the respondents' commencement of proceedings in the Validation Court.—BARKER *v.* EDGER, *P.C.*; [1898] A. C. 748; 79 L. T. 151.

See also Charity, 5.

NUISANCE:—

Injunction — Gas company — Statutory powers— Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 29—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *s.* 9.—A gas company was authorized by its special Acts (which incorporated the Gasworks Clauses Acts, 1847 and 1871), to purchase certain land and to erect gasholders thereon; these Acts contained no provision for compensation to persons injuriously affected thereby.

Held, that the gas company was not thereby entitled to erect works in such a way as to interfere with the rights of the owner of the adjoining land to light and support.

Decision of North, J. (*ante*, p. 222), affirmed.—JORDESON *v.* SUTTON, &c., GAS CO., *C.A.*; 68 L. J. Ch. 457; 80 L. T. 815.

See also Local Government, 14, 16; Trade Union, 2.

NULLUM TEMPUS ACT:—

New South Wales—Construction of statute—Nullum Tempus *Act* (9 *Geo.* 3, *c.* 16).—The English *Nullum Tempus* Act is in force in the colony of New South Wales, and applies to land which has never been granted out or dealt with by the Crown.—ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* LOVE, *P.C.*, 81; [1898] A. C. 679.

PARTITION:—

Practice—Judgment—Expenditure in improvements. —Minutes of judgment in a partition action directing an account and inquiry as to expenditure in permanent improvements.—WILLIAMS *v.* WILLIAMS, *Ch.D. Kekewich, J.*; 68 L. J. Ch. 528

PARTNERSHIP:—

1. *Assets—Deposit of title-deeds by partner to secure partnership debt—Devise of real estate—Sufficiency of partnership assets to pay debts in full—Real Estate Charges* (*Locke-King's*) *Act*, 1854 (17 & 18 *Vict. c.* 113), *s.* 1.—A testator who was a partner in a firm of shipbuilders had deposited at a bank the title-deeds of a real estate belonging to himself to secure the partnership overdraft. By his will he specifically devised the real estate. The partnership assets were, at the testator's death, sufficient to pay the firm's debts.

Held, affirming Romer, J. (46 W. R. 478), that the charge only extended to the debts of the partnership, and that, as the partnership assets were sufficient to pay these, no part thereof was a charge on the real estate of the testator comprised in the memorandum of charge.—RITSON, RE, RITSON *v.* RITSON, *C.A.*, 213; [1899] 1 Ch. 128; 68 L. J. Ch. 77; 79 L. T. 455.

2. *Sale of business to surviving partner—"Effects and securities"—Goodwill.*—Co-partners carried on business under the style of L. & D. until 1876, when L. died. D. then entered into a partnership with M., under articles which, *inter alia*, provided that the business should be carried on under the old style of L. & D., and that in the event of the decease of either partner the survivor might purchase the whole business, and for such purpose a general account of the firm's property should be made, including all the "effects and securities," and the value thereof should be calculated as at the date of such decease.

Upon the death of D., the parties interested appointed the same person to be arbitrator and appraiser, and this person stated a special case to the court under section 19 of the Arbitration Act, 1889, for a decision as to whether he ought to include the goodwill of the firm in his valuation, and, if so, what was the proper footing on which to value it.

Held, that the goodwill ought to be included in the valuation, and that it ought to be valued on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not have the right to solicit customers of the old firm, or carry on business under the style of the old firm.

The law with regard to the disposal of goodwill on the dissolution of a partnership, and as to surviving or continuing partner's right to set up a rival business, discussed and explained.—DAVID & MATTHEWS' ARBITRATION, RE, *Ch.D. Romer, J.*, 313; [1899] 1 Ch. 378; 68 L. J. Ch. 185; 80 L. T. 75.

See also Bankruptcy, 25, 26; Practice, 25.

PATENT:—

1. *Amendment—Pending action for infringement or proceeding for revocation—Disclaimer—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.—Where an action for infringement, or proceeding for the revocation, of a patent is pending, the patentee may not, under section 19 of the Patents, &c., Act of 1883, apply for leave to amend the patent by way of correction or explanation, except so far as such correction or explanation is incidental to a disclaimer strictly so called.—OWEN'S PATENT, RE, *Ch.D. Stirling, J.*, 190; [1899] 1 Ch. 157; 68 L. J. Ch. 63; 79 L. T. 458.

2. *Grant to two persons—Joint tenancy or tenancy in common—Survivorship—Agreement for sale—Covenant for validity—Joint or several—Death of one grantee.*—The grant of letters patent for a new invention to two persons, their executors, administrators, and assigns, in ordinary form, makes them joint tenants, and, upon the death of one, the rights upon the letters patent, if not previously severed, belong wholly to the survivor, the rule that a grant to A. and B. makes them joint tenants not being merely a rule of tenure or real property law.

A provision in an agreement for the sale of letters patent granted to two persons that an assignment should be executed, and should contain a covenant by the vendors that the letters patent are valid, cannot be enforced against the representatives of one of the vendors who has died after the agreement and before assignment, nor will such repre-

sentatives be liable for damages for breach of the agreement in this respect.—NATIONAL COMPANY OF ELECTRICITY DISTRIBUTION (LIMITED) *v.* GIBBS, *Ch.D. Cozens-Hardy, J.*, 518; 68 L. J. Ch. 503; 80 L. T. 524.

3. *Infringement — Repairs — Agent of plaintiff causing infringement by requesting article to be made.* —The sale of a patented article implies a licence to do simple repairs during the life of the article, but does not authorize a reconstruction of the article, making up precisely the combination which is the subject of the letters patent.

Position of defendant discussed when article is made at request of plaintiff's agent.

Kelly v. *Batchelar*, 10 Rep. Pat. Cas. 289, distinguished.—DUNLOP PNEUMATIC TYRE CO., *v.* NEAL, *Ch.D. North, J.*, 632; [1899] 1 Ch. 807; 68 L. J. Ch. 378; 80 L. T. 746.

4. *Infringement — Threat of legal proceedings— Injunction—Breach — Contempt of court — Costs — Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.—C., trading as M. & Co., had been restrained by injunction—in an action brought by E. against M. & Co.—from publishing, either verbally or otherwise, any statement to the effect that an injunction had been granted against E. restraining him from infringing certain letters patent, and also from threatening E. or any of E.'s customers with any legal proceedings or liability in respect of the manufacture, sale, or purchase of a certain machine. After the order M. & Co. circulated amongst E.'s customers a pamphlet prepared by the A. B. Co., which stated in effect that M. & Co. were the special agents of the A. B. Co., who were the exclusive makers of the machine in question under the licence of the patentee, and who intended to prosecute all infringers of their patents.

On motion to commit C. to prison for contempt of court for a breach of the injunction, Romer, J., ordered C. to pay the costs of the motion. On appeal,

Held, by Lindley, M.R., and Vaughan Williams, L.J. (*dissentiente* Chitty, L.J.), that the injunction was not so plainly worded to prohibit what C. had done, as to justify a judicial decision that a breach of the injunction had been committed.

Per Lindley, M.R.—The court will not strain the language of an injunction even to meet a case which would have been prohibited if foreseen.—ELLAM *v.* MARTYN, *C.A.*, 212; 68 L. J. Ch. 123; 79 L. T. 510.

5. *Licence — Agreement for sale — Assignment — Registration — Title — Priority — Notice — Equitable rights—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 87.—By an agreement in writing W., the registered proprietor of a patent, agreed for value to assign it to the plaintiffs. Before that agreement had been registered W. granted a licence to use the patent to S., who forthwith registered the licence. S., before he took his licence, was informed by W. of the agreement with the plaintiffs, which W. stated to be no longer in force. Subsequently the plaintiffs registered their agreement and took an assignment, which they duly registered.

Held, affirming the decision of Kekewich, J. (46 W. R. 567), that under the proviso in section 87 of the Patents, Designs, and Trade-Marks Act, 1883, S., having had before he took his licence express notice of the plaintiffs' agreement, could not assert against them his legal title by prior registration, and that the licence was void as against the plaintiffs.—NEW IXION TYRE AND CYCLE CO. *v.* SPILSBURY, *C.A.*; [1898] 2 Ch. 484; 79 L. T. 229.

6. *Opposition to grant—Right to be heard as opponent — Person having no interest — Application by comptroller to Attorney - General for directions— Mandamus to comptroller—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 11, 95—*Patents, &c., Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 4.—Opposition to the grant of a patent under section 11 of the Patents, &c., Act, 1883, on the ground that the invention has been patented in this country on an application of prior date, can only be made by a person having an interest in the earlier patent.

Where, on an application by the Comptroller of Patents to the Attorney-General for directions in a matter of doubt or difficulty under section 95 of the Patents, &c., Act, 1883, the Attorney-General directs that the comptroller shall not hear a particular person as an opponent to the granting of a patent, the court will not grant a *mandamus* to the comptroller to hear such person.—REG. *v.* COMPTROLLER-GENERAL OF PATENTS, *C.A.*, 567; [1899] 1 Q. B. 909; 68 L. J. Q. B. 568; 80 L. T. 777.

7. *Particulars of objections—Shorthand writer's transcript of evidence—Costs—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-section* 6.—In patent actions the settled practice is that certificates under section 29, sub-section 6, of the Patents, Designs, and Trade-Marks Act, 1883, are always granted so as to secure to the party delivering the particulars the costs of everything reasonably and properly inserted in them, although he may fail to prove the specific objection under which the detailed particulars may be ranged. —CASTNER-KELLNER ALKALI CO. (LIMITED) *v.* COMMERCIAL, &c. (LIMITED), *C.A.*, 534; [1899] 1 Ch. 803; 68 L. J. Ch. 402; 80 L. T. 476.

8. *Prolongation — Five years' prolongation — Inadequate remuneration.*—Where an invention was of conspicuous merit, and it appeared that as regards its application to one of its purposes the patentee had received for an exclusive licence to use it certain shares in companies formed for that purpose, the value of which shares was largely dependent on the prolongation of the patent, and that with respect to its application to all other purposes the patentee, who had done his best to push his invention, had received nothing at all if the accounts were made up on the basis of a reasonable allowance to himself for his services in working his patents.

Held, that the patentee, who had fairly kept and presented his accounts, should be allowed a five years' prolongation.—PARSONS' PATENT, RE, *P.C.*; [1898] A. C. 673.

9. *Prolongation—Petition for—Novelty consisting in the combination—Absence of unusual merit—Losses referable to want of business skill.*—Where letters patent had been granted for "improvements in steam generators," and it was shown that the invention consisted of the combination of various parts, all or most of which were admittedly not new at the date of the letters patent; an extension was refused in the absence of evidence that the invention was of unusual merit.

Where patentees had incurred losses, these cannot be regarded as evidence of inadequate remuneration if attributable to unskilfulness in conducting their business.—THORNEYCROFT'S PATENT, RE, *P.C.*; [1899] A. C. 415; 68 L. J. P. C. 68.

10. *Registration—Conviction—Persons practising prior to passing of Act—"Right acquired"—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 101—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 1, 27—*Register of Patent Agents Rules*, 1889—*Patent Rules*, 1890, *r.* 81

—*Register of Patent Agents Rules*, 1891, *r.* 1.—Section 1 of the Patents, Designs, and Trade-Marks Act, 1899, sub-section 1, enacts that no person shall be entitled to describe himself as a patent agent unless he is registered as a patent agent in pursuance of the Act. Section 27 provides that nothing in the Act shall affect the validity of any "right acquired" before the commencement of the Act.

Held, that a person who had been practising as a patent agent and describing himself as such prior to the passing of the Act is not protected by section 27 from the operation of section 1, nor from the liability to pay the fees imposed by the Register of Patent Agents Rules, 1889, made in pursuance of the Act.

Held also, that the Register of Patent Agents Rules, 1889, are in force, because, assuming they were repealed by rule 81 of the Patent Rules, 1890, they were re-enacted by rule 1 of the Register of Patent Agents Rules, 1891.—STAREY *v.* GRAHAM, *Q.B.D.*, 392; [1899] 1 Q. B. 405; 68 L. J. Q. B. 257; 80 L. T. 185.

See also Design.

PETROLEUM ACTS:—

Definition of petroleum—Composition containing petroleum—Petroleum Act, 1871 (34 & 35 *Vict. c.* 105), *s.* 3.—The term "petroleum," as used in the Petroleum Acts, is not confined to petroleum, or oils or products of petroleum in their simple state, but extends to a composition containing petroleum as one of its ingredients. — LONDON COUNTY COUNCIL *v.* HOLZAPFELS CO., *Q.B.D.*, 622.

POOR LAW:—

1. *Pauper lunatic — Expenses of maintenance—Arrears—Statute of Limitations* (21 *Jac.* 1, *c.* 16).—W., a lunatic not so found, was maintained by the guardians of the S. Union in a pauper lunatic asylum from 1882 until her death in 1898. In 1894 W. became entitled to a share of a fund, and in 1895 a person was appointed to exercise the powers of a committee of W., but the fund was not in fact paid into court to the credit of W. until after W.'s death.

In 1895 the guardians gave notice to the Master in Lunacy of their claim in respect of the past and future maintenance of W.

After the death of W. this action was commenced by the guardians against the administratrix of W., claiming arrears of maintenance.

Held, that the expenses of maintenance was a debt of the lunatic, and that arrears of maintenance could only be recovered in respect of six years prior to the commencement of the action.

Stedman v. *Hart*, 2 W. R. 462, Kay 607, discussed.

In re Newbegin's Estate, 36 W. R. 69, 36 Ch. D. 477, followed.—WATSON, RE, STAMFORD UNION *v.* BARTLETT, *Ch.D. Stirling, J.*, 359; [1899] 1 Ch. 72; 68 L. J. Ch. 21; 79 L. T. 462.

2. *Rating — Assessment—Rateable value—Licensed house—Competition of brewers—"Tied" houses*—6 & 7 *Will.* 4, *c.* 96, *s.* 1.—In assessing a licensed public-house to the poor rate, the fact that there is a great competition amongst brewers in the district to obtain the tenancy of such houses in order to sub-let them as "tied" houses ought not to be excluded from consideration so far as it shows the existence of such a demand as would necessarily increase the rent at which the premises might reasonably be expected to let, whether to brewers or others, on a tenancy from year to year; but the gross estimated rental ought not to be fixed at the special sum, in excess of the annual value obtainable in the market, which a brewer might be willing to give on the consideration, personal to himself, that he could make large profits by sub-letting the house as a "tied" house. — BRADFORD-ON-AVON UNION ASSESSMENT COMMITTEE *v.* WHITE, *Q.B.D.*; [1898] 2 Q. B. 630.

3. *Rating—Exemption of building used exclusively for education of poor—Institution to board and instruct children—Liverpool Corporation Act*, 1893 (56 & 57 *Vict. c. clxxxi.*), *s.* 36.—By the Liverpool Corporation Act, 1893, s. 36, it is provided that no person shall be rated to the general rate in respect of any building used for the education of the poor exclusively.

Held, that an institution for the reception of pauper children from the age of two to sixteen years, sent by poor law guardians and others, where they were received, clothed, maintained, instructed, and provided with medical attendance, was not a building used for the education of the poor exclusively.—HADFIELD *v.* LIVERPOOL (MAYOR), *Q.B.D.*; 80 L. T. 566.

4. *Rating—Non-payment—Issue of distress warrant—Right of appeal.*—No appeal lies from the order of a magistrate directing a distress warrant to issue for non-payment of poor rates.—REG. *v.* LONDON JUSTICES, *Q.B.D.*, 316; [1899] 1 Q. B. 532; 68 L. J. Q. B. 383; 80 L. T. 286.

5. *Rating—Public-house—Evidence of advantageous situation and business done—Parochial Assessment Act*, 1836 (6 & 7 *Will* 4, *c.* 96), *s.* 1.—On an appeal by the occupier against an assessment of a public-house to a poor rate, an arbitrator, to whom the case was referred, and whose award was to be published in the form of a special case, found that the rents actually paid for other public-houses in the district furnished no criterion of the rent which would be paid for the appellant's house. He rejected evidence, which the respondents desired to give, by cross-examination of the appellant, of the amount of the weekly takings, but he admitted evidence as to the largeness of the business actually done, and as to the advantageous situation of the house for carrying on business.

Held, affirming the judgment of the Divisional Court, that the ordinary method of arriving at a valuation by comparison with the market value of other public-houses not being available, the method of arriving at the valuation of this house adopted by the arbitrator was correct.

Dodds v. *South Shields Union*, [1895] 2 Q. B. 133, distinguished.—CARTWRIGHT *v.* SCULCOATES UNION, *C.A.*; [1899] 1 Q. B. 667; 68 L. J. Q. B. 455; 80 L. T. 667.

6. *Rating — Waterworks — Works not directly earning a profit in parish—Capital value, interest on—Cost of construction.*—The Corporation of Liverpool were empowered by Act of Parliament to construct a reservoir and other works in a parish in Wales for the purposes of the supply of water to Liverpool. The construction of the reservoir and works involved the submersion of the sites of the parish church, vicarage, and schools, and likewise the stopping up and diversion of certain roads. The Act required the corporation to provide sites for and erect a new church, vicarage, and schools in substitution for those which would be submerged, and to make certain new roads and bridges which were necessary for the purposes of the before-mentioned diversion. The corporation carried out the works in conformity with the Act, provided the requisite new church, vicarage, and schools, and made the necessary new roads and bridges. The

corporation, having been rated to a poor rate in respect of the reservoir and works, appeal to the quarter sessions against the rate. The sessions decided that, in estimating the capital value of the reservoir and works for the purpose of arriving at the rateable value, the amounts expended by the corporation in providing the new church, vicarage, and schools, and making the new roads and bridges, ought to be included as being part of the capital cost of the works.

Held (reversing the judgment of a Divisional Court), that there was nothing wrong in point of law in the decision of the sessions, which must therefore be affirmed.—LIVERPOOL CORPORATION *v.* LLANFYLLIN UNION. *C.A.*; [1899] 2 Q. B. 14; 68 L. J. Q. B. 762; 80 L. T. 667.

7. *Relief—Unauthorized purpose—Strike—Wilful refusal to work—"Sudden and urgent necessity"—Poor Law Acts*, 1834 *and* 1844—*Poor Law Audit Act*, 1848, *s.* 4—*Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.—On the 31st of March, 1898, a large number of colliers in South Wales went out on strike, in consequence of a disagreement with their employers, as to the rate of wages. On the 11th of April the men were invited to resume work at a slight advance on their former rate of wages, but the bulk of them declined the offer and remained out on strike.

On the 26th of April the guardians of the M. T. Union passed a resolution, in consequence of the large number of able-bodied men applying for relief, to establish labour yards throughout the union wherever required. The yards remained open till the 6th of August, and it was estimated that upwards of £20,000 had been spent out of the rates in relieving able-bodied colliers so refusing to work, an amount largely in excess of the normal sum expended in relief.

The guardians' statutory powers were defined by two orders of October, 1870, made under the Poor Law Amendment Act, 1834. By the order of the 1st of October, 1870, able-bodied persons and their families, if objects of relief, were to be relieved wholly in the workhouse, except under special circumstances mentioned in the order, such as sudden and urgent necessity; and by the supplemental order of the 29th of October, if the guardians should depart in any particular instance from the regulations and within fifteen days after such departure should report the same and the grounds thereof to the Poor Law Board (now represented by the Local Government Board), and the board should approve of such departure, then the relief granted in such particular instance should, if otherwise lawful, not be deemed to be unlawful or be subject to be disallowed.

The guardians by several reports had reported to the Local Government Board all the particular instances in which relief was being granted to the persons employed at the labour yards, and the grounds for granting such relief, and the board had approved of the granting of the relief in all but one of the reports, which was not yet approved.

In an action by certain ratepayers claiming a declaration that the guardians had exceeded their statutory powers,

Held, (1) that the guardians were bound to give relief in urgent cases, even though their urgency might have arisen from the wilful refusal of the men to work, the proper course for the guardians in case of wilful persistence in such refusal being to prosecute under the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3; (2) that, generally speaking, while the court had jurisdiction in a proper case in an action at the instance of ratepayers to restrain guardians from applying the poor rates for unauthorized purposes, it was not proper for ratepayers objecting to a poor rate as excessive to come to the court by way of appeal against it and ask for an injunction, instead of going before the auditors appointed by the Local Government Board, and appealing therefrom as provided by the Poor Law Amendment Act, 1844; (3) that, as in the special circumstances of this case it was not proved that the guardians had relieved a single case not of sudden and urgent necessity which they were bound to relieve, the plaintiffs were not entitled to any assistance by way of declaration or otherwise; and (4) that the guardians had not disregarded the regulations contained in the orders made under the Poor Law Amendment Act, 1834; that none of the relief given by them was not "otherwise lawful" within the meaning of the words of the orders; and that there was such "sudden and urgent necessity" within the meaning of the orders, as would justify relief being given out of the workhouse.—ATTORNEY-GENERAL *v.* MERTHYR TYDVIL GUARDIANS, *Ch.D. Romer, J.*; 80 L. T. 618.

8. *Settlement—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35—*Derivative settlement.*—An illegitimate pauper child whose mother had a derivative settlement, and who has never gained a settlement of its own, takes its own birth settlement.

Decision of the Court of Appeal affirmed.—PLYMOUTH UNION *v.* AXMINSTER UNION, *H.L.*, 33; [1898] A. C. 586; 79 L. T. 4.

See also Justices, 6.

POWER:—

1. *Appointment—Exercise of power—One-third to son of donee of power—One-sixth to each of the two daughters—No appointment of the remaining two-sixths—Will—"Wish them to pass directly to my said two daughters"—Son not to share in "unappointed parts."*—A testator bequeathed £15,000 to trustees upon trust for J. B. for her life, and on her death in trust for her three children, H. B., J. W., and A. W., in such shares as J. B. should by will or codicil appoint, and in default of appointment in trust for her three children equally as tenants in common.

J. B., by a codicil to her will, appointed two-sixths of the fund in trust to pay the income to her son H. B. until he should assign, charge, or otherwise dispose thereof; and on such event happening, then in trust during his life, and after his death for his children (if any) as therein mentioned, and if no children in trust to be equally divided between all her children and grandchildren then living *per capita*; and she appointed one-sixth in trust for her daughter J. W. as therein mentioned, and one-sixth in trust for her daughter A. W. as therein mentioned, and declared as follows: "I make no appointment of the other two-sixth parts of the said sum of £15,000, as I wish them to pass directly to my said two daughters, so as to give them an immediate vested and disposable interest therein, and I also declare that neither my son nor his children (if any) shall take any share or interest in the said unappointed parts of the said trust funds."

Held, that the last mentioned two-sixth parts of the funds went as unappointed among the three children of J. B.—JACK, RE. JACK *v.* JACK, *Ch.D. Romer, J.*; [1899] 1 Ch. 374; 68 L. J. Ch. 188; 80 L. T. 321.

2. *Special power of appointment—Exercise by will—"Give, bequeath, and appoint"—Bequests to persons not objects of power.*—In determining whether a testator has exercised by will a power of appoint-

ment, the court will look at the will to discover therefrom evidence of the testator's intention, and if it finds therein a general expression of intention to exercise the power, it will not infer a contrary intention from such circumstances as bequests to persons not objects of the power.

A testatrix had, under her father's will, a power of appointment in favour of her husband. By her will she bequeathed certain legacies out of "my separate estate or out of the estate and effects over which I have any disposing power," and gave, bequeathed, and appointed all the residue of her estate and effects to her husband.

Held, that the power was exercised.—MILNER, RE, MILNER v. BRAY, *Ch.D. Stirling, J.*, 369; [1899] 1 Ch. 563; 68 L. J. Ch. 255; 80 L. T. 151.

See also Married Women, 4; Settlement, 1.

PRACTICE:—

1. *Appeal—Costs—Security—Appeal under Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37)—*Ord.* 58, *r.* 15.—The ordinary rule of the court that the poverty of the appellant is a reason for ordering security to be given for the costs of the appeal, extends to appeals under the Workmen's Compensation Act, 1897.—HALL v. SNOWDEN (No. 1), *C.A.*, 322; [1899] 1 Q. B. 593; 68 L. J. Q. B. 363; 80 L. T. 256.

2. *Appeal—Costs—Special leave to appeal.*—Special leave to appeal may be given on terms that the appellants should be liable to pay the respondent's costs in any event.—MONTREAL GAS CO. v. CADIEUX, MONTREAL GAS CO., EX PARTE, *P.C.*; [1898] A. C. 718.

3. *Appeal from chambers—Court of Appeal—Matters of practice and procedure—Prohibition to county court—Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.—Where a judge at chambers has made an order either granting or refusing an application for a writ of prohibition to a county court, the appeal from such order lies to the Divisional Court, and not direct to the Court of Appeal.—WATSON v. PETTS (No. 1), *C.A.*, 68; [1899] 1 Q. B. 54; 68 L. J. Q. B. 249; 79 L. T. 330.

4. *Appeal — Interlocutory order — Leave—Jurisdiction—Liverpool Court of Passage—Court of Appeal—Liverpool Court of Passage Act*, 1893 (56 & 57 *Vict. c.* 37), *ss.* 6, 9, 10.—Under sections 6 and 10 of the Liverpool Court of Passage Act, 1893, the presiding judge has power to give leave to appeal to the Court of Appeal from an interlocutory order made by him; and that power is not cut down by section 9 of the same statute.—HUNTER v. JACOBSON, *C.A.*; 80 L. T. 641.

5. *Attachment—Corporation—Order on Disobedience—Enforcement by attachment of director—Service of order—Rules of the Supreme Court, ord.* 42, *r.* 31.—Obedience to an order made against a corporation will not be enforced, under rule 31 of order 42, by the attachment of a director of the corporation unless the order has been served personally upon the director.—MCKROWN v. JOINT STOCK INSTITUTE (LIMITED), *Ch.D. North, J.*; [1899] 1 Ch. 671; 68 L. J. Ch. 390; 80 L. T. 641.

6. *Costs—Appeal for costs—Costs in discretion of judge—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Costs of examination as to debtor's means and of garnishee proceedings—Rules of Supreme Court*, 1883, *ord.* 42, *rr.* 32, 34; 45, *r.* 9.—The plaintiff, having obtained judgment and being unable to obtain payment of his debt, obtained, under ord. 42, r. 32, an order to have the debtor examined as to his means. The debtor on his examination admitted having a retiring pension and a balance at his bankers. The plaintiff then obtained a garnishee order against the bankers, and by that means recovered part of his debt. He then applied for his costs of the examination proceedings and of the garnishee proceedings. The master refused to make any order, on the ground, as was stated by affidavit, that the practice in the Queen's Bench Division was to treat such proceedings as a luxury, the costs of which the plaintiff could not throw on the defendant. The plaintiff appealed; the judge in chambers dismissed the appeal, as was stated, on the same ground, and refused leave to appeal. The plaintiff applied to the Court of Appeal, who gave leave, and he then appealed against the order in chambers.

Held, that as by the express terms of the Judicature Act, 1873, s. 49, no appeal will lie from any order as to costs which are left to the discretion of the court except by leave of the judge making such order, and the costs in question were, by the terms of ord. 42, r. 34, and ord. 45, r. 9, in the discretion of the judge, the appeal must be dismissed, though the court stated their inability to understand the practice alleged to exist in the Queen's Bench Division that examination of a debtor as to his means, and proceedings to attach debts due to him, were luxuries the costs of which the debtor ought not to be called on to pay.—ADLINGTON v. CONYNGHAM, *C.A.*; [1898] 2 Q. B. 492; 79 L. T. 232.

7. *Costs—Infant defendant—Injunction.* — Where an order had been made against an infant defendant granting a perpetual injunction restraining him from carrying on his business under a style calculated to lead the public to believe that it was in any way connected with the similar business of the plaintiff,

Held, that the order in also ordering the defendant to pay the costs was good.—WOOLF v. WOOLF, *Ch.D. Kekewich, J.*, 181; [1899] 1 Ch. 343; 68 L. J. Ch. 82; 79 L. T. 725.

8. *Costs—Judgment by consent—False statement—Action to set aside judgment.*—Where a consent judgment wrongfully obtained by means of a false statement has been set aside, the party who has got it set aside is entitled to recover back the costs he has paid in the former action.—STURROCK v. LITTLEJOHN, *Q.B.D.*; 68 L. J. Q. B. 165.

9. *Costs—Probate action—Trustee—Notice to cross-examine witnesses only—Ord.* 21, *r.* 18.—Where a defendant in a probate action has given notice that he desires only to cross-examine the witnesses to a will, the court will, in deciding the question of costs if it pronounces for the will, give weight in case of doubt to the fact that the defendant is a trustee and protecting the interests of the *cestuis que trust*.—PERRY v. DIXON, *P.D. & Ad.D.*; 80 L. T. 297.

10. *Costs—Taxation—Employment of two counsel—Trustee—Hostile attack—Severance of defence.*—A hostile attack being made in a creditor's administration action against one of two trustees and defendants, the attacked trustee was allowed to appear separately, and, the attack having substantially failed, was given his costs as between solicitor and client. The plaintiff had employed two counsel.

Held, that the attacked trustee was to be allowed his costs of employment of two counsel.—MADDOCK, RE, BUTT v. WRIGHT, *Ch.D. Cozens-Hardy, J.*, 684.

11. *Costs—Taxation—Objections—Carrying in—Right to dispense with—Ord.* 65, *r.* 27, *sub-rr.* 39, 41.—In taxing a bill of costs in an action where

judgment on a counterclaim had been given for the plaintiff with costs, the master disallowed the whole of the costs incurred by the plaintiff in meeting the counterclaim upon the merits and in detail.

The plaintiff took out a summons to discharge the certificate of the master on the ground of misconstruction of principle, without having previously carried in objections to the taxation.

Held, that there was nothing in this case to prevent the ordinary rule as to carrying in objections from applying.—CRASKE *v.* WADE, *C.A.*; 80 L. T. 380.

12. *Discovery — Privilege — Use of privileged document in former action—Production—R. S. C., ord.* 31, *r.* 1.—Documents in their original nature privileged are liable to production if such use has been made of them that they have become *publici juris*, but not otherwise.

Accounts which had been prepared by a witness's solicitors for purposes of litigation were, in the course of cross-examination of the witness before an examiner, handed to the witness and admitted to be correct, but were not read out in court. The same accounts were subsequently made an exhibit to an affidavit read on a summons before a judge in chambers to compromise the action. On an application in a subsequent action to produce the accounts and copies of the witness's depositions,

Held, that the accounts had never been effectually made public, and that the use made of them did not amount to a waiver of privilege, but that the witness's depositions had become public property and must be produced accordingly.—GOLDSTONE *v.* WILLIAMS, *Ch.D. Stirling, J.*, 91; [1899] 1 Ch. 47; 68 L. J. Ch. 24; 79 L. T. 373.

13. *Evidence — Ancient document in support of ancient possession—Act of ownership—Declaration by deceased person against interest—Admission by tenant as to title.*—In an action brought to determine the title of certain land, the plaintiff sought to put in evidence an ancient document, dated 7th of May, 1659, which was found in his muniment room. The document was signed by M., who was a tenant of a predecessor in title of the defendant, and was attested. It stated that J. (who was a predecessor in title of the plaintiff) had been persuaded to stop all proceedings of law that he then had against M. for wilfully bringing of his sheep and milking of his cows in J.'s freehold land therein specified (which land formed part of the land in dispute) without leave, for which wilful trespass M. bound himself to pay 16s. costs, and that he would for the future keep his own and all other people's sheep and cattle from trespassing on the said ground to the utmost of his power. Byrne, J., held, on the authority of *Papendick* v. *Bridgwater*, (1855) 5 E. & B. 166, that the document was not admissible, and he decided the action in favour of the defendant.

Held, by the Court of Appeal, that this was an ancient document coming from the proper custody, which showed that a person in possession of land was vindicating his possession by bringing an action of trespass. The document, though not an act of ownership itself, was evidence of an act of ownership. Upon that ground it was admissible against anybody, on the principle of *Malcolmson* v. *O'Dea*, (1862) 10 H. L. C. 593. This document was admitted not as being an admission by the tenant of want of title, in which case it would be open to the objection that it could not be used against the reversioner, and would fall within the principle of *Papendick* v. *Bridgwater*, (1855) 5 E. & B. 166, but as evidence of the acts of ownership stated therein.

Decision of Byrne, J., reversed upon the question of evidence.—BLANDY-JENKINS *v.* EARL OF DUNRAVEN, *C.A.*; [1899] 2 Ch. 121.

14. *Evidence — Information and belief — Interlocutory application—Irremediable damage—Admissibility.*—A. and B. moved in two separate actions against a company for the appointment of a receiver and manager. B.'s solicitor filed an affidavit founded on information derived from an interview between him and one J. with a view to throw discredit on A. and secure the conduct of the litigation for B. B.'s solicitor swore that the statements were true to the best of his information and belief.

A.'s counsel objected to the affidavit being read.

Held, that as no irremediable damage would be caused by not allowing the affidavit to be read, and as J. lived near at hand and was willing to be sworn, the objection would be allowed as to so much of the affidavit as the solicitor swore to the best of his information and belief J. had stated.—ANTHONY BIRRELL, &c., CO., RE, DOIG *v.* ANTHONY BIRRELL, *Ch.D. Kekewich, J.*; [1899] 2 Ch. 50; 68 L. J. Ch. 444; 80 L. T. 688.

15. *Execution — High Court judgment — County court—Payment by instalments—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.—A creditor who has obtained a judgment in the High Court and afterwards obtained from the county court judge an order for payment of the debt by instalments cannot put in motion the High Court procedure and issue execution without going to the county court judge and getting the order made by him discharged.

Jones v. *Jenner*, 4 W. R. 651, 25 L. J. Ex. 319, approved.

In re Ives, Ex parte Addington, 34 W. R. 593, 16 Q. B. D. 665, overruled.—MONTGOMERY *v.* DE BULMES, *C.A.*, 22; [1898] 2 Q. B. 420.

16. *Garnishee order, action upon—Judgment—R. S. C.*, 1883, *ord.* 42, *r.* 24; *ord.* 45, *rr.* 1, 2, 7; *Appendix K., Form* 40.—Though a garnishor who has not received payment from the garnishee, a limited company, is not thereby entitled to petition for a winding up, he can bring an action under order 14 on the garnishee order, and obtain a judgment against the garnishee which may be made the foundation of winding-up proceedings.

In re Combined Weighing and Advertising Machine Co., 38 W. R. 67, 43 Ch. D. 99, discussed.—PRITCHETT *v.* ENGLISH AND COLONIAL SYNDICATE (LIMITED), *C.A.*, 577; 68 L. J. Q. B. 801.

17. *Interpleader — Stakeholder — Bailee estopped from setting up* jus tertii—*R. S. C., ord.* 57.—A bailee who is estopped from setting up the *jus tertii* may nevertheless be entitled to relief by way of interpleader. — MERSEY DOCKS AND HARBOUR BOARD, EX PARTE, *C.A.*, 306; [1899] 1 Q. B. 546; 68 L. J. Q. B. 540; 80 L. T. 143.

18. *Liquidated damages—Bond—Condition not to commit breach of injunction—Enumeration of prohibited acts—Condition depending on one event—R. S. C., ord.* 14, *r.* 1.—A bond was executed by the defendant for the payment of £100 to the plaintiff. The condition of the bond was that if the defendant should at all times thereafter, in obedience to a perpetual injunction granted by the High Court of Justice, refrain from trespassing on the plaintiff's lands therein mentioned, or the walls, gates, or fences thereof, or inclosing the same, and from pulling down or removing or otherwise injuring the same, or inciting others to commit any

such trespasses, the obligation should be void. The defendant committed a breach of the injunction.

Held, that the condition of the bond depended on one event only—namely, a breach of the injunction, and that the sum secured by the bond was a liquidated sum, to the recovery of which the procedure of ord. 14, r. 1, was applicable.—STRICKLAND *v.* WILLIAMS, *C.A.*; [1899] 1 Q. B. 382; 68 L. J. Q. B. 241; 80 L. T. 4.

19. *Mortgage—Foreclosure—Claim for accounts and inquiries, foreclosure or sale—Foreclosure judgment in chambers—Summons for directions—Ord.* 15, *rr.* 1, 2—*Ord.* 30, *rr.* 1, 2, 3.—An order for accounts and inquiries, foreclosure or sale, if made without objection on the hearing of a summons for directions under ord. 30 cannot subsequently be set aside solely on the ground of want of jurisdiction.

Dyott v. *Nevile*, W. N. 1887, p. 35, considered and applied.

Decision of Romer, J., affirmed.

Per Romer, J.: The court has jurisdiction to make an order for foreclosure in chambers on a summons under ord. 15.

Smith v. *Davies*, 28 Ch. D. 650, followed.

Whether there is any jurisdiction to make the usual order for accounts and inquiries, foreclosure or sale, on the hearing of a summons for directions under ord. 30, *quære.*—HORTON *v.* BOSSON, *C.A.*; 80 L. T. 435.

20. *Parties—Action against two joint debtors—Judgment by consent against one defendant—Continuance of action against the other—Merger—Pleading.*—If in an action brought against two joint debtors one of the two submits to judgment, the claim against the other is merged in the judgment, and the plaintiff cannot obtain a second judgment against the remaining defendant.

The rule in *King* v. *Hoare*, 13 M. & W. 494 (as explained by Bowen, L.J., in *In re Hodgson*, 34 W. R. 127, 31 Ch. D. 177), applied.—MACLEOD *v.* POWER. *Ch.D. Bryne, J.*, 74; [1898] 2 Ch. 295; 79 L. T. 67.

21. *Parties—Joinder of defendants—Separate torts—Alternative claims—Negligently letting down house—Ord.* 16, *r.* 7.—The plaintiffs claimed damages by reason of the defendants having negligently excavated the subsoil of the street adjoining the plaintiffs' premises, and so taken away the support thereof, thereby causing a part of the premises to subside. The defendants, in the statement of defence, denied that the injuries complained of were caused by their acts, and alleged that the injuries were caused by the negligence of a water company in leaving their water main insufficiently stopped. The plaintiffs thereupon applied to add the water company as defendants in the action.

Held, that the causes of action against the defendants and the water company were separate and distinct, and that therefore the water company could not be added as defendants.—THOMPSON *v.* LONDON COUNTY COUNCIL, *C.A.*, 433; [1899] 1 Q. B. 840; 68 L. J. 625; 80 L. T. 512.

22. *Parties—Joinder of plaintiffs—Causes of action—R. S. C., ord.* 16, *r.* 1.—Under ord. 16, r. 1, in its amended form now in force, persons may join as plaintiffs whose causes of action arise out of the same series of transactions, where a common question of law or fact arises.

Stroud v. *Lawson*, 46 W. R. 626, [1898] 2 Q. B. 44, considered.—OXFORD AND CAMBRIDGE UNIVERSITIES *v.* GILL, *Ch.D. Stirling, J.*, 248; [1899] 1 Ch. 55; 68 L. J. Ch. 24; 79 L. T. 338.

23. *Parties—Joinder of plaintiffs—Class actions—Common ground of relief—Rights in market—R. S. C., ord.* 16, *rr.* 1, 9.—Where certain preferential rights are alleged to have been conferred by statute upon an indefinite class, who claim such rights not as members of the general public, but as a section of and adverse to the general public, then the members of such a statutory class possess a common interest and common rights, and some members of the class can properly bring an action on behalf of themselves and all other members of the class to maintain such statutory interest and rights.

The Attorney-General is a proper party to such an action, but only as representing the public as a whole, and not the statutory class.

A statutory preferential right was claimed in respect of three classes of stands at Covent Garden Market, and it was sought to combine the three claims in one action.

Held, that this was a mere matter of convenience, and that there was nothing in the law to make it necessary that there should be three actions, each confined to one class of stands.

Decision of Romer, J. (*ante*, p. 170) (Vaughan Williams, L.J., *dissentiente*), reversed.—ELLIS *v.* BEDFORD (DUKE), *C.A.*, 385; [1899] 1 Ch. 494; 68 L. J. Ch. 289; 80 L. T. 332.

24. *Parties—Joinder of plaintiffs—Common cause of action—R. S. C., ord.* 16, *r.* 1—*Company—Prospectus—Director—Liability—Director wilfully ignorant of contents of prospectus, but not repudiating it before action brought—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.—The expression "The same transaction" in R. S. C., ord. 16, r. 1, does not necessarily imply a transaction taking place between two parties; and, where different persons have causes of action arising out of the same transaction, they may be joined as co-plaintiffs.

The expression "prospectus" in the Directors' Liability Act, 1890, means the prospectus on the faith of which shares or debentures are taken.

A person, who assumes the post of director of a company and is aware of the issue of a prospectus, does not escape from his liabilities under the Directors' Liability Act, 1890, by abstaining from making an inquiry as to its contents; he must give public notice of his repudiation of such prospectus, and it will not be sufficient for him repudiate it after action brought. DRINQBIER *v.* WOOD, *Ch.D. Byrne, J.*, 252; [1899] 1 Ch. 393; 68 L. J. Ch. 181; 79 L. T. 548.

25. *Partnership—Action against firm in firm's name—Form of defence—Death of partner after action—Defence by sole surviving partner—Ord.* 48*a*, *r.* 5.—Two partners were sued in the name of their firm. After appearance and before defence delivered one of the partners died, and the surviving partner, R. C. Nesbitt, delivered a defence headed with the title of the action, followed by the words "Defence of the defendant R. C. Nesbitt."

Held, that the defence was wrong in form, as it was not a defence of the firm, but of the surviving partner in his individual capacity, in which capacity he was not sued.—ELLIS *v.* WADESON & MALLESON, *C.A.*, 420; [1899] 1 Q. B. 714; 68 L. J. Q. B. 604; 80 L. T. 508.

26. *Payment into court—Denial of liability—Acceptance by plaintiff—Counterclaim—Admission—R. S. C., ord.* 22, *rr.* 1, 6, 7.—The object of payment into court, where all liability is denied, is to enable a defendant to deny a plaintiff's right to sue, yet to offer a sum as the price of peace and for the prevention of further litigation. Such an offer is not an admission of the plaintiff's title, and

cannot be converted into such by the plaintiff accepting the sum paid in.

Decision of *Stirling, J.* (*ante*, p. 489), affirmed.—COOTE *v.* FORD, *C.A.*, 548; [1899] 2 Ch. 93; 68 L. J. Ch. 508; 80 L. T. 697.

27. *Payment into court—Trustee.*—A trustee, in answer to a motion that he should pay into court money arising from the sale of shares forming part of the trust property, swore that he in good faith paid away the purchase-money in the belief that he was entitled thereto, and no part thereof was then in his hands.

Held, that as the terms of the affidavit did not show that the trustee had no control over the purchase-money, he must bring the sum into court.—BENSON, RE, ELLETSON *v.* PILLERS, *Ch.D. North, J.*, 264; [1899] 1 Ch. 39; 68 L. J. Ch. 5; 79 L. T. 590.

28. *Payment out of court—French subjects—Infants—French guardian's right to receive money—Discretion of court.*—A French subject who, according to French law, is the legal guardian of his infant children (also French subjects), and is empowered by that law to receive and give legal discharges for all moneys coming to them during their minority, is not entitled as of right to payment out of court of a fund to which such infant children have become absolutely entitled.

The court, however, can, in its discretion, pay the fund out to him upon the production of satisfactory evidence that it will be applied for the benefit of the children.—CHATARD'S SETTLEMENT, RE, *Ch.D. Kekewich, J.*, 515; [1899] 1 Ch. 712; 68 L. J. Ch. 350; 80 L. T. 645.

29. *Receiver—Ejectment action—Disputed title—Defendant in receipt of rents—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.—The appointment of a receiver in an action pending to recover possession of land is discretionary on the part of the court, and on all such applications the surrounding circumstances must be considered. If on the evidence before the court it is satisfied that the plaintiff has shown a good title, and that the tenants are in jeopardy through the defendant being in possession, a receiver will be appointed.—JOHN *v.* JOHN, *C.A.*, 52; [1898] 2 Ch. 573; 79 L. T. 362.

30. *Receiver—Equitable execution—Charge on land—Reversion, sale of—"Actual delivery in execution"—Judgments Act* (27 & 28 *Vict. c.* 112), *s.* 1.—The defendants in a probate action having been condemned in costs, the plaintiff obtained an order from the Probate Division for the appointment of a receiver of the rents and profits of real estate vested in remainder in the defendants. On an application in the Chancery Division by the plaintiff for a charge on and sale of such remainder,

Held, that no such charge or sale could be enforced, as the appointment of a receiver did not constitute an "actual delivery in execution" of the remainder within the meaning of section 1 of the Judgments Act, 1864.—HARRISON AND BOTTOMLEY, RE, *C.A.*, 307; [1899] 1 Ch. 465; 68 L. J. Ch. 208; 80 L. T. 29.

31. *Receiver—Equitable execution—Summons for appointment of receiver—Personal service—Ord.* 67, *r.* 4, 5.—Where the defendant has not entered an appearance to the writ in the action, a summons for the appointment of a receiver cannot be served upon him by filing it at the Central Office under ord. 67, r. 4, but must be served personally, or an order obtained for substituted service.—TILLING *v.* BLYTHE, *C.A.*, 273; [1899] 1 Q. B. 557; 68 L. J. Q. B. 86; 80 L. T. 44.

32. *Receiver—Married woman—"Equitable execution"—Jurisdiction—Costs "payable out of married woman's separate estate, but not otherwise"—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.—A married woman, in an action unsuccessfully brought by her, was condemned in costs, to be taxed and paid to the defendants "out of the plaintiff's separate estate, but not otherwise." The only separate estate to which the plaintiff was entitled was a reversionary share in some property left to her by her sister's will. The share having come into possession, Kekewich, J., on the application of the defendants, and before the certificate of the defendants' costs had been issued, appointed a receiver of the plaintiff's share.

Held, by the Court of Appeal, on the authority of *Kearns* v. *Leaf*, 12 W. R. 462, 1 Hem. & M. 681, that, apart from the Judicature Act, 1873, s. 25, there was jurisdiction in the court to appoint a receiver of the married woman's separate estate for the protection of the fund out of which the costs were directed to be paid.

Decision of Kekewich, J. (*ante* p. 138), affirmed.—CUMMINS *v.* PERKINS, *C.A.*, 214; [1899] 1 Ch. 16; 68 L. J. Ch. 57; 79 L. T. 456.

33. *Striking out statement of claim—Action to set aside judgment by default on ground of fraud—R. S. C.*, 1883, *ord.* 27, *r.* 15—*Payment into court—Action for malicious presentation of bankruptcy petition—Allegation of special damage.*—Notwithstanding the provisions of ord. 27, r. 15, which provides a short method of setting aside a judgment by default, an action to set aside such a judgment on the ground of fraud is still, subject to the discretion of the court as to costs, maintainable without leave. The court will not, therefore, strike out as frivolous the statement of claim in an action for that purpose, though it may order the plaintiff to pay into court the amount of the judgment impeached. Nor will the court strike out as frivolous a statement of claim in an action for damages in respect of bankruptcy proceedings maliciously taken, on the ground that it does not contain an allegation that the plaintiff has sustained special damage.—WYATT *v.* PALMER, *C.A.*, 549; [1899] 2 Q. B. 106; 68 L. J. Ch. 86; 80 L. T. 639.

34. *Summons for directions—Statement of claim—Judgment in default of defence—Ord.* 27, *r.* 11—*—Ord.* 30, *rr.* 1 (*b*) *and* 8.—K. commenced an action against C. for an injunction. C. appeared. K. having on motion obtained an *interim* injunction delivered a statement of claim to C. without taking out a summons for directions as required by ord. 30, r. 1 (b). C. failed to deliver a defence, and K. moved for judgment in default of defence, under ord. 27, r. 11. At the hearing of the motion C. contended that it should be dismissed as irregular, since it and the delivery of the statement of claim were steps in the action, and they were taken without first taking out a summons for directions.

Held that C. was not entitled to have the motion dismissed. K.'s procedure was irregular, but C.'s only remedies were to take out a summons to have the action dismissed under ord. 30, r. 8, or to move to have the notice of motion set aside as irregular.—KEMP *v.* COLMAN, *Q.B.D.*; 80 L. T. 54.

35. *Trial—New trial—Appeal from county court—Plaintiff's evidence—Refusal of judge to withdraw case from jury—Defendant's evidence—Case then withdrawn from jury.*—On the 14th of September, 1898, the son of G., the appellant, at 1.30 p.m. loaded twelve cows at M. D. station on a truck of the respondent company. The cows were consigned to C., another station twenty-five miles distant, and

at the time of loading were in good condition. Appellant had on other occasions sent cattle from M. D. to C., and they had usually arrived by 8 p.m. On this occasion they did not arrive till after midnight, and were then found to be in a damaged and exhausted condition. G. then brought an action against the respondent company in the county court, on the ground that the injuries had been caused by the respondents' negligence. After evidence had been given in support of the plaintiff's case, counsel for the defence submitted that there was no evidence of negligence to go to the jury, but the judge held that a *primâ facie* case had been made out. Evidence was then given by the company to the effect that the delay in the arrival of the cattle was due solely to shunting operations to avoid passenger trains. The judge thereupon withdrew the case from the jury, and gave judgment for the company. G. appealed.

Held that, though the county court judge was wrong in withdrawing the case from the jury, and should have left it to them with a strong direction to find a verdict for the defendants, yet that it would be useless to send the case back for trial, as the only verdict that could be found on the evidence must be a verdict for the defendants.—GODDARD *v.* MIDLAND RAILWAY CO., *Q.B.D.*; 80 L. T. 624.

36. *Trial — New trial — Verdict — Judgment — Damages.*—Where a jury found (1) that the death of the plaintiff's wife had been accelerated, but not to any appreciable extent, by taking a dose of tartar emetic negligently supplied by the defendants; (2) that the plaintiff had suffered no damage thereby, but that his minor child had incurred damage to the extent of 1,000 dols.

Held, that the action must be dismissed, because the damages attributable to the defendants were on those findings (which could not properly be disturbed) inappreciable and irrecoverable.

The Court of Queen's Bench was in error in directing a new trial on the assumption that the findings as to damages are contradictory and illogical.—KERRY *v.* ENGLAND, *P.C.*; [1898] A. C. 742.

37. *Trial—Notice of trial—Length of notice—Ten days before trial—R. S. C.*, 1883, *ord.* 36, *rr.* 14, 18; *ord.* 30, *r.* 2.—The court has jurisdiction to order a defendant, in any case in which it seems just, to take ten days' notice of trial, to expire on the day when the trial comes on.—BAXTER *v.* HOLDSWORTH, *C.A.*, 179; [1899] 1 Q. B. 266; 68 L. J. Q. B. 154; 79 L. T. 434.

38. *Trial with jury—Probate—Notice only to cross-examine witnesses—Costs—Ord.* 21, *r.* 18.—Ord. 21, r. 18, has established a new and complete rule that a party opposing a will, who with his defence gives notice of intention only to cross-examine the witnesses produced in support of the will, is not to be liable to pay the costs of the other side unless the judge is of opinion that there was no reasonable cause for opposing the will, and the rule extends to cases heard before a jury asked for by the defendant.—DAVIES *v.* JONES, *P.D. & Ad.D.*; 68 L. J. P. 69; 80 L. T. 631.

39. *Writ—Service—Service of writ out of jurisdiction —Contract "which, according to the terms thereof, ought to be performed within the jurisdiction"—Rules of Supreme Court*, 1883, *Ord.* 11, *r.* 1 (*e*).—In order to allow service of a writ out of the jurisdiction under ord. 11, r. 1 (*e*), the contract for breach of which the action is brought must be one which, according to the terms thereof, must be performed within the jurisdiction. Leave cannot be given in a case where the contract may be performed either within or out of the jurisdiction.

Where the defendant abroad contracted to sell goods sent to him and remit the proceeds to England by bills, and he sold the goods and kept the proceeds,

Held, that since his contract could all be performed abroad, no writ could be issued here for service abroad, either for breach of contract or for money had and received.

The decision of the Court of Appeal reversed. —COMBER *v.* LEYLAND, *H.L.*; [1898] A. C. 524; 79 L. T. 180.

40. *Writ—Service out of jurisdiction—Necessary and proper parties—R. S. C.*, 1883, *ord.* 11, *r.* 1 (*g*)—*Insufficient disclosure of facts—Discretion of court.*—This was an action brought against four persons for relief in respect of a breach of trust in improper investment of trust funds. The first three defendants were partners in a firm of solicitors practising in Calcutta; the fourth was the legal personal representative of the survivor of the two trustees who were alleged to be responsible for the breach of trust. He was resident in England, and had been duly served. An order had been made for service out of the jurisdiction upon the first three defendants upon affidavits which only stated that the money was in their hands when invested, and the investment was really made by them. The three defendants now moved to discharge the order. It appeared from the evidence on this motion that the defendant's firm had only acted as solicitors for the trustees, the business having been brought in and entirely conducted by a deceased member of the firm.

Held, that the order for service must be discharged, because (1) the affidavits on which the order was obtained did not sufficiently disclose the facts; (2) the first three defendants were not necessary or proper parties to the action; (3) the case was not one in which the court ought in the exercise of its discretion to order the case to be tried in England.—PLASKETT *v.* EDDIS, *Ch.D. North, J.*; 79 L. T. 136.

See also Administration, 8; Admiralty, 3; Assignment, 1, 2; Bankruptcy, 20, 21; Common; Company, 3, 11, 34, 35, 37; County Court, 1; Divorce, 9-11; Injunction, 1; Inland Revenue, 8; Justices, 5; Libel, 3; Local Government, 21; Married Woman, 2; Partition; Poor Law, 4.

PRINCIPAL and AGENT:—

1. *Agreement by agent with third party to detriment of principal—Surreptitious dealing with other principal —Bribe accepted by agent—Avoidance of contract.*—The defendant agreed to purchase a pair of horses from the plaintiff, provided they were passed as sound by a veterinary surgeon who was employed by the defendant to examine them. The horses were certified as sound by the veterinary surgeon, and the defendant sent a cheque for the price. The horses were delivered and found to be unsound, and thereupon they were returned and the cheque stopped. In the course of the trial of an action on the cheque it was elicited that the veterinary surgeon had accepted a bribe from the plaintiff.

Held, that it was immaterial to inquire what effect the bribe had on the mind of the defendant's agent, that the offer and acceptance invalidated the certificate, and that the plaintiff could not recover under the contract which depended on the validity of the certificate.—SHIPWAY *v.* BROADWOOD, *C.A.*; [1899] 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11.

2. *Public body—Negligence—Making up road—*

Dangerous work—Employment of contractor—Liability of public body.—Where a public body takes upon itself the making-up of a road, such work being of itself, unless carefully done, likely to be dangerous to the public, a duty is cast upon such public body to see that no dangerous obstructions are allowed to exist to passengers passing along the road. That duty cannot be evaded by employing a contractor to carry out the work.—HILL *v.* TOTTENHAM DISTRICT COUNCIL, *Q.B.D.*; 79 L. T. 495.

3. *Ratification by principal—Contract by agent in name of principal, but for his own benefit.*—Where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers.—TIEDEMANN AND LEDERMANN FRERES, RE, *Q.B.D.*; [1899] 2 Q. B. 66; 68 L. J. Q. B. 852.

See also Contract, 6; Negligence, 1, 2.

PRINCIPAL and SURETY:—

1. *Bond—Rate collector—Discharge of sureties.*—Sureties to a bond for the due performance of the duty of a rate collector will not be discharged from their obligation by reason of the obligees continuing such collector in their service where he has been guilty of irregular modes of accounting, but has been guilty of no dishonesty in the course of his service, and where such obligees have done all in their power to get such collector dismissed, the power to dismiss is not being vested in them.—CAXTON *v.* DEW, *Q.B.D.*; 68 L. J. Q. B. 380; 80 L. T. 325.

2. *Co-sureties — Co-sureties constituted principal debtors—Giving time by one co-surety—Contribution.*—The plaintiffs and the defendant gave a joint and several bond to secure the repayment of an advance made to a company upon a second mortgage, and by the bond it was agreed that the plaintiffs and defendant, as between themselves and the mortgagee, should be taken to be principal debtors, and that they should not, nor should either of them, be released by reason of time being given to the company, or by any forbearance, act, or omission of the mortgagee or his assigns. The company was subsequently wound up and a new company formed to take over the business, subject to the mortgages, and the plaintiffs, without the assent of the defendant, paid off the mortgage debt due under the bond to the mortgagee, who was pressing for payment, obtained a transfer of the second mortgage to themselves, the new company covenanting to pay to them the principal sum thereby secured, and entered into an agreement with the new company that the mortgage should not be enforced or the mortgage money called in for six months. The course adopted by the plaintiffs in dealing with the mortgage security was in the best interests of all concerned. In an action by the plaintiffs to recover from the defendant his proportion of the amount so paid by them under the bond,

Held, that the plaintiffs were entitled to recover.—GREENWOOD *v.* FRANCIS, *C.A.*, 230; [1899] 1 Q. B. 312; 68 L. J. Q. B. 228; 79 L. T. 624.

See also Trustee, 3.

PROBATE:—

1. *Administration—Administrator* de bonis non—*Trustees—Grant to beneficiary limited to trust funds.*—Where trust funds are standing in the name of a deceased trustee, a grant of letters of administration *de bonis non*, limited to the trust fund, may be made to a person entitled to the whole beneficial interest in the fund, though the deceased trustee has appointed an executor.—RATCLIFFE, IN GOODS OF, *P.D. & Ad.D.*; 68 L. J. P. 47; 80 L. T. 170.

2. *Administration — Administrator and receiver* pendente lite—*Citing heir-at-law—Land Transfer Act*, 1897.—Where the deceased has died possessed of real and personal estate an administrator and receiver *pendente lite* will not be appointed without notice to the heir-at-law.—WIGGINS *v.* HUDSON, *P.D. & Ad.D.*; 80 L. T. 296.

3. *Administration—Bond—Dispensing with sureties—Personal bond only allowed—Court of Probate Act*, 1857, *ss.* 81, 82.—The administrator of an estate which consists of sums standing to the credit of an action in the Chancery Division may be allowed to give a personal bond for due administration without sureties for such sums as will be paid in that action to other beneficiaries directly, and only required to give a bond with sureties for the sum to which he is himself entitled.—LEACH, IN GOODS OF, *P.D. & Ad.D.*; 80 L. T. 170.

4. *Administration — Citation — Disappearance of son—Grant to grandson without citing son.*—The deceased had three children, two of whom predeceased him. The third, a son, left England in 1872, and had not since been heard of. A grandson, a child of one of the deceased children, applied for letters of administration.

Held, that the grant prayed for might be made to the applicant without citing the son on the applicant swearing that he believed himself to be the sole next-of-kin.—CALLICOTT, IN GOODS OF, *P.D. & Ad.D.*; 68 L. J. P. 67; 80 L. T. 421.

5. *Administration — Creditor — Next-of-kin unknown—Form of grant.*—The deceased, who had carried on a business during his lifetime, died intestate without ascertainable next-of-kin in England. On an application by a creditor for an immediate grant of letters of administration without citing the next-of-kin,

Held, that a grant *ad colligenda bona* might be made to the creditor with power to dispose of the property and business of the deceased.—BOLTON, IN GOODS OF, *P.D. & Ad.D.*; 68 L. J. P. 63; 80 L. T. 631.

6. *Administration—Intestacy—Bastard—Real and personal estate—Right of Crown—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.—Where a person dies a widow (or bachelor) without issue, a bastard and intestate, entitled to real and personal estate, the grant of administration to the nominee of the Crown will be of the personal estate only, as before the Land Transfer Act, 1897. The Crown is not bound by that Act.—HARTLEY, IN GOODS OF, *P.D. & Ad.D.*, 287; [1899] P. 40; 68 L. J. P. 16.

7. *Administration—Married woman—Deed of separation—Citation of husband.*—A married woman executed a deed of separation, which provided that on her death her property should go as though her husband were already dead, and died while the deed was alleged to be still in operation, and while the husband was said to be largely indebted to the estate of the deceased for payments due under the deed.

Held, that letters of administration ought not to be granted to the deceased's next-of-kin without citing the husband, on the ground that he might dispute the deed.—MEGSON, IN GOODS OF, *P.D. & Ad.D.*; 80 L. T. 295.

8. *Administration — Married woman — Foreign domicil—Power of appointment — Will made in execution of power—Administration with will annexed*

—*Grant to appointee—Limited or general grant.*—Upon an application for administration with the will annexed it appeared that the deceased was domiciled in France, her husband, who survived her, being a domiciled Frenchman. The applicant was the appointee in trust under the marriage settlement of the deceased, which, on the face of it, appeared to include all the property, and the ground of the application was that the will had not been executed in accordance with the law of the domicil of the deceased,

Held, that unless the husband of the deceased were to consent, a full grant ought not to be made; and that, in accordance with the practice, failing the husband's consent, the grant to the applicant, as appointee, should be limited to such property as the deceased had power to dispose of, and did dispose of, by the instrument executing the appointment.—IN GOODS OF TREFOND, *P.D. & Ad.D.*; [1899] P. 247; 68 L. J. P. 82.

9. *Administration — Married woman — Limited administration—Will of married woman—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75)—*Probate Rules of April*, 1887.—Where, upon the death of a woman who had married before the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it appeared that, before her marriage, she had acquired a mortgage debt, which her husband had not reduced into possessson, and had since her marriage made a will purporting to dispose of all her real and personal property, the court made a grant to her husband of administration to such of her property as she had no power to dispose of by will.—IN GOODS OF LEMAN, *P.D. & Ad.D.*; [1898] P. 215.

10. *Administration — Passing over executor — Residence abroad — Probate Act*, 1857, *s.* 73.—A testator appointed a sole executor. The executor, shortly before the testator's death, disappeared, and a warrant for his arrest had been issued, but his whereabouts was unknown.

Held, that, though residence abroad could not be presumed, the executor might be passed over without citation, and administration with the will annexed might be granted.—WRIGHT, IN GOODS OF, *P.D. & Ad.D.*; 79 L. T. 473.

11. *Administration—Renunciation and assignment by next-of-kin—Grant to assignee.*—The deceased died intestate, leaving A. his sole next-of-kin. A. renounced her right to administration, and assigned her rights in the property of the deceased to B.

Held, that letters of administration might be granted to B.—QUILLIAM, IN GOODS OF, *P.D. & Ad.D.*; 68 L. J. P. 17; 79 L. T. 472.

12. *Administration—Son's death intestate—Disappearance of father—Citation.*—Where one of two brothers died intestate and the father, who had survived the deceased, had disappeared, the court, on an application for a grant of letters of administration by the surviving brother, directed that the father should be cited.—HARPER, IN GOODS OF, *P.D. & Ad.D.*; 68 L. J. P. 48; 80 L. T. 294.

13. *Administration — Surety — Trustee in bankruptcy of next-of-kin.*—Letters of administration may be granted to the trustee in bankruptcy of the next-of-kin without requiring sureties.—ASTBURY, IN GOODS OF, *P.D. & Ad.D.*; 80 L. T. 296.

14. *Administration—Will annexed—Foreign grant —Grant subject to order of foreign court—Renunciation by executor of foreign will.*—Where administration with the will annexed has been granted abroad by a foreign court subject to such orders as may from time to time be made by that court, the court here need not before granting such administration to an attorney of the foreign administrator inquire whether orders have been made by the foreign court modifying or cancelling the foreign grant.

Where a testator domiciled abroad has disposed by his will of all his property without qualification as to its situa ion, and the executor of the will has renounced probate abroad, the court here may grant letters of administration with the will annexed to an administrator appointed by the foreign court without requiring express renunciation by the executor of probate in this country.—SCARR, IN GOODS OF, *P.D. & Ad.D.*; 80 L. T. 296.

15. *Practice—Costs—Proof in solemn form—Notice by defendants to cross-examine only—R. S. C., ord.* 21, *r.* 18.—The court at the hearing of a probate suit being of opinion that the defendants—who were opposing a will and codicil, and had given notice under ord. 21, r. 18, that they merely insisted on the will being proved in solemn form of law, and that they only intended to cross-examine the witnesses produced in support of the will—had no reasonable ground for opposing the will, condemned the defendants to pay the costs of the plaintiffs who were propounding the documents.—SPICER *v.* SPICER, *P.D. & Ad.D.*, 271; [1899] P. 38; 79 L. T. 707.

16. *Practice—Several defendants—Right of two sets of counsel to be heard.*—Where several defendants are opposing a will and have filed separate defences, but the defences are substantially the same, the court will not at the trial of the action hear more than one counsel on behalf of the defendants.—BAGSHAW *v.* PIMM, *P.D. & Ad.D.*; 80 L. T. 360.

17. *Will—Codicil—Revocation—Revival.*—A testatrix made a will dated the 31st of January, 1888. By a subsequent codicil dated the 1st of August, 1893, and headed, "Memorandum for my trustee A. W. G.," the sole surviving executor and trustee of the will, she disposed of the whole of her property without any specific appointment of an executor.

By another will made abroad she confirmed her will "made in England in or about the year 1889," and thereby disposed only of her property situate abroad, of which latter will she appointed another executor.

Held, that probate of all three documents might be granted to A. W. G. as executor, with liberty to the foreign executor to come in.—GREEN, IN GOODS OF, *P.D. & Ad.D.*; 79 L. T. 738.

18. *Will—Executor—Misdescription.*—A testator, T. C., bequeathed his property to his wife, his son, and T. S. upon certain trusts, and appointed his wife, his son, and "the said T. C." executors of the will. The testator had no known relative or friend of the name of T. C.

Held, that probate of the will might be granted to the wife, the son, and T. S., with a blank in place of "C." in the clause appointing executors.—COOPER, IN GOODS OF, *P.D. & Ad.D.*; 68 L. J. P. 65; 80 L. T. 632.

19. *Will—Document referred to in will—Incorporation—Document ordered to be filed in registry.*—A testator, after bequeathing certain shares in his residuary estate to his children, directed that advances made to them should be taken as part of their shares, that entries in a certain book should be the only and conclusive evidence of the advances, and that no child should be entitled to any share under the will until the advances were brought into hotchpot. The book contained entries made before and after the will.

Held, that the book need not be admitted to probate, but that it ought to be filed in the registry.—PEASE, IN GOODS OF, *P.D. & Ad.D.*; 80 L. T. 295.

20. *Will—Foreign will—Revoked codicil—Foreign grant—Probate of exemplification.*—A testator died domiciled in India, leaving a will and two codicils, one of which had been revoked. The Indian court granted probate of the will and both codicils.

Held, that probate might be granted here of the exemplification probate granted in India, notwithstanding that it comprised a revoked codicil.—GURBOY, IN GOODS OF, *P.D. & Ad.D.*; 80 L. T. 808.

21. *Will—Non-appearance of cited legatees.*—Where an action is brought to set aside a will, a grant of administration may be made to the next-of-kin after citation of, and failure to appear by, the legatees under the will.—QUICK, IN GOODS OF, *P.D. & Ad.D.*; 68 L. J. P. 64; 80 L. T. 808.

22. *Will—Obliteration—Words obliterated "apparent"—Wills Act* (1 *Vict. c.* 26), *s.* 26.—A holograph will originally contained two devises and gift of a legacy to the testator's son "Daniel." The name had been obliterated in all three places, but when there was nothing to show, and the testator had written in the names of Daniel in one, and of another son Thomas in two other places,

The court, on the evidence of an expert that, with the aid of a magnifying glass, he could read the original name Daniel in all three places, on motion by consent of all parties interested, granted administration with the will annexed, with the original word "Daniel" substituted in all three places, on the ground that the original words were "apparent" within the meaning of section 26 of the Wills Act.—BRAZIER, IN GOODS OF, *P.D. & Ad.D.*, 272; [1899] P. 36; 68 L. J. P. 6; 79 L. T. 472.

23. *Will—Seaman—29 Car.* 2, *c.* 3, *s.* 23—1 *Vict. c.* 26, *s.* 11—"*At sea*"—*Voyage not yet begun.*—A letter containing testamentary dispositions written on a ship lying within a river, and before the ship has actually sailed, may be a valid will as made by a seaman at sea.—PATERSON, IN GOODS OF, *P.D. & Ad.D.*; 79 L. T. 123.

24. *Will in custody of foreign court—Notarial copy—Exemplification.*—Even where a will is in the possession of a foreign court merely for purposes of custody and not for purposes of probate, the court here will not admit a notarial copy to probate, but will require the original will or a copy authenticated by the foreign court.—BROWN, IN GOODS OF, *P.D. & Ad.D.*; 80 L. T. 360.

See also Administration, 8, 9; Estoppel; Married Woman, 3, 4; Practice, 9, 38.

PUBLIC AUTHORITIES PROTECTION ACT, 1893:—

1. *Costs—Solicitor and client costs—Public authority—Action for injunction—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).—Section 1 of the Public Authorities Protection Act, 1893, gives a right to solicitor and client costs in actions for injunctions as well as in actions for damages; but it does not apply to interlocutory applications or to appeals.

The title of an Act of Parliament is now to be read as part of the Act.—FIELDING *v.* MORLEY CORPORATION, *C.A.*, 295; [1899] 1 Ch. 1; 79 L. T. 231.

2. *Costs — Taxation — Action against public authority—Judgment for defendants—Consent order—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-section* (b).—In an action against a county council for acts done by them in pursuance of the Local Government Act, 1894, an order was made in chambers by consent that the action be dismissed, and that the plaintiff should pay the defendants their taxed costs of the action.

Held, that the defendants had obtained judgment within the meaning of section 1, sub-section (*b*), of the Public Authorities Protection Act, 1893, and that the costs must therefore be taxed as between solicitor and client.—SHAW *v.* HERTS COUNTY COUNCIL, *C.A.*; [1899] 2 Q. B. 282.

3. *Limitation of action—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict. c.* 76) *s.* 4.—A sanitary authority served notices, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4, on the owner of premises, requiring him to do certain specified works in respect of what was supposed to be a drain. He complied with the notices, and incurred expense in doing the works. It was discovered that the supposed drain was a sewer, which the sanitary authority was liable to repair, and the executors of the owner brought an action against the sanitary authority to recover the amount of the expenses incurred, as money paid to the use, and at the request, of the defendants. The action was not commenced within six months after the expenses had been paid.

Held, that the action was brought for an act done in pursuance, or execution, or intended execution, of the Public Health (London) Act, 1891, within the meaning of the Public Authorities Protection Act, 1893, s. 1, and ought to have been brought within six months, and therefore the defendants were not liable.

Waterhouse v. *Keen*, 4 B. & C. 200, and *Midland Railway Co.* v. *Withington Local Board*, 11 Q. B. D. 788, followed.—CREE *v.* ST. PANCRAS VESTRY, *Q.B.D.*; [1899] 1 Q. B. 693; 68 L. J. Q. B. 389; 80 L. T. 388.

4. *Limitation of action—Ship—Damages—Practice—Action against a harbour board—Limit of time for commencement of — Public duty — Costs — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.—The plaintiffs, owners of a barque, issued a writ, on the 14th of November, 1898, in an Admiralty action, against the defendants for damages sustained by the grounding of their vessel on the 13th of September, 1893, in the River Ribble within the port and harbour of Preston, through the alleged negligence of the defendants in inviting the vessel to come up when there was not sufficient water in the channel leading to the docks. Jeune, P., dismissed the action with costs to be taxed as between solicitor and client.

Held, affirming the decision of the President, that the defendants were acting in pursuance of their public duties, so that section 1 of the Public Authorities Protection Act, 1893, applied, and as that statute, dealing with procedure only, was retrospective, the action was barred after the expiration of six months from the default complained of.—THE "YDUN," *C.A.*; [1899] P. 236.

PUBLIC HEALTH.—See Arbitration, 1; Corporation, 4; Justices, 7-9; Licensing Law, 7; Local Government, 12-18, 21-26, 31; Public Authorities Protection Act, 3.

QUEENSLAND, LAW of:—

Succession and Probate Duties Act, 1892 (56 *Vict.*

No. 13), *s.* 4—*Succession defined—Movables locally situated in the colony—Domicil of the testator.*

Held, that section 4 of the Queensland Succession and Probate Duties Act, 1892, defining a "succession" being the same as section 2 of the English Succession Duty Act of 1853, must be read in the sense affixed to the English Act by the English tribunals; and that it does not include movables locally situated in Queensland which belonged to a testator whose domicil was in Victoria.

Held, further, that the Amendment Act of 1895, s. 2, is not retrospective in its operation.—HARDING *v.* COMMISSIONERS OF STAMPS FOR QUEENSLAND, *P.C.*; [1898] A. C. 769; 79 L. T. 42.

RAILWAY:—

1. *Borrowing powers—Unauthorized borrowing—Interest on debenture stock — Overdrawn banking account—Subrogation of lender to rights of creditors—Secured creditors.*—A railway company having power to borrow money by the creation of three classes of debenture stock, A, B, and C, had exhausted its borrowing powers, and then applied to its bankers for a loan in order to pay the half-yearly interest then due on the debenture stocks. The bank made the requisite advance. Shortly afterwards a judgment creditor of the company petitioned for and obtained the appointment of a receiver. The A stock had priority over the B and C stock, and the B stock over the C stock.

It subsequently came to the knowledge of the bank that the income of the company in the receiver's hands was sufficient to pay the next half-year's interest on the A stock and part of the interest on the B stock.

Held, affirming Romer, J. (*ante*, p. 172), on the application of the bank, that the bank was not entitled to be repaid in priority to the B. stockholders, even to the extent of the interest on the A stock paid out of the bank's money.

If a lender advances money to a company which has exhausted its borrowing powers, he is only entitled to have that portion of the advance actually expended in payments of debts of the company treated as a valid advance.

No right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers can be justified in principle.—WREXHAM, &c., RAILWAY Co., RE, *C.A.*, 464; [1899] 1 Ch. 440; 68 L. J. Ch. 270; 80 L. T. 130.

2. *Carriage of goods—"Owner's risk"—Breach of contract—Damages—Liability.*—A railway company contracted with M. to carry certain goods to Jersey, *viâ* the Great Western Railway. Instead of doing so they carried them *viâ* the London & South-Western Railway, and in consequence there was delay, and M. suffered damage and loss. The contract was for carriage at owner's risk. In the contract was a clause relieving the company from all liability for loss, damage, misdelivery, delay, or detention, except where such arose from the wilful misconduct of the company.

Held, that, as the company had not carried out the terms of the contract, the above clause did not apply, and the company were liable.—MALLET *v.* GREAT EASTERN RAILWAY Co., *Q.B.D.*, 334; [1899] 1 Q. B. 309; 68 L. J. Q. B. 256; 80 L. T. 53.

3. *Compensation—Lease of land—Yearly rent—Subsequent compulsory acquisition—Basis of value.*—By an indenture dated the 29th of May, 1839, the predecessor in title of the plaintiff grant to certain lessees, whose interest is now vested in the defendants certain lands for a railway for twenty-one years at a yearly rent of £144 5s.

The land in question now forms part of the N. E. R. Co.'s system, and the rent has always been duly paid since the expiration of the lease.

On the 3rd of October, 1890, the defendants served upon the plaintiff a notice to treat, and an arbitration took place under the Lands Clauses Act, 1845. The umpire in making his award considered the yearly rent of £144 5s. as a basis upon which to calculate the value of the lands.

Held, that he was entitled to do so.—ELDON (EARL) *v.* N. E. RAILWAY Co., *Q.B.D.*; 80 L. T. 723.

4. *Compensation—Purchase by railway company of reversion on lease—Covenant running with land—Covenant for quiet enjoyment—Injunction—Damages—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 6.—In 1893 an Act was passed enabling the plaintiff company to take compulsorily (*inter alia*) the property to which this action related. In 1894 the owner of the property let it to the defendant for a term of years by a lease containing the usual covenant for quiet enjoyment. In 1895 the company purchased the reversion of the property, subject to the lease. After this the company proceeded with their works, and in so doing caused structural injury to the defendant's house; they also for some time rendered the access to his premises less convenient, by erecting hoardings which blocked up half the thoroughfare along the street in which his house stood, and by taking a great number of carts along that street. They also for three or four days incumbered a passage along which he had a right of way so that he could not use it. It was not alleged that the company had exceeded their statutory powers or exercised them negligently. The company sued the defendant for rent, and he counterclaimed for damages for breach of the covenant for quiet enjoyment.

Held, that the covenant for quiet enjoyment was in force and was binding on the company, and that they were liable to make compensation for any breach of it, but that no action would lie against them for any breach of it committed in the reasonable and careful exercise of their statutory powers, the only remedy of the tenant for such breaches being under the compensation clauses of the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, and that the counterclaim, therefore, had been properly dismissed.

Though structural injury to a house by the lessor is a breach of the covenant for quiet enjoyment, no temporary inconvenience caused by the lessor, but not affecting the title or possession of the tenant, is a breach of the covenant.

Decision of Byrne, J., affirmed.—MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY Co. *v.* ANDERSON, *C.A.*; [1898] 2 Ch. 394.

5. *Fence—Owner and occupier of adjoining land—Adjoining highway—Licensee of owner of soil—Railway Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 18.—A railway company whose premises adjoin a public highway is not bound to fence against cattle straying upon the highway and not merely passing and repassing along it, even although the cattle are upon the highway by permission of the owner of the soil.—LUSCOMBE *v.* GREAT WESTERN RAILWAY Co., *Q.B.D.*; [1899] 2 Q. B. 313; 68 L. J. Q. B. 711.

6. *Level crossings—Speed of trains—Public body—Infringement of statute—Information by Attorney-General—Injunction—Evidence of injury—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20),

s. 48.—Upon an information filed by the Attorney-General to restrain a public body from exercising statutory powers in such a manner as to infringe an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of.

By the Railways Clauses Consolidation Act, 1845, s. 48, "Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour." A railway company had power, by a statute incorporating this clause, to cross a road, to which the clause applied, on the level. They constantly drove their trains over the level crossing at a speed exceeding four miles an hour.

On an information, filed by the Attorney-General, on the relation of the county council in whom the road was vested, for an injunction to restrain the company from allowing their trains to cross the level crossing at a speed greater than four miles an hour,

Held, that as the information was filed to enforce the express terms of an Act of Parliament, an injunction must be granted, although there was no evidence of any injury to the public.

Attorney-General v. *Great Western Railway*, L. R. 7 Ch. 767; *Attorney-General* v. *Cockermouth Local Board*, L. R. 18 Eq. 172; and *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752, approved and followed.—ATTORNEY-GENERAL v. LONDON AND NORTH-WESTERN RAILWAY CO., *Q.B.D.*; [1899] 1 Q. B. 72; 68 L. J. Q. B. 4; 79 L. T. 412.

7. *Line crossing highway—Liability of company to repair bridge and approaches—Power to construct level crossing—Diversion of road—Bangor and Carnarvon Railway Act*, 1851 (14 *Vict. c.* 21), *s.* 22—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 46.—A railway company, empowered by their private Act to carry a certain old road across their line on a level, built a bridge across their line at a spot where no highway had previously been, and 347 yards distant from the place where the line crossed the old road. Upon land given by the owners the company made approaches to the bridge, connecting it with the roads lying on either side of the line. The old road was at the same time thrown into the adjoining fields, and the traffic which formerly had passed along the old road thenceforth passed over the bridge and its approaches. The company repaired the bridge from time to time, but did not repair the approaches. On one occasion an adjoining landowner repaired the approaches, under an agreement with the highway authority. The highway authority applied to justices under the Railway Clauses Consolidation Act, 1845, for an order under section 46 directing the railway company to maintain the bridge and its approaches.

Held, that there being no evidence of any constructional necessity, which alone would justify a diversion of the old road under section 16 of the Railway Clauses Consolidation Act, 1845, the bridge and its approaches had not been made under section 46, and therefore the railway company were not bound to maintain them under that section.—LONDON AND NORTH-WESTERN RAILWAY CO. *v.* OGWEN COUNCIL, *C.A.*; 80 L. T. 401.

8. *Minerals—Notice of intention to work—Compensation—Repeal of prior Act—Reservation of rights—Arbitration—Duty of company to take up award—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 35—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.—By a special Act a number of railway companies were dissolved and consolidated into a new company, and the Acts relating to the dissolved companies were repealed. The special Act incorporated the Railways Clauses Consolidation Act, 1845, which was to apply to the new company as if the railways made under the repealed Acts had been made under the powers and provisions of the Railways Clauses Consolidation Act, 1845, and as if that Act had been expressly made applicable to those railways, and as if those railways had been authorized to be made under the special Act. There was a proviso that the repeal should not prejudice or affect anything done under the repealed Acts, or, except as in the repealing Act specially provided, affect the rights of any persons, under the repealed Acts, to which but for the repeal they would have been entitled.

Owners of minerals, lying under and near a part of the railway which had belonged to one of the dissolved companies, gave notice of their desire to work those minerals. An arbitration was held under section 35 of the Lands Clauses Consolidation Act, 1845, to assess the amount of compensation to be paid to the owners of the minerals. The company attended the arbitration under protest, and contended that, by virtue of the proviso in their Act, the assessment should be made under the Act of the dissolved company, and not under the Railways Clauses Consolidation Act, 1845. The arbitrator made his award, which the company refused to take up. On a rule for a *mandamus* to the company to take up the award,

Held (Collins, L.J., dissenting), that the effect of the special Act was to substitute the clauses relating to minerals of the Railways Clauses Consolidation Act, 1845, for those contained in the repealed Act, and that therefore the assessment was rightly made under the Railways Clauses Consolidation Act, 1845, and not under the repealed Act.

North-Eastern Railway v. *Crosland*, 32 L. J. Ch. 353, distinguished.

Held, also, by A. L. Smith, L.J., that the question whether the assessment of the amount of compensation to be paid to the owners of the minerals should have been made under the Railways Clauses Consolidation Act, 1845, or under the repealed Act, could not be entertained upon showing cause against the rule *nisi* to the company to take up the award.

Held, by Collins, L.J., that it was an answer to an application for a *mandamus* that the umpire had assessed compensation under the wrong Act.—REG. *v.* LONDON AND NORTH-WESTERN RAILWAY CO., *C.A.*; [1899] 1 Q. B. 921; 68 L. J. Q. B. 685; 80 L. T. 782.

9. *Passenger—Luggage—"Ordinary luggage"—Bicycle.*—A bicycle is not "ordinary luggage," within the meaning of a railway Act, by which every passenger travelling in a carriage of a certain class may take with him his ordinary luggage, not exceeding a certain weight, free of charge; and therefore a passenger by train, without luggage, is not entitled to take with him, free of charge, a bicycle, not packed up, and of less weight than the weight of luggage allowed to be carried free of charge by the class in which he is travelling.—BRITTEN *v.* GREAT NORTHERN RAILWAY CO., *Q.B.D.*; [1899] 1 Q. B. 243; 68 L. J. Q. B. 75; 79 L. T. 640.

10. *Passenger duty—Exemption—Extra charge for reserved carriage—Railway Passenger Duty Act*, 1842, *s.* 2—*Cheap Trains Act*, 1883 (46 & 47 *Vict. c.* 34), *s.* 2.—By section 2 of the Railway Passenger Duty

Act, 1842, a duty at the rate of 5 per cent. is made payable upon all sums received for the conveyance of passengers upon any railway. By section 2 of the Cheap Trains Act, 1883, fares not exceeding the rate of one penny a mile are exempt from duty.

A railway company whose third-class fares did not exceed a penny a mile, abolished all second-class carriages and fares, and in lieu thereof introduced a system whereby third-class passengers, after taking and paying for their tickets, could for an extra charge procure "supplementary reserve tickets" entitling them to travel in reserved third-class carriages not available for third-class passengers with ordinary tickets only.

Held, that the extra sums were paid in respect of extra accommodation incidental to the conveyance of the passengers, and that the Crown was entitled to duty thereon when the total sum paid exceeded a penny a mile.—ATTORNEY-GENERAL *v.* FURNESS RAILWAY CO., *Q.B.D.*; [1899] 2 Q. B. 267; 68 L. J. Q. B. 623; 80 L.T. 710.

11. *Rates—Exemption—Land used as railway for public conveyance—Liverpool Corporation Act*, 1893. *s.* 36 (ii.).—A railway company occupied land in Liverpool for a goods station. The premises consisted of a large covered shed open on one side, and on the other side with openings in the walls to admit of trucks. Inside the shed were a number of railway lines, with sidings and platforms for the loading of trucks: these lines were used for the conveyance of goods sent by the public to and from the premises. The premises were connected with the company's main line by a dock line belonging to the Mersey Docks Board, and by a tramway laid across a street by the company under a licence from the Liverpool Corporation.

Held, that the land used for the lines, sidings, and platforms inside the company's premises was "land used as a railway made under the powers of an Act of Parliament for public conveyance" within the meaning of section 36 of the Liverpool Corporation Act, 1893, and that the railway company were therefore only liable to be rated upon one-fourth of the net annual value thereof, under that section.—WILLIAMS *v.* LONDON AND NORTH-WESTERN RAILWAY CO., *Q B.D.*; [1899] 2 Q. B. 197; 80 L. T. 803.

12. *Receiver and manager — Costs of defending action—"Working expenses"—"Other proper outgoings"—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.—The W., M., and C.'s Q. Railway Co. incurred costs in defending an action brought against it for large sums by the contractor for the line in respect of the balance of the contract price.

A receivership order had been made against the company after the action was commenced; and the plaintiff had obtained leave to continue the proceedings in the action. At the same time leave was given to the company to attend the proceedings, but no order was made as to its costs.

This was an application by the company that these costs might be paid to them at once by the receiver and manager of the railway out of the moneys received by him, upon the footing that the costs in question were "other proper outgoings" within the meaning of section 4 of the Railway Companies Act, 1867.

Held, that as the line could have been carried on just as well and effectually, although the company had not resisted the claim made in the action, however proper it might have been for them to do so, these costs were not "proper outgoings" within the meaning of section 4, and the application failed.—WREXHAM, MOLD, &c., RAILWAY CO. (No. 2), *Ch.D. Byrne, J.*; 68 L. J. Ch. 115; 80 L. T. 649.

13. *Traffic—Arbitration—Charges—Reasonableness—Midland Railway Order Confirmation Act*, 1891, *s.* 5.—By section 5 of the Midland Railway Order Confirmation Act, 1891, the railway company were empowered to charge a reasonable sum for certain additional services rendered to a trader at his request or for his convenience, and "any difference" arising thereunder was to be determined by an arbitrator appointed by the Board of Trade.

Held, that all matters material and incidental to such a difference are within the competence of the arbitrator, whose decision is final.

London and North-Western Railway v. *Donellan*, [1898] 2 Q. B. 7, 46 W. R. Dig. 147, approved.

Decision of the Court of Appeal affirmed.—MIDLAND RAILWAY CO. *v.* LOSEBY, *H.L.*, 656; [1899] A. C. 133; 68 L. J. Q. B. 326; 80 L. T. 93.

14. *Traffic—Loss of market—Finding of the jury—No negligence—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.—Goods carried at various times by the defendant company for the plaintiffs arrived too late for market, and the plaintiffs suffered loss for which they sued. In answer to questions left to them by the judge, the jury found that the defendants accepted the goods with the knowledge that they were to be sold in particular markets, that the defendants lost those markets, but that they had not—except in one instance—been guilty of negligence. On these findings judgment was reserved for further consideration.

Two kinds of consignment notes had been used, one of which contained a notice that the defendants had two rates for the carriage of the goods thereinunder mentioned, "one the ordinary rate, when the company take the ordinary liability of a railway company; the other, a reduced rate, adopted when the sender agrees to relieve the company from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, &c., arose from wilful misconduct on the part of the company's servants." The defendants admitted that, as a matter of fact, they had only one rate for the carriage of the class of goods consigned by the plaintiffs. Both kinds of consignment notes contained the following, among other, conditions: "The company will not be liable for any loss of market."

It was contended, on behalf of the plaintiffs, that the defendants came within section 7 of the Railway and Canal Traffic Act, 1854, and that the condition was in the circumstances not just and reasonable; and on behalf of the defendants that, as the jury had found no negligence, the defendants were outside that section, and that the condition was good as a notice to the consignor.

Held, that, if section 7 of the Railway and Canal Traffic Act, 1854, had been applicable, the condition would have been unreasonable, but that, as the jury had negatived negligence, the defendants were not within section 7, and that, at common law, the condition was good as a notice to the consignor.—DUCKHAM *v.* GREAT WESTERN RAILWAY CO., *Q.B.D*; 80 L. T. 774.

15. *Traffic — Rates — Rebate — Goods received at private siding—Station accommodation and terminal services — Burden of proof — Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 4.—On an application to the railway commissioners to determine a rebate upon rates under section 4 of the Railway and Canal Traffic Act, 1894, the applicants proved that they delivered goods to the respondent railway company at a siding which belonged to

themselves and not to the railway company, and that they had been charged rates by the railway company; but they did not prove that the rates so charged included any charge for station accommodation or terminal services. Their case was that they had sufficiently raised a presumption that they had been charged for station accommodation and terminal services.

Held, by A. L. Smith and Rigby, L.JJ., that the application failed on the ground that the applicants had not satisfied the *onus* which lay upon them of making out the *primâ facie* case which they undertook to establish.

Held, by Vaughan Williams, L.J., that the application failed on the ground that it was clear that the rates charged did not include charges for station accommodation or terminal services; but, *quære*, whether the *onus* was upon the applicants to show that the railway company had charged for station accommodation or terminal services.—SALT UNION *v.* NORTH STAFFORDSHIRE RAILWAY CO., *C.A.*, 4; [1898] 2 Q. B. 435; 79 L. T. 16.

16. *Traffic—Sidings—Charge for use of—Arbitration—Jurisdiction—Condition precedent—Difference before action brought.*—A railway Act confirming a Provisional Order, after empowering the railway company to charge a reasonable sum for certain services rendered to a trader, by way of addition to the tonnage rate, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The company having sued the respondents for services under this section, the respondents objected to the jurisdiction of the court on the ground that the matter was one for the arbitrator to determine.

Held, that as there had been no difference existing between the parties before action brought the arbitrator had not and the court had jurisdiction.

The decision of the Court of Appeal, [1898] 2 Q. B. 7, reversed and the decision of Wright and Darling, JJ., restored upon the above ground.

Query whether the arbitrator can determine any matter except the reasonableness of the charges.—LONDON AND NORTH-WESTERN AND GREAT WESTERN JOINT RAILWAY COS. *v.* BILLINGTON (LIMITED), *H.L.*; [1899] A. C. 79; 68 L. J. Q. B. 162; 79 L. T. 503.

See also Canada, Law of, 5; Contract, 7; Master and Servant, 29.

RECEIVER.—See Mortgage, 12; Practice, 29-32.

RENT:—

1. *Rent-charge—Eviction from part of land—Apportionment of rent-charge—Distinction between grant and reservation of rent.*—By a deed of feoffment made in 1840 A., in consideration of the rent thereinafter reserved, enfeoffed land to B. and his heirs, to the use that A. and his heirs should receive thereout the said rent, and subject to and charged as aforesaid, to the usual uses to bar dower in favour of B.; and, by the same deed, for the consideration aforesaid, B. granted to A. and his heirs the above-mentioned rent and covenanted to pay the same rent. Part of the land having been recently recovered by title paramount, a question arose whether the rent-charge ought to be apportioned or still continued to be payable in full.

Held, that, a rent-charge being reserved to A. on the face of the deed in priority to B.'s estate in fee, no effect could be given to B.'s grant to A. of the same rent.

Held, therefore, according to the distinction drawn in Co. Litt., p. 148*b*, between the grant of a rent and the reservation of a rent in respect of apportionment, that the above-mentioned rent, being a rent reserved, was apportionable.—HARTLEY *v.* MADDOCKS, *Ch.D. Cozens-Hardy, J.*, 573; [1899] 2 Ch. 199; 68 L. J. Ch. 496; 80 L. T. 755.

2. *Way-leaves—Rent or sum in gross—Tenement—Statute* 32 *Hen.* 8, *c.* 34—*Railway company.*—Way-leaves over land are an incorporeal hereditament and a tenement, and sums of money covenanted to be paid for such way-leaves granted for a term of years are not sums in gross, but are rents, the right to which follows the reversion after the term, under the statute 32 Hen. 8, c. 34.

This is the case even where some of such sums are payable to the lessor in respect of traffic passing over the lands of others and not over any part of his own.

Decision of Byrne, J. (*ante*, p. 59), affirmed.—HASTINGS (LORD) *v.* NORTH-EASTERN RAILWAY CO., *C.A.*; [1899] 1 Ch. 656; 68 L. J. Ch. 315; 80 L. T. 217.

See also Inland Revenue, 28; Landlord and Tenant, 19.

RES JUDICATA.—See Justices, 9.

REVENUE.—See Inland Revenue.

RESTRAINT of TRADE:—

1. *Contract—Reasonableness—Limit of space—Limit of time—Injunction—Evidence of reasonableness inadmissible.*—An agreement made in 1894 between the plaintiff, a hardware manufacturer at Dudley, and the defendant, a young man of twenty-four, on the defendant entering the plaintiff's service, contained a restrictive clause that the defendant would not, during his service or after the determination thereof, divulge to any person the secrets of the plaintiff or the mode of conducting his business, or any part thereof, or any information with regard to the same, or, after the determination of such service, work for or serve any other person or firm carrying on the same kind of business, or any part thereof, within a radius of twenty-five miles from the plaintiff's works at Dudley, without his consent. In 1897 the defendant left the plaintiff's service, and in 1899, without his consent, entered the service of a firm carrying on a business similar to that of the plaintiff about three miles from his works.

Held (affirming Stirling, J.), that the plaintiff was entitled to an injunction, since the restrictive clause was not void either as being unreasonable for the plaintiff's protection or as being unlimited in point of time, and so binding the defendant during his whole life.

In an action by a trader against his servant for breach of a contract restricting him from serving a rival trader, evidence from persons in the trade giving their views as to the reasonableness or unreasonableness of the contract is inadmissible, since the reasonableness of a contract depends on its true construction and legal effect, and is consequently a question for the court alone.—HAYNES *v.* DOMAN, *C.A.*; [1899] 2 Ch. 13; 68 L. J. Ch. 419.

2. *Covenant—Validity—Reasonableness—Injunction.*—B., being in the employ of the plaintiffs, who were wholesale and retail hay and straw merchants carrying on business in the United Kingdon and elsewhere, covenanted that he would not, "for the space of twelve months next after his leaving or being dismissed, carry on the business of hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of hay and straw merchant in the United Kingdom of Great Britain and Ireland, or in France,

or in the kingdom of Belgium, or Holland, or in the Dominion of Canada."

B., having voluntarily left the plaintiff's employ, immediately entered the service of a rival hay and straw merchant in London.

Held, by the Court of Appeal (*dissentiente* Vaughan Williams, L.J.), that the restraint being reasonably required for the protection of the plaintiffs, having regard to the nature of their business, was not void, and that, therefore, B. must be restrained by injunction from committing a breach of his covenant. —UNDERWOOD *v.* BARKER, *C.A.*, 347; [1899] 1 Ch. 300; 68 L. J. Ch. 201; 80 L. T. 306.

RIVER:—

Pollution—Stream—"Putrid solid matter"—Nuisance—Remedies—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 17, 20.—The defendant owned weaving sheds, worked by steam-power, on the bank of a stream, and he had for many years prior to the passing of the Act lawfully exercised the right of impounding and diverting water from the stream for the purposes of his business. Such water was diverted from the stream through a goit and impounded in the defendant's reservoir, and contained substances discharged into the stream from paper manufactories, not belonging to the defendant, higher up the river. Whilst the water was so impounded those substances sank to the bottom and became putrescent in the form of sludge. Part of the water, when thus cleared, was taken from the reservoir and used for condensing purposes. Once a week the reservoir was cleaned by opening sluice-gates into the river and allowing the water to flow through the reservoir and out into the stream, carrying with it the sludge deposited in the reservoir. The effluent water as it went into the stream through the sluice-gates contained 97·6 per cent. of water and 2·4 per cent. of solid water.

Held, that the solid matter, when it entered the stream from the reservoir, was "solid matter in suspension in water" within section 20, and therefore not "solid matter" within the meaning of section 2 of the Act;

Held, also, that, assuming that what was put into the stream was "solid matter" within the meaning of section 2, the defendant was protected by section 17, and therefore not liable to be proceeded against under the Act.—RIVER RIBBLE JOINT COMMITTEE *v.* HALLIWELL, *Q.B.D.*; [1899] 1 Q. B. 27; 68 L. J. Q. B. 20; 79 L. T. 626.

See also Local Government, 13.

SALE of GOODS:—

1. *Documents of title—Buyer obtaining possession with consent of seller—Bill of exchange not accepted—Bill of lading indorsed to sub-purchaser—Title to goods—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-section* 2—*Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-section* 1.—The seller of copper forwarded to the buyer the bill of lading, under which the copper had been shipped, and a bill of exchange for the price for the buyer's acceptance. The buyer, when he received the document, was about to become bankrupt. He did not accept the bill of exchange, but indorsed the bill of lading to the plaintiffs, with whom he had previously entered into a contract for the sale of copper. The seller stopped the goods *in transitu*.

Held, that the buyer had obtained possession of the bill of lading with the consent of the seller within the meaning of section 25, sub-section 2, of the Sale of Goods Act, 1893, and that the plaintiffs, who took the bill of lading in good faith and without notice, had a title to the goods which defeated the seller's right to stop the goods *in transitu*.

Judgment of Mathew, J., [1898] 2 Q. B. 61, 46 W. R. Dig. 149, reversed.—CAHN *v.* POCKETT'S, &c., STEAM PACKET CO. (LIMITED), *C.A.*, 422; [1899] 1 Q. B. 643; 68 L. J. Q. B. 515; 80 L. T. 269.

2. *Oral contract—Part payment—Agreement that seller should retain sum previously overpaid him—Statute of Frauds*, *s.* 17—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-section* 1.—Where one of the terms of an oral contract for the sale of goods of a greater value than £10 was that the seller should retain in part payment a sum which the buyer had by some mistake previously overpaid him,

Held, that there had been no part payment sufficient to satisfy section 4, sub-section 1, of the Sale of Goods Act, 1893.

Walker v. *Nussey*, 16 M. & W. 302, followed.—NORTON *v.* DAVISON, *C.A.*, 275; [1899] 1 Q. B. 401; 68 L. J. Q. B. 265; 80 L. T. 139.

SETTLED LAND:—

1. *Capital moneys—Money liable to be laid out in the purchase of land—Settled Land Act*, 1882, *s.* 33.—By a marriage settlement lands were conveyed to trustees in trust for sale, with a power to invest the proceeds in government and other personal securities, and it was declared that it should be lawful for the trustees, with the consent of the husband and wife, who were successively tenants for life of the trust funds, to call in or sell any investments, and to invest the proceeds in the purchase of freehold hereditaments to be conveyed to them upon trust for sale, and to hold the proceeds upon the trusts of the settlement. The husband, who was tenant for life, desired to have some improvements made upon the land which remained unsold, and took out this summons asking for leave to submit a scheme of improvements under section 26 of the Settled Land Act, and for a declaration that the trustees had power under section 33 to sell investments which they held upon the trusts of the settlement and apply the proceeds in making the improvements.

Held, that the words "money which is liable to be laid out in the purchase of land" in section 33 of the Act do not mean which must be, but which may be so laid out, and that the trustees had power to raise money out of the investments in their hands for the improvements.—SOLTAU'S SETTLED ESTATES, RE, *Ch.D. North, J.*; 68 L. J. Ch. 39; 79 L. T. 335.

2. *Heirlooms, sale of—Sanction of court—Discretion—Tenant for life in pecuniary difficulties caused by extravagance—Opposition of remaindermen—Jewel of unique character—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 37.—The fact that a tenant for life has, by his own extravagance, brought himself into pecuniary difficulties, will not induce the court to relieve him by ordering a sale of heirlooms under the discretionary power conferred by section 37 of the Settled Land Act, 1882.

An application by the tenant for life for the sanction of the court to a contract by him for the sale of the Tavernier Blue (or Hope) Diamond refused.

The court ought, on such an application, to have regard to the wishes of persons entitled in remainder, and even to their sentimental preferences —as *e.g.*, the wish to preserve in the family a celebrated jewel of a unique kind. It ought to

consider what was the intention of the settlor, what are the wishes of the family generally, and what would be for the benefit of the estate as a whole.

Decision of Byrne, J. (*ante*, p. 536), affirmed.—HOPE, RE, DE CETTO *v.* HOPE, *C.A.*, 641.

3. *Mansion-house—Trust to allow widow to occupy castle and lands so long as she might wish to do so—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 38, 58.—A mansion-house was vested in trustees for a term of 1,000 years upon trust to allow the plaintiff to occupy the same rent free so long as she might wish to continue to do so.

Held, that the plaintiff was tenant for life within the meaning of the Settled Land Act, 1882; but held, that the trustees of the term were not trustees for the purposes of the settled Land Act.—CARNE'S SETTLED ESTATES, RE, *Ch.D. North, J.*, 352; [1899] 1 Ch. 324; 68 L. J. Ch. 120.

4. *Pecuniary legacy—Gift over in event of sale of settled land—Invalidity—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 51.—The widow of a settlor died in 1869 leaving a will bequeathing personal property to the person entitled to the ownership and enjoyment of the settled estate, with a gift over in the event of a sale of the settled real estate.

Held, that the gift over was inoperative if a sale was made under the Settled Land Acts.—SMITH, RE, GROSE-SMITH *v.* BRIDGES, *Ch.D. North, J.*, 357; [1899] 1 Ch. 331; 80 L. T. 218.

5. *Settlement — Succession — Ecclesiastical land — Land granted by bishop to grantee during tenure of office—Settled Land Act*, 1882, *s.* 2.—The Settled Land Act, 1882, does not apply to ecclesiastical property.—BATH AND WELLS (BISHOP OF), RE; [1899] 2 Ch. 138; 68 L. J. Ch. 524.

6. *Undivided share—Power of tenant for life to sell —Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2. *sub-section* 5, 10 (i.).—The Settled Land Act, 1882, enables the tenant for life of an undivided moiety of land to sell that moiety without the concurrence of the owner of the other undivided moiety.

In re Collinge's Settled Estates, 36 W. R. 264, 36 Ch. D. 516, overruled.—COOPER *v.* BELSEY, *C.A.*, 443; [1899] 1 Ch. 639; 68 L. J. Ch. 258; 80 L. T. 69.

7. *Vendor and purchaser—Settlement—Jointure and portions created by prior settlement—Resettlement—Compound settlement—Title—Power of tenant for life to convey free from jointure and portions—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 20, 50.—By deed dated the 15th of March, 1861, the O. Estate was settled to the use of C. F. M. for life, with remainder to the use of his first and other sons successively in tail male. By a settlement dated the 7th of August, 1865, in exercise of a power reserved to him by the previous deed, C. F. M., on his marriage, appointed a rent-charge to his wife, and portions to his younger children, both secured by terms of years. By a disentailing assurance of the 28th of January, 1889, the O. Estate was disentailed. By a settlement dated the 30th of January, 1889, C. F. M. and his son appointed the O. Estate to the use of C. F. M. for his life, with remainders over. The life estate was not expressed to be in restoration or continuation of any estate in C. F. M.

Held, that the settlement of the 30th of January, 1889, was not a settlement complete in itself, but, with the deeds of 1861, 1865, and 1889, formed a compound settlement within the meaning of the Settled Land Act, 1882; and that, therefore, C. F. M. could sell the O. Estate freed from the jointure and portions charged thereon.

In re Marquis of Ailesbury and Lord Iveagh, 41 W. R. 644, [1893] 2 Ch. 345, approved.—MUNDY AND ROPER'S CONTRACT, RE, *C.A.*, 226; [1899] 1 Ch. 275; 68 L. J. Ch. 135; 79 L. T. 583.

8. *Voluntary settlement—Tenant for life—Trustees —Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 51.—By a voluntary settlement made in March, 1890, a certain house and manor together with other hereditaments were conveyed to J. to the use that M. might receive an annuity thereout, and, subject thereto, to the use of trustees for the term of 1,000 years upon the trusts therein declared with remainder to the use of J. his heirs and assigns. And it was thereby declared that the trustees should stand possessed of the premises comprised in the term of 1,000 years upon trust to allow M. to occupy the mansion-house, pleasure-grounds, gardens, stables, and six fields on the estate rent free so long as she might wish to continue to do so; and upon further trust out of the rents and profits of the premises, or by any other reasonable ways and means, to raise and pay succession duty, and also by mortgage of the premises, or out of the rents and profits, or by any other reasonable ways and means, to raise and pay the sums of £680, and by the ways and means aforesaid, at such time or times as the trustees should think fit, to raise £40,000 in satisfaction of a mortgage upon the premises. And the settlement contained a covenant to permit M., so long as she chose to reside in the house, to use the furniture, plate, and effects belonging thereto; and if, after her death, or after her ceasing to live there, J. should choose to live there, to permit him while living there to use the furniture, plate, and effects; provided that neither M. nor J. should be entitled to remove the same therefrom. M. entered into possession of the premises and still remained in possession thereof. Various differences arose as to the right of the parties under the provisions of the settlement, and the trustees brought an action against J. for the determination thereof.

On the hearing of the action the questions were raised whether M. was tenant for life under the Settled Land Acts, and whether the trustees of the settlement were trustees for the purposes of these Acts.

Held, that M. was tenant for life under the Settled Land Acts, but that the trustees were not trustees for the purposes of these Acts.—ST. DONATS SETTLED ESTATES, RE, *Ch.D. North, J.*; 79 L. T. 542.

See also Vendor and Purchaser, 4.

SETTLEMENT:—

1. *Marriage settlement—After-acquired property—Covenant to settle — Power — General — Special — Exercise by will—"In pursuance of all powers and authorities in anywise enabling me thereto direct, limit, and appoint."*—By a marriage settlement in 1859 real estate was settled for the benefit of S. R. and her husband W. R. for their lives and then for the children of S. as she should by deed or will appoint, and, in default, to them in equal shares, and if no such child then for such persons as S. should by deed or will appoint, and in default for S., her heirs and assigns. And in the settlement was a covenant by W. that after-acquired property of S. should be conveyed to the trustees to be held by them upon the trusts of the settlement. W. and S. R. married and had four children, one only of whom was now living. W. R. died in 1891. By her will made in that year S., "in pursuance of

all powers and authorities in anywise enabling me thereto," directed, limited, and appointed her residuary estate as to a moiety for her son M. and his wife and children, and as to the other moiety to persons not objects of the special power. She died in 1898. During her coverture she had become entitled to certain real and personal estate which was never conveyed to the trustees of the settlement.

Held, (1) that the after-acquired property was not bound by the covenant in the settlement; (2) that there was not sufficient evidence to show an intention on the part of the testatrix to exercise her special power of appointment in favour of her son M. — RICKMAN, RE, STOKES *v.* RICKMAN, *Ch.D. Stirling, J.*; 80 L. T. 518.

2. *Marriage settlement—Covenant to settle after-acquired property—Second settlement.*—By an ante-nuptial settlement, dated the 15th of March, 1879, the wife covenanted to settle after-acquired property on trust for herself for life, with remainder to her children. By another settlement, dated the 7th of May, 1879, the wife covenanted to settle after-acquired property on herself for life, with remainder to the husband for life, and, after the death of the survivor, with remainder to such persons as the wife should appoint. The marriage was solemnized on the 10th of May, 1879.

Held (in the absence of evidence), that the covenant contained in the first deed was not revoked by the second deed.—GUNDRY, RE, MILLS *v.* MILLS, *Ch.D. North, J.*, 137; [1898] 2 Ch. 504; 79 L. T. 438.

3. *Marriage settlement—Illegal consideration—Marriage with sister of deceased wife.*—On the 30th of April, 1873, a widower executed a deed, by which, in contemplation of a marriage which "had been agreed upon and was intended shortly to be solemnized" between himself and Clara Probyn, he conveyed real estate to trustees in fee, to the use of himself and his assigns during his life, with remainder to the use of Clara Probyn during her life, "provided she shall remain a widow and unmarried; and from and immediately after her decease or marriage, whichever event shall first happen," to such uses as the settlor should by deed or will appoint, and, in default of appointment, to the use of such person or persons as would be entitled thereto if the deed had not executed. Clara Probyn was in fact a sister of the settlor's deceased wife, though this was not stated in the deed. On the 5th of March, 1877, he went through the ceremony of marriage with her, and she afterwards lived with him as his wife. He died in November, 1891, intestate. He had not exercised the power of appointment by deed reserved to him by the settlement. During the life of his son and heir-at-law Clara Probyn received the rents of the property without objection on his part.

Held, that the trust for Clara Probyn was illegal and invalid, and that the property was held on trust for the son's administratrix, she being, under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), his real representative.

Ayerst v. *Jenkins*, [1873] L. R. 16 Eq. 275, distinguished.—PHILLIPS *v.* PROBYN, *Ch.D. North, J.*; [1899] 1 Ch. 811; 68 L. J. Ch. 401; 80 L. T. 513.

4. *Marriage settlement — Marriage with deceased husband's brother— Invalid marriage—Limitations after "solemnization of the intended marriage"—Construction.*—A widow, being about to marry her deceased husband's brother, executed a settlement by which her real estate was conveyed to trustees to hold to her use in fee "until the intended marriage" and "from and after the solemnization of the said intended marriage" upon trust for her for life with remainder in fee to her younger son. She shortly afterwards went through the form of marriage with her deceased husband's brother, and subsequently died intestate.

Held, that the words "solemnization of marriage" could be construed only as meaning a valid marriage, and that extrinsic evidence was not admissible to show that this was not the intention of the parties; and that the heir-at-law was therefore entitled to the property.—NEALE *v.* NEALE, *C.A.*; 79 L. T. 629.

5. *Tenant for life—Payment off of mortgage—Presumption.*—Where a tenant for life of a settlement pays off out of his own moneys a mortgage on a reversionary interest, assigned to the trustees of the settlement subject to the mortgage, and takes a reconveyance which in effect makes the payment off of the mortgage enure for the benefit of the settlement, the court will make a declaration that, notwithstanding the form of reconveyance, the tenant for life is entitled to have the charge kept alive for his own benefit, and that the sum so paid off has priority over the settlement.—GIFFORD (LORD) *v.* FITZHARDINGE (LORD), *Ch.D. North, J.*, 618; [1899] 2 Ch. 32; 68 L. J. Ch. 529.

See also Bankruptcy, 34; Infant, 4.

SHERIFF.—See Bankruptcy, 13, 14, 31, 32.

SHIP:—

1. *Bill of lading—Exemption of shipowner from liability—"Defects latent on beginning voyage or otherwise."*—A bill of lading contained, among other exceptions, one by which the shipowner was not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise" in hull, tackle, boilers, or machinery, or their appurtenances.

Held, affirming the judgment of Bigham, J., that the exception did not cover a defect which was obvious at the commencement of the voyage. —OWNERS OF CARGO ON BOARD STEAMSHIP WAIKATO *v.* NEW ZEALAND SHIPPING CO., *C.A.*; [1899] 1 Q. B. 56; 68 L. J. Q. B. 1; 79 L. T. 326.

2. *Charter-party—Advance freight—Destruction of part of cargo before sailing—Liability to pay advance freight on cargo destroyed.*—By a charter-party it was provided that the charterers should load the ship with a full and complete cargo such as would load the vessel to her water-marks, and that the freight, which was to be at a certain rate per ton on the quantity delivered to the consignees, should be due and paid as follows: "Two-thirds in cash three days after sailing, ship lost or not lost, and the balance on unloading and right delivery of the cargo"; and that, "in the event of the charterers not loading vessel to her marks, the freight shall be paid on the basis of 4,350 tons, which the owners guarantee to be vessel's capacity of cargo for the voyage."

A portion of the cargo which had been loaded on board was destroyed by fire—which was a peril mutually excepted—before the sailing of the ship, and the ship sailed with other cargo on board. Three days after the sailing of the ship the shipowners claimed, but the charterers refused to pay, two-thirds advance freight on the whole cargo, including the part destroyed.

Held, that the shipowners were not entitled to the two-thirds advance freight on the part of the cargo which had been destroyed, but that they were entitled to the advance on the basis of the 4,350 tons, less the part destroyed.—WEIR *v.* GIRVIN, *Q.B.D.*,

365; [1899] 1 Q. B. 193; 68 L. J. Q. B. 170; 79 L. T. 596.

3. *Charter-party—Berth for loading—Order by charterers—"To load always afloat"—Detention—Tides—Liability.*—A charter-party provided that a ship was to proceed to a certain dock at M., or so near thereto as she could safely get, and there load, always afloat, as and where ordered by the charterers. The character of the harbour at M. was such (as both parties were aware) that it was impossible to load always afloat. The ship proceeded to the named dock, and was ordered by the charterers to a berth where she loaded part of her cargo, but, in consequence of falling tides, left the dock for the necessary interval, and then returned and completed her cargo.

Held, that the charterers were not liable for the detention of the ship.

By Lord Herschell.—The obligations and rights created by the charter-party must be construed with reference to the natural conditions of the particular harbour specified as the place of loading by the charter-party.

Decision of the Court of Appeal (46 W. R. 68, [1897] 2 Q. B. 485) affirmed.—CARLTON STEAMSHIP CO. *v.* CASTLE MAIL PACKETS CO., *H.L.*, 65; [1898] A. C. 486.

4. *Charter-party—Construction—"Working days of twenty-four hours"—Demurrage.*—By a charter-party shipowners agreed to provide the charterers with ships for the carriage of 50,000 tons of iron ore during a period of twelve months. In the charter-party there was a clause as follows: "Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . and to count from 6 a.m. of the day following the day when the steamer is reported, unless she be reported before noon, in which case time to count from notice of readiness . . . steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used."

Held (affirming the judgment of Bigham, J., *dissentiente* Rigby, L.J.), that the charterers were entitled to have twenty-four working hours to load or discharge each 350 tons.—RHYMNEY STEAMSHIP CO. *v.* IBERIAN IRON ORE CO., *C.A.*; 79 L. T. 240.

5. *Charter-party—Colliery guarantee—Demurrage—Lay days—Exceptions—Colliery working days.*—On the 16th of November, 1896, D. & Sons entered into a contract for the delivery to the U. S. C. of 25,000 tons of F. coal by instalments. In order to carry out the contract the U. S. C. on the 25th of January, 1898, chartered the S. to take delivery of the coal, and following that charter-party D. & Sons entered into a colliery guarantee with the U. S. C. containing the obligations of D. & Sons with regard to demurrage and lay days. The colliery guarantee was incorporated into the charter-party. On the 31st of January, 1898, the S. received a stemming note from D. & Sons. The lay days began to run on the 16th of March and expired on the 31st of March, and thereafter the captain daily sent demurrage notes to D. & Sons. On the 9th of April a strike took place at the colliery from which the coal was to be delivered. The ship continued to wait for her cargo, and no intimation was given by D. & Sons that they did not hope to give delivery within a reasonable time until the 24th of May. The shipowners, the S. S. C., then took steps to obtain another charter-party, which they succeeded in doing on the 13th of June, but at a lower freight, and on the 17th of June the ship got away. They claimed demurrage from the 31st of March up to the 17th of June.

Held, on the construction of the charter-party and the colliery guarantee incorporated therewith, that the shipowners, the S. S. C., were entitled as against the U. S. company, the charterers, to demurrage from the 13th of March to the 17th of June, for they were entitled to demurrage for every day which ordinarily would be "colliery working days," although in fact no work was done at the collieries owing to the strike; and further, they could also recover the difference between the freight obtained in the second charter-party and that in the original one.

Held, further, that the U. S. company could recover against D. & Sons what they had to pay the steamship company as damages for breach of the colliery guarantee.

There was a further claim by the U. S. company against D. & Sons for the non-delivery of the coals in conformity with the contract of November, 1896.

Held, that the U. S. company were entitled to damages on this head, and that the measure of such damages was the difference between the market price and the contract price when they should have been delivered, the date of such delivery, taking into consideration the charter-party and the colliery guarantee, being extended to the 24th of May.—SAXON STEAMSHIP CO. *v.* UNION STEAMSHIP CO.; UNION STEAMSHIP CO. *v.* DAVIS, *Q.B.D.*; 68 L. J. Q. B. 58; 79 L. T. 486.

6. *Charter-party—To ship coal ordered by charterers—Vessel loaded subject to colliery guarantee—Strike at colliery—Refusal to accept guarantee—Breach of charter-party.*—By a charter-party made on the 14th of January between the plaintiffs, the owners, and the defendants, the charterers, the *Curzon* was, after discharging her inward cargo at Liverpool, to proceed to Cardiff to such loading berth as the charterers should name, and there load a cargo of steam coal as ordered by the charterers which they bind themselves to ship except in the event of strike of shippers' pitmen. "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee in working days as may be arranged. Any claim for demurrage in loading to be settled with the colliery direct, no liability attaching to the charterers in respect thereof."

On the 3rd of February the defendants bought a cargo of Hood's Merthyr Colliery coal for the *Curzon*.

On the 6th of April Hood's Colliery stopped owing to the strike, and on the 26th of April the defendants procured from the colliery the usual guarantee whereby they undertook to load in twenty days, subject to the usual exception as to strikes.

The ship's agents refused to accept this guarantee, as the colliery was on strike, and required to be furnished by a colliery that was working, 15 per cent. about not being on strike.

Held, that the defendants were not bound to furnish any other guarantee, and that the plaintiffs could not recover damages for a breach of the charter-party.—DOBELL *v.* GREEN, *Q.B.D.*; 80 L. T. 19.

7. *Charter-party—Warranty of seaworthiness—Voyage divided into stages for coaling purposes.*—Where, in a contract for sea carriage, the voyage is such that it is not reasonably possible for the steamer to carry, in addition to her cargo, sufficient coals to take her from her port of loading to her ultimate destination, and the voyage is therefore,

for coaling purposes, divided into stages, there is an implied warranty that the vessel shall, at the commencement of each stage, be seaworthy so far as regards the supply of coal necessary for that stage.—"VORTIGERN," THE, *C.A.*, 437; [1899] P. 140; 68 L J. P. 49; 80 L. T. 382.

8. *Collision—Compulsory pilotage—Pilot alone in fault—Costs.*—Where, in a collision action, the defendants, while denying that the collision was caused or contributed to by the negligence of themselves or their servants, pleaded that the negligence, if any (which was denied), was solely that of a compulsory pilot, the court having found that the collision was caused by the negligent navigation of the compulsory pilot alone, ordered the action to be dismissed with costs.—"BURMA," THE, *P.D. & Ad.D.*; 80 L. T. 808.

9. *Collision—Compulsory pilotage—River Scheldt.*—Although pilotage is compulsory in the River Scheldt, the charge of the ship is not surrendered to the pilot so as to free the shipowners from liability for collision caused by the pilot's negligence.—"PRINS HENDRIK," THE, *P.D. & Ad.D.*; 68 L. J. P. 86; 80 L. T. 838.

10. *Collision—Compulsory pilotage—Vessel bound from abroad proceeding from one port in the United Kingdom to another to complete discharge—Coasting trade—Port in Europe north and east of Brest—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 625, *sub-sections* 1, 4.—A steamship proceeding from one port in the United Kingdom to another port in the United Kingdom in the course of a voyage from a foreign port to both those ports is not a vessel engaged in the coasting trade, and is therefore not exempt from compulsory pilotage under the Merchant Shipping Act, 1894, s. 625, sub-section 1.

The word "Europe" in the Merchant Shipping Act, 1894, s. 625, sub-sections 3, 4, is limited to the Continent of Europe, and therefore a vessel trading from Ipswich to Leith is not a vessel trading from a port in Europe north and east of Brest.—"GLANYSTWYTH," THE, *P.D. & Ad.D.*; 68 L. J. P. 37; 80 L. T. 204.

11. *Collision—Damage—Collision caused by running foul of sunken barge—Negligence of owner of barge in not providing for proper lighting of wreck, where wreck not abandoned—Liability of owner of wreck if independent contractor employed to raise wreck for him.*—The owner of a vessel sunk in the fairway of a navigable river who has not abandoned the wreck, but has agreed with an independent contractor to raise her for him, is answerable in damages for the loss sustained by the owners of another vessel running foul of the wreck without negligence, in consequence of the wreck being improperly lighted.—"SNARK," THE, *P.D. & Ad.D.*, 398; [1899] P. 74; 68 L. J. P. 22; 80 L. T. 25.

12. *Collision—Damage—Registrar and merchants—Vessel totally lost in collision—Loss of beneficial charter-party.*—The owners of a vessel totally lost in consequence of a collision with another vessel when bound in ballast on a voyage to take in cargo under a charter-party already entered into can, if such other vessel is proved, in an action of damage instituted against her, to have been to blame for the collision, recover against her damages for the loss of any profits which, but for the collision, they would have gained by carrying out the charter-party.—"KATE," THE, *P.D. & Ad.D.*, 669; 68 L. J. P. 41; 80 L. T. 423.

13. *Collision — Lightship — Substitution of spare lightship—Demurrage—Hire—Deprivation of use of chattel—Public body—Right to recover—Measure of damages.*—The lightship *C.*, the property of the plaintiffs, the Mersey Docks and Harbour Board, was sunk in a collision with the defendants' steamship *M.* owing to the negligence of those in charge of *The M.*

The board maintains six lightships for the service of the port, four of which are kept at the stations in the Mersey and its approaches, the other two being kept in reserve. Upon the happening of the collision, one of the latter, *The O.*, was substituted for *The C.* It was admitted by the board that *The O.* would have been unemployed during the period she was filling the place of *The C.* The board claimed a sum of money representing either demurrage of *The C.* during the time she was under repair in consequence of the collision, or, alternatively, hire of *The O.* during the time she was occupying the place of *The C.*

Held, by the Court of Appeal, that the case could not be distinguished from *The Greta Holme*, [1897] A. C. 596, and that the plaintiffs were entitled to recover substantial damages.

Where a person has been deprived of the use of a chattel by a wrongdoer, he is entitled to damages simply because of such deprivation.

The deprivation may also be the subject of special damage.—"MEDIANA," THE, *C.A.*; 68 L. J. P. 26; 80 L. T. 173.

14. *Collision—Second anchor light—"At or near the stern"—Regulations for Preventing Collisions at Sea, art.* 11.—The plaintiffs' steamship, 455 feet long, with two masts, was at anchor at night in the River Elbe, athwart the channel, slowly swinging to the first of the flood with her starboard side up river. She had two anchor lights up, the one aft hanging inside the fore-shroud of the port main rigging, 120 feet from the stern.

The defendants' steamship coming down the river did not see the after light until too late to avoid a collision, and struck the plaintiffs' vessel on her starboard side between the forward and after lights. By article 11 of the Regulations for Preventing Collisions at Sea, the second light is to be carried "at or near the stern."

Held, affirming the decision of Bucknill, J., [1899] W. N. 53, that the plaintiffs' vessel was to blame, as the position of the light aft was a breach of the statutory rule, and the plaintiffs had failed to prove that the infringement could not possibly have contributed to the collision; but varying the decision by finding the defendants' vessel also to blame for defective look-out, as the position of the light was such that those in charge of her might have seen it sooner.—"GANNET," THE, *C.A.*; [1899] P. 230.

15. *Collision—Steamship and sailing ship—Fog—Duty to slacken speed, or stop or reverse if necessary—Regulations for Preventing Collisions at Sea*, 1897—*Arts.* 16, 20, 22, *and* 23.—A steamship on a N. by W. ½ W. course, in a dense fog, the wind being about south, heard a single blast of a fog horn on her port bow, whereupon her engines were at once stopped. Shortly afterwards another blast of the fog horn was heard closer to and nearer on the bow, and her engines were then reversed full speed and her helm put hard aport, but a collision occurred.

Held, that the steamship was to blame for not reversing when she stopped her engines, since those on board of her ought to have known that the fog horn they heard came from a sailing vessel on the starboard tack not far off, and that with the wind where it was the sailing vessel must be on a course

crossing that of the steamship from port to starboard, that it was the duty of the steamship under articles 20 and 22 of the Regulations for Preventing Collisions at Sea to avoid passing ahead of the sailing vessel, and, to enable her to perform that duty, it was necessary under article 23 to reverse her engines.—"MERTHYR," THE, *P.D. & Ad.D.*; 79 L. T. 676.

16.—*Collision—Thames—Regulations for Preventing Collisions at Sea, art.* 4 (a)—*Vessel aground—Whether Regulations for Preventing Collisions at Sea apply in River Thames.*—Plaintiffs' vessel, while proceeding up the Thames, took ground at Limehouse Reach about 3.20 p.m., and remained hard and fast. She sounded the four-blast signal prescribed by article 40 of the Thames Bye-laws to signify that she was out of command. Defendants' vessel, which was following her up the river, disregarded these signals and ran into her stern.

In an action by the plaintiffs to recover damages the defendants alleged that the plaintiffs' vessel had failed to carry two black balls as prescribed by article 4 (*a*) of the Regulations for Preventing Collisions at Sea in the case of vessels out of command.

Held, that, assuming without deciding that the Regulations for Preventing Collisions at Sea applied to the River Thames, article 4 (*a*) of those regulations was not applicable, as it applied only to vessels not under command whilst afloat; and, further, even if that article did apply to vessels aground, the case was governed by article 40 of the Thames Bye-laws.—"CARLOTTA," THE, *P.D. & Ad.D.*, 702; [1899] P. 223; 68 L. J. P. 87; 80 L. T. 664.

17. *Contract of sale of cargo—Delivery to be "at any safe port"—Bills of lading—Delivery to be "at any safe port (Manchester excepted)"—Meaning of "port of Manchester"—Commercial practice—Legal definition—Manchester Ship Canal Act,* 1885.—By section 3 of the Manchester Ship Canal Act, 1885, the port of Manchester is defined to include the whole of the Manchester Ship Canal above Eastham Locks, and the former port of Runcorn is abolished.

Nevertheless, on its being proved that in commercial matters it was customary for the words "port of Manchester" to be used as referring only to Manchester and the waters adjacent thereto, and to treat Runcorn Lay-bye, which is on the Manchester Ship Canal, but about twenty-four miles from Manchester, as a separate port,

Held, that in interpreting shipping documents these words were to be read in that sense, and not in their legal significance.

B., W., & Co. sold a cargo of grain by the ship *V.* to G. & Co., delivery to be given "at any safe port in the United Kingdom."

When the bills of lading arrived it was found that by them—as by the chapter-party—delivery was to be given "at any safe port in the United Kingdom (Manchester excepted)."

G. & Co. notified B., W., & Co. that they would not accept the documents with this variance.

B., W., & Co. then, by arrangement with the owner of *The V.*, had the words "Manchester excepted" erased.

At the proper time the documents were presented to G. & Co. so altered, when they refused to accept them, on the ground that they had been altered without their consent or the consent of the master of *The V.*

On the dispute being referred to arbitration, the arbitrators found that for a vessel of *The V.'s* tonnage the Manchester Ship Canal above bridges was not a safe port; that Runcorn Lay-bye, the last dock below bridges, was a safe port; that under a charter-party to proceed to a safe port (Manchester excepted) the ship could be compelled to go to Runcorn Lay-bye, and that, though the port of Manchester was defined by section 3 of the Manchester Ship Canal Act, 1885, as including the whole ship canal, and the port of Runcorn was abolished as a separate port, yet the weight of evidence was that in commercial matters "port of Manchester" was used as meaning Manchester itself and the waters adjacent thereto, and Runcorn Lay-bye was treated as a separate port.

Held, on these findings, "Manchester excepted" here meant Manchester and the adjacent waters only excepted; that, so read, Manchester was not a safe port for *The V.*, and that accordingly its insertion in the bills of lading was an immaterial variation in the contract of sale, and its erasure was also immaterial; and that, therefore, G. & Co. were bound to accept the documents.—GOODBODY AND BALFOUR'S ARBITRATION, RE, *Q.B.D.*; 80 L. T. 188.

18. *Harbour authority — Collision — Damage — Efficient tugs.*—The appellants were the port and harbour authority of Preston, and were entitled to make contracts for towage of vessels using that port. The respondent's ship, under the directions of the harbour authority, was towed up the river on the flood tide towards Preston, preceded by two other vessels, also in tow. These tugs were hired by the appellants. Owing to the delay of the foremost tug the respondent's ship grounded and received considerable damage.

Held, that the appellant corporation were liable for the damage caused.

Decision of the Court of Appeal (*The Ratata*, [1897] P. 118, 45 W. R. Dig. 118, 152) affirmed.—PRESTON (MAYOR) *v.* BIORNSTAD, "RATATA," THE, *H.L.*, 156; [1898] A. C. 513.

19. *Pilotage—Merchant Shipping Act,* 1894, *ss.* 603, 625 (4)—*Merchant Shipping Act,* 1897 (60 & 61 *Vict. c.* 61), *s.* 1.—The provisions of section 1 of the Merchant Shipping (Exemption from Pilotage) Act, 1897, abolishing exemptions from compulsory pilotage contained in 6 Geo. 4, c. 125, *s.* 59, and an Order in Council dated the 18th of February, 1854, do not abolish the exemptions from compulsory pilotage contained in section 625 of the Merchant Shipping Act, 1894.

A vessel bound from Norway or Sweden to this country is a vessel trading from a port in Europe north and east of Brest within the meaning of section 625 of the Merchant Shipping Act, 1894, and is consequently, when not carrying passengers, exempt from compulsory pilotage.—"COLUMBIA," THE, *P.D. & Ad.D.*; 80 L. T. 203.

20. *Salvage — Amount — Salving vessels specially equipped—Principles of assessment of award.*—In reviewing an award for salvage made by the judge of the Admiralty Division and affirmed by the Court of Appeal this House will not interfere with the amount awarded unless it appears that the established principles have not been satisfactorily applied.

The decision of the Court of Appeal ([1898] P. 97) affirmed.—OWNERS OF "GLENGYLE," HER CARGO AND FREIGHT *v.* NEPTUNE SALVAGE CO.; "GLENGYLE," THE, *H.L.*; [1898] A. C. 519.

21. *Salvage — Detention of salved property by receiver of wreck—"Salvage due under this Act"—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 544, 546, 552.—By section 552 of the Merchant

Shipping Act, 1894, "Where salvage is due to any person under this Act," the receiver shall, if the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel, or cargo, or apparel.

Held, that the words "salvage due under this Act" were not confined to cases where there was a claim for life salvage under sections 544 and 545 of the Act, or where the claim was for salvage services rendered to a wreck or vessel stranded or in distress on or near the coasts of the United Kingdom under section 546, but extended to all cases where salvage was recoverable under any of the provisions of the Act.

Judgment of Barnes, J. (*ante*, p. 62, [1898] P. 206), affirmed.—"FULHAM," THE, *C.A.*, 598; [1899] P. 251; 68 L. J. P. 75.

22. *Salvage—Discontinuous service—Agreement as to amount payable for services already completed—Authority of master.*—Where a salvage service is discontinuous in character, the services being rendered on distinct occasions, with substantial intervals between, it is beyond the scope of a master's authority, when he has completed a portion of the service whereby rights to a salvage award have become vested in the owners of the vessel and her crew as well as himself, to agree to complete the services for a sum of money to cover as well the work already performed as that which remains to be done.—"INCHMAREE," THE, *P.D. & Ad.D.*; 68 L. J. P. 30; 80 L. T. 201.

23. *Salvage—Failure to render material benefit—Engaged services—Failure to accomplish the service—Engagement to tow—Right to reward.*—The steamship *N.* fell in with the steamship *D.* in the North Atlantic Ocean. *The D.*, which was flying the signal "N C," engaged *The N.* to tow her. The weather was very bad.

The N. succeeded in making fast to *The D.*, and towed her a short distance.

Shortly afterwards the tow rope parted, and *The N.*, after standing by for some time, continued her course, and did not attempt to render further assistance.

The D. was subsequently salved by another steamship, *The P.*

Upon the owners, masters, and crew of *The N.* claiming salvage reward,

Held, that the action must be dismissed, upon the grounds that *The N.* had not rendered any material benefit to *The D.*, and that she had not accomplished the services she was engaged to perform—namely, to tow; an engagement to tow is only fulfilled by the vessel engaged towing the other into a port of safety.—"DART," THE, *P.D. & Ad.D.*; 80 L. T. 23.

24. *Seaman—Agreement with the crew—Foreign port where there is a British consular officer—Advance note for more than one month's wages—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 113-115, 124, 140.—When a seaman is engaged abroad before a British consular officer, as provided by section 124 of the Merchant Shipping Act, 1894, the provisions enacted by section 140 relative to agreements with the crew and the restrictions as to advance notes do not apply.—RITCHIE *v.* LARSEN, *Q.B.D.*, 413; [1899] 1 Q. B. 727; 68 L. J. Q. B. 335; 80 L. T. 259.

25. *Seaman—Engagement of—Foreign ship—Civil debt—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 111, *sub-sections* 1, 4; *ss.* 260, 261, 682, *sub-section* 2.—A person who, in an English port, engages or supplies a seaman to be entered on a ship in the United Kingdom without having a licence for the purpose from the Board of Trade, acts in contravention to section 111, sub-section 1, of the Merchant Shipping Act, 1894, and is liable to a fine under sub-section 4, notwithstanding that the ship for which the seaman is engaged or supplied is a foreign ship.

A fine recoverable under sub-section 4 is not a sum recoverable as a civil debt under section 682, sub-section 2, but is a fine inflicted as a punishment for an offence the proceedings in prosecuting which are those prescribed by section 681, sub-section 1 (*b*).—REG. *v* STEWART AND OLSEN, *Q.B.D.*, 445; [1899] 1 Q. B. 964; 68 L. J. Q. B. 582; 80 L. T. 660.

26. *Seaman—Termination of service abroad—"Passage home"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 186, *sub-section* 2 (*c*).—By section 186 of the Merchant Shipping Act, 1894, where the service of any seaman belonging to any British ship terminates at any port out of her Majesty's dominions, the master shall, as one of several alternatives (by sub-sections 2 (*c*)) "provide him with a passage home."

Held, that a "passage home" means a passage to the port in her Majesty's dominions at which the seaman was originally shipped, or to some port in the United Kingdom agreed to by him.

Dicta in *Edwards* v. *Steel, Young, & Co.*, 45 W. R. 689, [1897] 2 Q B. 327, followed.—PURVES *v.* "STRAITS OF DOVER" STEAMSHIP CO., *C.A.*, 630; [1899] 2 Q. B. 217.

27. *Seamen—Wages—Seaman engaged abroad—Advance of wages abroad by master—Right to deduct*—8 *Geo.* 1, *c.* 24, *s.* 7—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 140, 163.—When a ship is in a foreign port, the master of the vessel can make a valid contract with a seaman whom he is there engaging for the homeward voyage for an advance to the seaman of any sum on account of his wages conditionally on his shipping. Such advance is not limited to one month's wages, and if the master pays the sum so advanced to the seaman, or to any person authorized by the seaman to receive it, he can at the end of the voyage deduct from the seaman's wages the whole sum advanced, as such advances are not prohibited by section 163 of the Merchant Shipping Act, 1894, or otherwise.—ROWLANDS *v.* MILLER, *Q.B.D.*, 687; [1899] 1 Q. B. 735; 68 L. J. Q. B. 338; 80 L. T. 290.

See also Admiralty, 1-6; Arbitration, 2; Master and Servant, 21; Negligence, 4; Public Authorities Protection Act, 4.

SOLICITOR:—

1. *Auctioneer—Fees—Country solicitor—London agent—Action by auctioneer employed by country solicitor against London agent.*—H. had been employed in a foreclosure action by D. & B., a country firm of solicitors, as auctioneer, and when the costs came to be taxed by the London agent S. he received a voucher from H. for his fees. S. thereupon took the money out of court after taxation, which included this item of H.'s fees. Before he received this money it came to his knowledge that H. had not been paid. In an action by H. against S. to recover these fees as money had and received,

Held, that there was no privity of contract between them, and the action therefore failed.—HANNAFORD *v.* SYMS, *Q.B.D.*; 79 L. T. 30.

2. *Certificate—Suspension of solicitor—Application after suspension for certificate—Discretion of Incorporated Law Society to refuse—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 23, 24.—A solicitor was suspended from practice for professional misconduct,

and during the period of suspension he became bankrupt. After the period of suspension had expired, he—being an undischarged bankrupt—applied, under section 23 of the Solicitors Act, 1843, to the registrar of the Incorporated Law Society for a certificate, but the registrar refused to grant the certificate upon the ground that the applicant was an undischarged bankrupt; the applicant thereupon applied under section 24 to the court for an order that the certificate should be granted.

Held, that the registrar was not bound under section 23 to issue a certificate, but had a discretion to refuse to issue the same, and that, upon application to the court under section 24, the court were not bound to make an order for the issuing of the certificate, but could make such order "as shall be just"; and that in this case the discretion of the registrar should not be interfered with.—SOLICITOR, A, RE, *Q.B.D.*, 575; 80 L. T. 729.

3. *Charging order—Property recovered or preserved—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—A testator devised his estate to his wife for life, and after her death to his two daughters, of whom one was legitimate and the other illegitimate. The daughters having opposed probate of the will, an action was commenced by the executor in which the will was upheld.

Held, that the solicitor of the executor was entitled to a charging order for his costs on the property devised, as being property preserved through his instrumentality.—TWEED, EX PARTE, *C.A.*; [1899] 2 Q. B. 167; 68 L. J. Q. B. 794.

4. *Costs—Costs of inquiry before Incorporated Law Society—Jurisdiction—Judge at chambers—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.—Where a solicitor has been exonerated from charges brought against him on an inquiry before the committee of the Incorporated Law Society, under section 13 of the Solicitors Act, 1888, an application by him for the costs of the inquiry must be made to the Divisional Court, and not to a judge at chambers.—DAVIDSON, RE, DAVIDSON, EX PARTE, *Q.B.D.*; [1899] 2 Q. B. 103; 68 L. J. Q. B. 836.

5. *Costs—Taxation—Pauper client—Taxation of costs in House of Lords—Liability to costs as between solicitor and pauper client—R. S. C.*, 1883, *ord.* 16, *rr.* 22-31.—Where a solicitor had been retained by, and acted for, a successful pauper appellant (since deceased) in the House of Lords, but in accordance with the practice in the House of Lords as laid down in *Johnson* v. *Lindsay*, [1892] A. C. 110, the respondent in the House of Lords was not liable for party and party costs,

Held—on an application by the solicitor against the estate of his deceased client for taxation of the costs of the appeal to the House of Lords—that the solicitor was entitled to recover from the client's estate the ordinary costs which a solicitor is entitled to charge—viz., costs to be taxed as between solicitor and client.—RAPHAEL, RE, SALOMON, EX PARTE, *Ch.D. Kekewich, J.*, 330; [1899] 1 Ch. 853; 68 L. J. Ch. 309; 80 L. T. 226.

6. *Costs—Taxation—Purchase of land in register county—Scale fee—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44); *General Order, r.* 4; *Schedule I., Part I.*—The scale fee allowed to a purchaser's solicitor on a purchase of land, under the General Order to the Solicitors' Remuneration Act, 1881, for "completing the conveyance" covers the expense, in the case of a register county, of registering a memorial of the conveyance.—GREY *v.* CURTICE. *C.A.*, 294; [1899] 1 Ch. 121; 68 L. J. Ch. 60; 79 L. T. 713.

7. *Costs—Taxation—Refusal to deliver bill of costs—Disclaimer of right to costs—Common order to tax.*—A client obtained the common order for delivery of a bill of costs and taxation against his solicitor, who had received the loan of money from him. No bill was delivered, and the client moved for leave to issue a writ of attachment. The solicitor, in defence, said he made no claim for costs, and that such a claim, if made, was statute-barred.

Held, that, if the solicitor made a further affidavit that he had not been paid for work done, and refused to claim costs for such work and abandoned any right to receive costs therefor, no bill of costs could be demanded.—LANDOR, RE, *Ch.D. North, J.*, 457; [1899] 1 Ch. 818; 68 L. J. Ch. 373; 80 L. T. 643.

8. *Costs—Taxation—Scale fee—Negotiating loan—Mortgage of personalty—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*Schedule I. of General Order.*—The scale fee chargeable by a "mortgagee's solicitor for negotiating loan" under Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, is not limited to loans on mortgages of "freehold, copyhold, or leasehold property" exclusively, but extends also to loans on mortgages of any kind of personal property.—FURBER, RE, *Ch.D. Kekewich, J.*, 184; [1898] 2 Ch. 538; 79 L. T. 266.

See also Bankruptcy, 4, 5, 8; Mortgage, 8; Pubic Authorities Protection Act, 1.

STAMP.—See Inland Revenue, 25-36.

STOCK EXCHANGE.—See Gaming, 6, 7.

THAMES:—

1. *Landing stage—Authorized toll of sixpence for use of pier—"Every time of calling"—Illegal charges—Right to recover excess so paid—Thames Conservancy Act*, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 68, 165.—By section 165 of the Thames Conservancy Act, 1894, the conservators are authorized to levy a toll of sixpence "for each and every time of call" on any vessel using any of their piers or landing stages to embark or discharge her passengers and goods.

The plaintiffs owned a pleasure steamer which ran day trips between the Old Swan Pier, London Bridge, and Hampton Court. The steamer was brought alongside the Old Swan Pier about three-quarters of an hour before the advertised starting time and remained there until she started, her officers meanwhile doing all they could to get persons to take tickets for the trip.

The conservators by resolution decided that the plaintiffs used the pier for a longer period daily than would be covered by a mere "call" at the pier by their vessel, for which the 6d. toll was payable, and they alleged their right to impose a terminal charge for this use of the pier by the plaintiffs of £2 a week. For a time this increased charge was paid.

Held, that, although the conservators might have a right to ask for special payment from a vessel using the pier other than for the purpose merely of embarking passengers or goods, that would be based on contract; but there was nothing in the Act which gave the defendants the right to levy more than the 6d. toll on a vessel merely because she was more than a few minutes alongside a pier embarking or discharging her passengers or goods; and that the extra charge already paid, being unauthorized, was paid without consideration, and could be recovered back.—"QUEEN OF THE RIVER" STEAMSHIP CO. *v.* THAMES CONSERVATORS, *Q.B.D.*, 685.

2. *Navigation—Watermen—Towing barges on river—Bye-law providing for licensed waterman on steamboat employed in towing barges—Validity—Watermen and Lightermen Amendment Act*, 1859 (22 & 23 *Vict. c. cxxxiii.*), *s.* 80.—Section 80 of the Watermen and Lightermen Amendment Act, 1859, gave power to the Company of Watermen and Lightermen of the River Thames to make bye-laws "for the government of the company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act and the several powers and authorities thereby vested in the company."

Held, that a bye-law made under this section, requiring that "every steamboat navigated on the river in the towing of barges, vessels, and craft should have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof" was *ultra vires* and invalid, as not coming within the scope of any of the purposes specified in the section.—KENNAIRD *v.* CORY, *Q.B.D.*, 30; [1898] 2 Q. B. 578.

See also Ship, 16.

TOLLS:—

Prescriptive right—Extinguishment of old franchise by statute.—A municipal corporation having a prescriptive right to take certain customary tolls for the passage of carriages, cattle, &c., over a bridge belonging to them, obtained in 1734 a local Act which, after reciting their right to take the customary tolls, enacted that the said customary tolls should be and remain vested in them, and empowered them to take the said tolls, with a variation as to the exemption of freemen of the borough. In 1819 the corporation obtained another local Act which repealed the former Act, and empowered them to take down the old bridge and build a new one, and to take tolls which varied from the old tolls in amount and subject-matter. This Act was temporary, and had expired.

Held, that the prescriptive right to take tolls had been merged in and extinguished by the statutory right given in 1734, and neither had nor could have been revived by the later Act, and that the right to take tolls expired with the later Act.

The decision of the Court of Appeal ([1898] 1 Q. B. 186) affirmed.—WINDSOR (MAYOR) *v.* TAYLOR, *H.L.*; [1899] A. C. 41; 68 L. J. Q. B. 87; 79 L. T. 450.

TRADE-MARK:—

1. *Passing off—Improper use of the words "trade-mark"—Misrepresentation—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 105.—Where a name is put on goods, with the addition of the words "Trade-Mark," but the trade-mark has not been registered, it does not necessarily follow that there is a representation that the trade-mark has been registered, so as to disentitle the plaintiff to relief in a passing-off action.

Held, on the facts, that the plaintiffs were entitled to an interlocutory injunction to restrain the defendant from passing off his goods as or for those of the plaintiffs.

Lewis's v. *Goodbody*, 67 L. T. Rep. 194, 41 W. R. Dig. 250, distinguished.—SEN SEN *v.* BRITTEN, *Ch.D. Stirling, J.*, 358; [1899] 1 Ch. 692; 68 L. J. Ch. 250; 80 L. T. 278.

2. *Registration—"St. Raphael"—Geographical name—Descriptive name—Fancy word—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (1) (c) (2), 74 (a).—The company had registered under the Patents, Designs, and Trade-Marks Act, 1883, as their trade-mark a label upon which the words "St. Raphael" appeared several times. On the application by a rival company to have this mark removed from the register unless a disclaimer of the said words was entered,

Held, that, upon the evidence, the words were not "geographical words"; and that no disclaimer was required; and, further, that the words, being contained in a distinctive label, registered as a whole under the Act of 1883, need not be disclaimed under section 74, inasmuch as they formed a part of the label, and were not additions to it.—CLEMENT ET CIE.'S TRADE-MARK, RE, *Ch.D. Kekewich, J.*, 407; 80 L. T. 230.

3. *Registration—"Solio"—"Invented word"—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 5), *s.* 64, *Patents, Designs and Trade-Marks Act*, 1888 (51 & 22 *Vict. c.* 10), *s.* 10, *sub-section* 1 (d) (e).—The word "Solio" is an invented word, within the Patents, Designs, and Trade-Marks Act, 1883, s. 64, as amended by section 10 of the Act of 1888, and may be registered as a trade-mark in respect of photographic paper. It does not indicate the character or quality of the goods.

Sub-section 1 (*d*) and (*e*) of section 10 of the Patents, Designs, and Trade-Marks Act, 1888 (which is substituted for section 64 of the Act of 1883), are not to be read together, and therefore "an invented word" may be registered though it has reference to the character or quality of the goods.

In Re Farbenfabriken Application, 42 W. R. 408, [1894] 1 Ch. 645, overruled.

Decision of the Court of Appeal (45 W. R. Dig. 163) reversed.—EASTMAN PHOTOGRAPHIC MATERIALS CO. *v.* COMPTROLLER-GENERAL OF TRADE-MARKS, *H.L.*, 152; [1898] A. C. 571; 79 L. T. 195.

4. *Wrappers—Similarity—Endeavour to pass of—No deception probable—Injunction.*—A. brought an action to restrain B. from passing off his soap as A.'s soap by using wrappers which were alleged to have been copied in many respects from A.'s wrappers, and to be calculated to deceive, but no actual deception was proved.

The court came to the conclusion that the draughtsman who designed B.'s wrapper had used A.'s wrapper when doing so, but that there was no probability of deception in the ordinary course of business.

Held, that, notwithstanding the copying of A.'s wrapper, he was not entitled to an injunction as B.'s wrapper was not calculated to deceive.

Judgment of Lord Macnaghten in *Reddaway* v. *Banham*, [1896] A. C. 219, distinguished.—LEVER *v.* BEDINGFIELD, *C.A.*; 80 L. T. 100.

TRADE NAME:—

1. *Company—Similarity of name—Deception.*—The Manchester Brewery Co. (Limited) had carried on business under that name for years. The appellants bought an old business called "The North Cheshire Brewery Co. (Limited)," and then (without intending to deceive) got themselves incorporated and registered under the name "The North Cheshire and Manchester Brewery Co. (Limited)."

Held, upon the evidence, that as a matter of fact the name of the appellant company was calculated to deceive, and that the appellants must therefore be restrained by injunction in the usual way.

The decision of the Court of Appeal, [1898] 1 Ch. 539, affirmed.—NORTH CHESHIRE AND MANCHESTER BREWERY CO. *v.* MANCHESTER BREWERY CO.

H.L.; [1899] A. C. 83; 68 L. J. Ch. 74; 79 L. T. 645.

2. *Descriptive name—Interdict.*—The appellants, an English company, claimed to have invented, or at least to have put upon the market, a fabric suitable for shirtings and underwear woven in a particular manner; and alleged that they had for the last ten years described this fabric in their advertisements as made in a certain way; and that they had marked it and invoiced it under the name of "cellular cloth" largely in England and, to some extent, in Scotland. The name had not been registered. The respondents were a wholesale firm in Edinburgh who sold cotton and woollen goods which they had recently described as "cellular."

Held, affirming the decision of the First Division of the Court of Session, [1898] 25 R. 1098, that the appellants were not entitled to relief on the grounds (1) that the word "cellular" was an ordinary English word which appropriately and conveniently described the cloth of which the goods sold by the respondents were manufactured; and (2) that the term had not been proved to have acquired a secondary or special meaning so as to denote only the goods of the appellants.

Reddaway v. *Banham*, [1896] A. C. 199, distinguished.—CELLULAR CLOTHING CO. *v.* MAXTON & MURRAY, *H.L.* (*Sc.*); [1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809.

TRADE UNION:—

1. *Dissolution of union — Unexpended funds—Resulting trust—Principle of division of funds.*—A trades union society registered under the Trade Union Acts passed a resolution to dissolve itself. The rules contained no provision for the application of the funds in the event of a dissolution. The Crown laid no claim to the funds as *bonâ vacantia.*

Held, that there was a resulting trust in favour of the existing members at the time of the dissolution in proportion to the amount contributed by each member to the funds of the society, and that, in taking the account, it was not necessary to pay any regard to payments for fines and forfeitures or for benefits received under the rules.—PRINTERS AND TRANSFERERS' PROTECTION SOCIETY, RE, *Ch.D. Byrne, J.*, 619; [1899] 2 Ch. 184; 68 L. J. Ch. 537.

2. *Strike—Picketing—"Watching and besetting"—Nuisance—Injunction—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict.* c. 86), *ss.* 3, 7.—To watch or beset a man's house with a view to compel him to do or not to do what it is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct would support an action on the case for a nuisance at common law. Proof that the nuisance was "peaceably to persuade other people" would be no defence to such an action.

In section 7 of the Conspiracy and Protection of Property Act, 1875, the words "such other person" must be read as "any other person."

Decision of Byrne, J. (46 W. R. 461). affirmed.—LYONS *v.* WILKINS, *C.A.*, 291; [1899] 1 Ch 255; 68 L. J. Ch. 146; 79 L. T. 709.

3. *Watching or besetting—"Place"—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict.* c. 86), *s.* 7.—Two members of a workmen's union met men who had been brought over from Ireland to replace workmen on strike at the landing-stage of the steamer, informed them on the strike, and paid their railway fares to places unaffected by the strike.

Held, that this was a watching or besetting of a place where workmen happened to be, within subsection 4 of section 7 of the Conspiracy and Protection of Property Act, 1875, as there was nothing in the statute which necessarily implied any prolonged watching, nor was its operation limited to a place habitually frequented by the workmen; nor was this attending to a place merely to communicate information within the proviso at the end of section 7, inasmuch as the two members of the workmen's union attended to hold out inducements to the men to go elsewhere.—CHARNOCK *v.* COURT, *Ch.D. Stirling, J.*, 633; [1899] 2 Ch. 35; 68 L. J. Ch. 550; 80 L. T. 564.

TRAMWAY:—

1. *Purchase by local authority—Compulsory purchase under Tramways Act*, 1870 (33 & 34 *Vict.* c. 78), *s.* 43—*Purchase under earlier local Act—Contingency—Basis of valuation—The Southampton Corporation Tramways Act*, 1897 (60 & 61 *Vict.* c. *cxxvi.*), *ss.* 2, 3, 4.—By section 43 of the Tramways Act, 1870, it was provided that the local authority might after the expiration of twenty-one years from the passing of the Act, by notice in writing, require the company to sell to them their undertaking upon the terms of paying to them their then value (exclusive of any allowance for past and future profits of the undertaking or any compensation for compulsory sale or other consideration whatever) of the tramway and all lands, buildings, works, materials, and plant of the company. . . .

The S. Street Tramways were constructed in pursuance of their private Act in 1877 (40 & 41 Vict. c. cxxi.), and by that Act the provisions of section 43 of the Tramways Act, 1870, were incorporated.

By the Southampton Corporation Tramways Act, 1897, the corporation were to purchase the undertaking of the company, and in case of dispute the price was to be settled by arbitration under the provisions of the Lands Clauses Act.

And by section 2 of the same Act "'the undertaking of the company' means the undertaking, works, lands, easements, plant, fixed and movable, stock-in-trade, buildings, equipment, rights, powers, privileges, and authorities of the company, including the right to demand and take and recover tolls, rents, and charges."

Held, that in determining the price to be paid under the Act of 1897 the umpire should treat the undertaking of the company as defined by that Act as an undertaking which the company only enjoyed subject to the contingency of being compelled to part therewith under the terms of section 43 of the Tramways Act, 1870; and not as an undertaking which the company enjoyed free from all obligation to part therewith otherwise than under the terms of the Act of 1897 itself.—SOUTHAMPTON TRAMWAYS CO. *v.* SOUTHAMPTON CORPORATION, *Q.B.D.*; 80 L. T. 236.

2. *Telephone company interfering with tramway—Consent of person liable to repair—Injunction—Telegraph Act*, 1863 (26 & 27 *Vict.* c. 112), *ss.* 9, 13—*Tramway Act*, 1870 (33 & 34 *Vict.* c. 78), *ss.* 28, 32.—A telephone company, under licence from the Postmaster-General, was proceeding to lay wires under a tramway, and in so doing interfered with the tramway company. The telephone company had the consent of the road authority, but the tramway company asked for an injunction restraining the telephone company from doing any work without its previous consent, as the "person liable for the repair" of the street under section 13 of the Telegraph Act, 1863.

Held, that the tramway company was only brought within section 13 of the Telegraph Act, 1863 (if at all), by section 28 of the Tramway Act, 1870, and that section 32 of that Act prevented the powers of the road authority from being abridged so that the consent of the tramway company was not required.—BRISTOL TRAMWAYS CO. *v.* NATIONAL TELEPHONE CO., *Ch.D. North, J.*; 80 L. T. 836.

See also Easement; Landlord and Tenant, 15.

TRINIDAD, LAW of:—

Land forfeited to Crown—Waiver of forfeiture—Receipt of rates.—Where land has been forfeited to the Crown by regular legal process, the fact that rates have subsequently been demanded from, and paid by, persons found in occupation of the land without any title, will not be held to be a waiver of the forfeiture.—DE SILVA *v.* ATTORNEY-GENERAL OF TRINIDAD, *P.C.*; 79 L. T. 130.

TRUSTEE:—

1. *Breach of trust—Accumulation clause—Wilful default—Compound interest—Rate of interest—Trustee and* cestui que trust.—A testator bequeathed the proceeds of his residuary estate upon trust for his children, and directed the trustees to apply towards the maintenance of the infant children the whole or part of the income of their expectant shares, and to accumulate the residue of the income and the income thereof at compound interest.

Held, (1) that in a proper case it was competent for the court, upon the further consideration of an action, to charge trustees with interest, whether simple or compound, on balances retained in their hands, although no case of wilful default had been raised by the pleadings, and the question of interest was not referred to in the judgment; (2) that as the trustees had neglected to comply with the express trust for accumulation they were chargeable with compound interest upon the balances in their hands, but at the rate of 3 per cent. only, and that in ascertaining such balances trust funds improperly invested were to be treated as remaining in their hands.

Knott v. *Cottee*, 16 Beav. 77, followed, except as to the rate of interest.—BARCLAY, RE, BARCLAY *v.* ANDREW, *Ch.D. Stirling, J.*; [1899] 1 Ch. 674; 68 L. J. Ch. 383; 80 L. T. 702.

2. *Breach of trust—Debt left outstanding—Liability—Ambiguous will—No application to court—"Acted honestly and reasonably"—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—The executors and trustees of a will did not call in a debt belonging to their testator, and did not apply to the court for directions. It was doubtful, on the construction of the will, whether the testator had or had not directed them to "maintain" the debt, which was producing 5 per cent. in its existing condition; and they acted on the view that he had. Eventually part of the debt was lost.

Held, that the trustees had acted "honestly and reasonably," both in not calling in the debt, and (its amount being small) in not incurring the expense of an application to the court, and were therefore, under section 3 of the Judicial Trustees Act, 1896, entitled to be relieved from personal liability.—GRINDEY, RE, CLEWS *v.* GRINDEY, *C.A.*, 53; [1898] 2 Ch. 593; 79 L. T. 105.

3. *Breach of trust—Principal debtor—Surety—Indemnities—Release of debt.*—Where the life tenant (a married woman) of the income from investments in a settled fund of £30,000, having a power of appointment by will over the capital and income of the same, requested the trustees to sell so much as would realize the sum of £10,000, which she was desirous of handing to her husband, himself one of the trustees; and where, all parties understanding that the said sale and payment were breaches of trust, the other trustee only consented on the life tenant and the co-trustee agreeing to enter into a covenant to indemnify him against all claims; and where the said sum was not repaid to the life tenant prior to her death nor to her estate since her death upon the demand of the other trustee.

Held, that the husband of the life tenant was the principal debtor to his wife's estate, and that she was surety.

Held, further, that, upon the true construction of the will of the life tenant, the £10,000 passed to the husband.—BAIRD, RE, BAIRD *v.* STAVELEY-HILL, *Ch.D. Kekewich, J.*, 277.

4. *Breach of trust—Sale of leaseholds—No power of sale—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35) *s.* 3.—Where trustees of a settlement which did not contain a power of sale had, in the *bonâ fide* belief that they possessed such a power, advantageously sold leaseholds which formed part of the trust estate,

Held, that under section 3 of the Judicial Trustees Act, 1896, they were entitled to be relieved from personal liability to make good the diminution of income sustained by the tenant for life in consequence of the sale.

Decision of Kekewich, J. (46 W. R. 682), affirmed.—PERRINS *v.* BELLAMY, *C.A.*, 417; [1899] 1 Ch. 797; 68 L.J. Ch. 397; 80 L. T. 478.

5. *Investment—Loan to tenant for life upon personal credit without security—Liability of trustee.*—Where the tenant for life under a voluntary settlement made by herself requested the trustees to exercise the power which by the settlement was given them of investing the fund upon personal credit without security, by advancing the moneys to herself upon such conditions.

Held, that the trustees were at liberty, in their discretion, to make the advance, being satisfied of the reasonable prospect of the moneys being recouped.

Keays v. *Lane*, 3 Ir. Rep. Eq. 1, 17 W. R. Ch. Dig. 168, discussed and distinguished.

Proposition in Lewin on Trusts (10th ed.), p. 335, controverted.—LAING, RE, LAING *v.* RADCLIFFE, *Ch.D. Kekewich, J.*, 311; [1899] 1 Ch. 593; 68 L. J. Ch. 230; 80 L. T. 228.

6. *Investment clause—Bond or debenture of "public company corporate, municipal, commercial, or otherwise"—Investment in bond of unincorporated body.*—A power to invest trust moneys in "bonds, mortgage debentures, debenture stock, preference or other shares of any public company or body corporate, municipal, commercial, or otherwise," is confined to such investments in public companies and bodies duly incorporated.

A trustee invested trust funds subject to such a power in the bond or debenture of a body called "The Trustees for the Town and Harbour of Whitehaven," which at the time of investment were unincorporated.

Held, that the word "corporate" was attached to the word "body," so that the clause should read "any public company or body corporate, whether municipal, commercial, or otherwise," and consequently such on investment was a breach of trust.

As to whether the trustee might be relieved from liability under the Judicial Trustee Act, 1896, s. 3, *quære.*—WOOD *v.* MIDDLETON, *Ch.D. Stirling, J.*; 79 L. T. 155.

7. *Judicial trustee—Appointment—Application by*

beneficiary—Sole executor—"Trustee"—Administration—"Trust"—Reversioner—Remuneration of trustee—Discretion of court—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 1, *sub-sections* 1, 2, 4.—A person interested in an estate is not entitled as of right to the appointment of a judicial trustee under the Judicial Trustees Act, 1896, but the appointment is, under section 1, sub-section 1, a matter entirely within the discretion of the court.

Thus where the reversioner under a will applied under the Act for the appointment of a judicial trustee to act either alone or jointly with the testator's widow, who was sole executrix and also tenant for life (there being no trustee appointed by the will), the court refused the application, as it was opposed to her wish and to the testator's manifest intention, which was that she should have the sole control of his estate, there being, moreover, no ground of complaint against her; nor was the fact that the applicant offered that the remuneration of the judicial trustee, when appointed, should come out of capital and not out of income held to justify the application.

Under section 1, sub-section 2, of the Act the administration of the property of a deceased person is a "trust" and the executor is a "trustee": so that, under sub-section 1, the court can, in a proper case, remove the executor and appoint a judicial trustee in his place, to whom, under sub-section 4, it can give directions as to the administration of the trust.—RATCLIFF, RE, *Ch.D. Kekewich, J.*; [1898] 2 Ch. 352.

8. *Judicial trustee—Building society—Dissolution deed—Absconding trustee—Liability of the inactive co-trustee—Judicial Trustee Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—P., the active trustee of the two trustees of the dissolution deed of a building society, who had been required to give an account of moneys received and expended by them, had absconded. Where the *cestuis que trustent* asked, by summons, for the payment by the remaining trustee of the costs of the action which had ensued.

Held, that S., the remaining trustee, had acted dishonestly—within the meaning of section 3 of the Judicial Trustees Act, 1896—in permitting his co-trustee to manage the affairs without check or inquiry, and was therefore liable to pay all the costs of the action.—SECOND EAST DULWICH, &c., BUILDING SOCIETY, RE, MIALL *v.* PEARCE, *Ch.D. Kekewich, J.*, 408; 68 L. J. Ch. 196; 79 L. T. 726.

9. *Mortgage—Will—Real estate—Trust for sale—Postponement of sale—Improvements—Repairs.*—A testator gave his real and residuary personal estate to trustees in trust for sale, with a power of postponement in the usual form, followed by a power (also in common form) during such postponement to manage and let the real estate and to make out of the income or capital of his real and personal estate any outlay they might consider necessary for renewals of leases, improvements, repairs, premiums on policies or otherwise for the benefit or in respect of his real or personal estate. The will contained no express power to raise money by mortgage or charge.

Held, that the trustees had power to raise money by mortgage or charge of the real estate for the purpose of repairing houses forming part of the real estate.—BELLINGER, RE, DURELL *v.* BELLINGER, *Ch.D. Kekewich, J.*; [1898] 2 Ch. 534; 79 L. T. 54.

10. *New trustees—Appointment—Vesting order—Trustee of unsound mind—Jurisdiction—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25-41—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 143.—Where the sole surviving trustee of a settlement is a person of unsound mind, not so found, and is within the jurisdiction, the Chancery Division of the High Court has, under the Trustee Act, 1893, jurisdiction to appoint new trustees, but has no jurisdiction to make a vesting order.—M., RE, *Ch.D. Stirling, J.*, 267; [1899] 1 Ch. 79; 68 L. J. Ch. 86; 79 L. T. 459.

11. *Notice—Assignment—Notice to trustees—Notice to new trustees—Priority.*—An assignee who has given notice to all the trustees in existence at the time of his assignment is not bound to give notice to every new trustee, and is entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all the original trustees and given notice to the new trustees.—WASDALE, RE, BRITTIN *v.* PARTRIDGE, *Ch.D. Stirling, J.*, 169; [1899] 1 Ch. 163; 68 L. J. Ch. 117; 79 L. T. 520.

See also Company, 15; Contract, 9; Limitation Statutes, 6; Married Woman, 1; Practice, 27; Vendor and Purchaser, 4, 6.

TROVER:—

Conversion—Estoppel—Proximate cause of loss—N. pledged with the plaintiffs as security for an advance eighteen hogsheads of tobacco in the custody of defendants as warehousemen. He afterwards repaid the advance on one of the hogsheads, and presented to the plaintiffs for signature a delivery order on the defendants. The quantity was left blank in the order when the plaintiffs signed it, and N. afterwards filled in the blank with the words "eighteen hogsheads," and obtained delivery of them all from the defendants.

Held, that the plaintiffs were estopped as against the defendants from showing that the authority to deliver was limited to one hogshead only. N. also pledged with the plaintiffs two separate consignments of tobacco, and having paid off the advance on one consignment, presented to the plaintiffs a properly drawn delivery order in respect of it, which the plaintiffs signed. N. afterwards added the description of the other consignment, and thus obtained delivery of both from the defendants.

Held, that an action for conversion lay against the defendants, as the plaintiffs had not been guilty of any negligence which was the proximate cause of the wrongful delivery.

N. after fraudulently obtaining the tobacco as above stated, pledged it with a bank as security for an advance, and before the fraud was discovered repaid the advance and recovered possession of the tobacco.

Held, that no action of conversion lay at the suit of the plaintiffs against the bank, as N.'s dealing with the bank had been concluded before the plaintiffs discovered the fraud.—UNION CREDIT BANK *v.* MERSEY DOCKS BOARD, *Q.B.D.*; [1899] 2 Q. B. 205.

VACCINATION:—

Justices—Certificate of conscientious objection—Evidence—Certificate of the birth of the child—Vaccination Act, 1898 (61 & 62 *Vict. c.* 49), *s.* 2.—Justices have power to make a rule that they will not entertain an application for a certificate of conscientious objection under section 2 of the Vaccination Act, 1898, unless and until, where it is possible, a certificate of the birth of the child in respect of whom the application is made is produced to them.—REG. *v.* BUCKINGHAMSHIRE JUSTICES, *Q.B.D.*, 315.

VENDOR and PURCHASER:—

1. *Bankruptcy—Protected transaction—Notice of*

act of bankruptcy—Act of bankruptcy by vendor after contract and before date for completion—Payment after notice of act of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 49.—The plaintiff entered into a contract to purchase a public-house, the purchase to be completed within four weeks, and paid a deposit. By the contract the deposit was to be forfeited in case of neglect or refusal on the part of the purchaser to perform his part of the contract, and to be returned in case of such neglect or refusal on the part of the vendor. Before the expiration of the four weeks the vendor committed an act of bankruptcy. The plaintiff thereupon gave notice refusing to complete the purchase and requiring the deposit to be returned. The vendor never in fact became bankrupt.

Held, that, as the plaintiff had at the date fixed for completion notice of an available act of bankruptcy, payment of the purchase-money to the vendor would not have been protected by section 49 of the Bankruptcy Act, 1883, in the event of the vendor's bankruptcy upon a petition presented within three months of the act of bankruptcy, and the vendor was not in a position to complete the purchase by executing a conveyance and giving a good receipt for the purchase-money; and that the plaintiff was accordingly entitled to the return of the deposit.—POWELL *v.* MARSHALL, PARKES, & Co., *C.A.*, 419; [1899] 1 Q. B. 710; 68 L. J. Q. B. 477; 80 L. T. 509.

2. *Condition—Sale of property subject to tenancies, and with condition for apportionment of outgoings—Unstamped agreement for yearly tenancy—Obligation of vendor to stamp it.*—An agreement for the sale of freehold property provided that the property was sold subject to all tenancies, and also for apportionment of outgoings. Upon investigation of the title the purchaser discovered that an agreement with a yearly tenant of part of the property was unstamped and required the vendor to stamp it before completion of the purchase. The vendor refused, and commenced proceedings for specific performance against the purchaser.

Held, that the purchaser was entitled to have agreement stamped at the vendor's expense.—COLEMAN *v.* COLEMAN, *Ch.D. North, J.*; 79 L. T. 66.

3. *Contract—Sale by auction—Offer by conditions of sale—Acceptance by highest bidder—Payment of deposit by cheque—Custom at auction—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—A vendor who offers property for sale by auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer if those conditions be violated, and who, being the highest bidder, is not allowed to sign the written contract; and it is no defence to an action to enforce such a liability that there is no contract in writing signed by the vendors.

Under the usual condition of sale that the purchaser shall, immediately after the sale, pay the auctioneer a deposit of 10 per cent. and sign the subjoined agreement, cash must be paid.

There is no custom that a vendor is bound to accept the cheque of a person of good credit, much less that of a pauper.—JOHNSTON *v.* BOYES, *Ch.D. Cozens-Hardy, J.*, 517; [1899] 2 Ch. 73; 68 L. J. Ch. 425; 80 L. T. 488.

4. *Contract—Trustees for purposes of Settled Land Act—Settled Land Act,* 1882, *s.* 22.—Where, to the knowledge of a purchaser from a tenant for life selling in exercise of powers conferred on him by the Settled Land Acts, there are no trustees for the purposes of the Act, the purchaser cannot be compelled to pay the purchase-money into court or to accept the title, unless such trustees are appointed.—FISHER AND GRAZEBROOK'S CONTRACT, RE, *Ch.D. Romer, J.*, 58; [1898] 2 Ch. 660; 79 L. T. 263.

5. *Delay—Sale of reversion—Equitable interest.*—S., in April, 1886, contracted to sell to K. the equitable reversion in a sum of Consols vested in trustees, the purchase to be completed on the 25th of June, when an assignment was to be executed containing a covenant by the purchaser to pay succession duty and indemnify the vendor and his estate against it. The purchaser was to pay a deposit; and if the purchase was not completed on the 25th of June, he was to pay interest on the balance of his purchase-money. The deposit was paid and the title investigated; when it appeared that the reversion was subject, along with other property, to heavy incumbrances which the vendor could not discharge, and from which the incumbrancers declined to release the reversion. In January, 1888, S. became bankrupt, and his property was sold, under which sale R. claimed title to the reversion. K.'s interest under the contract for sale became vested in B. In 1890 S. died. In 1895 the reversion fell into possession. No active step to enforce the contract for sale was taken till the 5th of March, 1896, when B. obtained leave to attend proceedings in an action in which the estate of S. was being administered. He then took out a summons claiming the Consols, upon which summons an order of the 11th of May, 1896, was made directing an inquiry who was entitled to them, with a provision that the applicant's claim was to be treated as if he had commenced an action for specific performance on the 5th of March, 1896. The master found that R. was entitled, and Stirling, J., affirmed his decision.

Held, that, although the interest to which the contract related was purely equitable, so that the complete property in it could pass without a formal conveyance, B. could only obtain relief on the ground of specific performance; that the proviso in the order of the 11th of May, 1896, was therefore right; that he was barred from relief by delay; and that the appeal ought to be dismissed.—LEVY *v.* STOGDON, *C.A.*; [1889] 1 Ch. 5; 68 L. J. Ch. 19; 79 L. T. 364.

6. *Disclosure of trust—Mortgagees—Trustee—Devolution of trustees' title.*—On a sale of freeholds a mortgage debt thereon was to be paid off. It was inadvertently disclosed that the mortgage money belonged to the mortgagees as trustees of a settlement, and that they were not the original trustees thereof. On a vendor and purchaser summons,

Held, that the vendor must trace the devolution of the title of the trustees from the date of the settlement, in order to enable the purchasers to get a good discharge for the payment of the mortgage money.—BLAIBERG AND ABRAHAMS' CONTRACT, RE, *Ch.D., Kekewich, J.*, 634.

7. *Lease—Contract—Insurance—Fire.*—A., the lessor, contracted with B., the lessee, for the purchase of B.'s interest in certain premises. B. insured the premises for about half their value. Before the completion of the contract the premises were damaged by fire to about the amount insured, which sum was paid by the insurance company. A. brought his action for damages for breach of the covenant to insure in addition to the sum paid by the insurance company.

Held, that A. was not entitled to any sum by way of damages beyond the insurance money paid by the company.—NEWMAN *v.* MAXWELL, *Ch.D. Kekewich, J.*; 80 L. T. 681.

8. *Lost title-deed—Secondary evidence, what required, and at what time.*—Where a deed forming part of the vendor's title to land is lost, the purchaser can nevertheless be compelled to complete if he is furnished in proper time with satisfactory evidence of its contents and of its due execution.

Bryant v. *Busk*, 4 Russ. 1, and *Moulton* v. *Edmonds*, 8 W. R. 153, 1 De G. F. & J. 246, followed.

But evidence not produced till after the time for completion has expired, and the purchaser has properly issued a summons claiming a declaration that the vendor has not shown a good title, is too late; and evidence, in other respects satisfactory, which fails to prove the execution of one material deed by one necessary party, is insufficient.

Decision of Stirling, J., affirmed (Vaughan Williams, L.J., *dubitante*).—HALIFAX COMMERCIAL BANK AND WOODS' CONTRACT, RE, *C.A.*, 194; 79 L. T. 536.

9. *Restrictive covenant—Building land.*—In 1886 certain land was sold and conveyed subject to a covenant to observe the following stipulation: "Except on lots marked 'tavern lots,' no hotel, tavern, public-house, beer-house, shop, or other building for the sale of wines, spirits, ale, or stout, or any spirituous, malt, or excisable liquor of any kind, shall be built upon any lot now offered for sale; and on no lot shall any manufacture be carried on unless with the consent of the vendor, who shall be at liberty to grant a licence for the same." In January, 1897, the lessees from the purchaser, of two of the lots, which were not marked "tavern lots," with full notice of the covenant, erected a restaurant on the lots. This restaurant was opened to the public on the 25th of March, 1897, but without any wine, spirit, or beer licence. In August, 1897, a licence to sell wines and spirits was obtained. Thereupon the vendor, together with the purchaser of another lot, on which it was intended to erect a public-house, brought an action against the lessees, and then moved for an interlocutory injunction to restrain them from using their restaurant for any of the purposes mentioned in the stipulation.

Held, that the true meaning of the covenant was that no hotel, tavern, &c., should "be" upon any lot except marked "tavern lot"; that it would not be possible to tell whether or not a house when it was in course of building was intended for a hotel, tavern, &c.; but that the user of the house would have to be looked to before declaring that the covenant had been infringed.

Held, therefore, that the plaintiffs were entitled to the injunction claimed.—WEBB *v.* FAGOTTI, *C.A.*; 79 L. T. 683.

10. *Restrictive covenant—Construction—Injurious or offensive or disagreeable noise or nuisance—Carrying on school—Action for rescission of contract.*—W. entered into negotiations with the defendant's agent for the purchase of a house for the purpose of carrying on a boys' school, and was induced to enter into a contract to purchase the house by his representing that there was no covenant which would interefere with W.'s carrying on his school there. W. subsequently discovered that the house was subject to a covenant which, after specially restraining certain trades or businesses from being carried on, provided that there should not be carried on upon the premises any trade or business or occupation whatsoever whereby (*inter alia*) any injurious or offensive or disagreeable noise or nuisance should or might be occasioned, caused, or made. He thereupon brought an action for rescission of the contract, and return of the deposit made by him, with interest.

Held, that the covenant was not limited to trades or businesses *ejusdem generis* as those specifically mentioned; that the carrying on of a boys' school would come within the prohibition of the covenant; that the agent's representation was as to a fact, and not a mere statement of law; and, therefore, that the plaintiff was entitled to succeed in his action.

Tod-Heatly v. *Benham*, 37 W. R. 38, 40 Ch. D. 80 followed.—WAUTON *v.* COPPARD, *Ch.D. Romer, J.*, 72; [1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467.

11. *Sale of land by auction—Agreement to take a free conveyance—Misinterpretation by vendor, of contract—Refusal to deliver abstract of title—Wilful neglect or default.*—On a sale of land by auction the particulars stated that "those purchasers who wished to avoid unnecessary expense and to accept conveyances prepared by the vendors' solicitors may have such conveyances free of expense (except stamp duty)," but the conditions of sale did not provide that purchasers who agreed to accept free conveyances should not be entitled to the delivery of abstracts of title or to investigate the title to the lots purchased by them. They however contained the usual provision requiring the purchaser to pay interest on his unpaid purchase-money in case of non-completion on the appointed day, if not caused by wilful neglect or default of the vendor.

A purchaser of several lots agreed in his contract to take a free conveyance, but requested delivery of an abstract to enable him to investigate the title, before completion. The vendors, however, refused to deliver the abstract until completion, on the ground that the purchaser by agreeing to accept a free conveyance had waived his right to delivery of an abstract and to investigate the title. Upon a summons under the Vendor and Purchaser Act, 1874, taken out by the purchaser,

Held, that the vendors were bound to deliver an abstract to the purchaser to enable him to investigate the title before completion, and that their refusal to do this, though owing to misinterpretation of the conditions of sale, constituted wilful neglect or default on their part, so as to free the purchaser from liability to pay interest on his unpaid purchase-money from the day fixed for completion. —PELLY AND JACOBS' CONTRACT, RE, *Ch.D. North, J.*; 80 L. T. 45.

12. *Sale under order of court—Purchaser for value without notice—Equitable execution—Judgments Act*, 1864 (27 & 28 *Vict. c.* 112)—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70.—No estate or interest will be bound by section 70 of the Conveyancing Act, 1881, which estate or interest would not, apart from such section, have been bound by an order of court dealing with such estate or interest, having regard to the terms of such order and the proceedings in which and the circumstances under which it was made.—JONES *v.* BARNETT, *Ch.D. Romer, J.*, 493; [1899] 1 Ch. 611; 68 L. J. Ch. 244; 80 L. T. 408.

13. *Specific performance—Grant to uses subject to a proviso for re-entry to the heirs of grantor—Common law condition subsequent—Shifting use—Rule against perpetuities in reference to a common law condition—Application of the principles of the common law.*—A proviso for re-entry for condition broken, following on a grant to uses, is a common law condition subsequent, and not a shifting use.

The rule against perpetuities applies to a common law condition for re-entry.

A title which for its validity depended on the

application of the rule against perpetuities to a common law condition for re-entry was not forced on a purchaser, the point not formerly having been the subject of a judicial decision, and there being danger of litigation.—HOLLIS' HOSPITAL TRUSTEES AND HAGUE'S CONTRACT, RE, *Ch.D. Byrne, J.*, 691.

14. *Specific performance—Neglect of defendant to comply with judgment—Rescission of contract—Form of order.*—In a vendor's action for specific performance, judgment has been recovered against the defendant in default of appearance, and an order made on further consideration that the defendant should pay the costs; that the usual account of rents, profits, interest, and costs should be taken, and on payment of the balance a conveyance should be executed to the defendant. The accounts had been taken into chambers, but not proceeded with.

The vendor now moved, upon evidence that the purchaser had no means and could not complete, for rescission of the contract and stay of all proceedings except for the recovery of costs.

Held, that the only order the court could make was that the contract be rescinded and all proceedings stayed, the defendant to pay the costs of this application.

Henty v. *Schroder*, 12 Ch. D. 666, explained and followed.—JEFFERY *v.* STEWART, *Ch.D. North, J.*; 80 L. T. 17.

15. *Specific performance — Rescission — "Eligible for investment"—House used as brothel—Defect unknown to vendor.*—If, at the time of the contract the vendor himself was not aware of any defect in the estate, the purchaser must take the estate with all its faults.

Where a house, described in particulars of sale as an eligible property for investment, was, after the sale, alleged by the purchaser to have been used by the tenant as a disorderly house at and some time before the date of the contract, but neither the vendors nor the purchaser knew of such user at the time of the sale,

Held, on the above principle, that that circumstance—assuming it to be true in fact—did not give any ground for rescission, or even constitute a defence to the vendors' action for specific performance of the contract.

The observations in *Lucas* v. *James*, 7 Hare 410, at p. 418, followed.—HOPE *v.* WALTER, *Ch.D. Cozens-Hardy, J.*, 479; [1899] 1 Ch. 879; 68 L. J. Ch. 359; 80 L. T. 355.

16. *Title—Sewer under property—Conditions of sale—Error or omission discovered in particulars of sale—Compensation.*—The conditions of sale relating to a dwelling-house and grounds, not sold for building purposes, provide (*inter alia*) that any error or omission which might be discovered in the particulars of sale affecting the nature of the property should not annul the sale, but should be a matter for compensation; and that the property was sold subject to all rights of way or other easements.

A deed of mutual covenants, subject to which also the property was sold, precluded any building on the property.

The purchaser discovered that there was a public sewer passing under the garden at the rear of, and some distance from, the house, and a manhole used for obtaining access to the sewer.

The vendor was entirely ignorant at the time of the sale of the existence of such sewer.

The sewer was vested in the local authority under the Public Health Act, 1875, and no buildings could be erected over it without the sanction of the local authority.

The purchaser objected to complete, on the ground that the vendor was unable to make a title to the property.

Held, that the circumstances did not justify the court in releasing the purchaser from his contract to take the property; that the existence of the sewer did not so alter the character of the piece of ground that the purchaser could say that he did not get what was intended to be sold; and that the case was a matter for compensation.—BREWER AND HANKINS' CONTRACT, RE, *C.A.*; 80 L. T. 127.

See also Ecclesiastical Law, 3; Settled Land, 7.

VICTORIA, LAW of:—

1. *Company—Trustees' powers of investment—Deposits with banks—Companies Act*, 1890 (54 *Vict. No.* 1074), *s.* 384.—Section 384 of the Victoria Companies Act, 1890, while authorizing the employment of bankers, does not on its true construction enlarge the powers of investment possessed by trustee companies in common with other trustees.

Held, that the appellant company was not authorized thereunder, or under its special Act, to invest trust moneys on deposit at interest with banks.—PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA *v.* SWAN, *P.C.*; [1898] A. C. 763; 79 L. T. 148.

2. *Income Tax Act*, 1895 (58 *Vict. No.* 1374), *ss.* 5, 7, *sub-section* 3—*Construction—Trusts.*

Held, that the appellant company, which carried on insurance business with strangers for gain to the company as a whole, but had not its principal office in Victoria, was by section 5 of the Victorian Income Tax Act, 1895, liable to income tax on the proceeds from money lent on the security of land in Victoria.

It could not claim exemption under section 7 (*e*), which exempts trusts and all associations not carrying on trade for purposes of gain to be divided amongst the members; for besides granting assurances to persons not its members, it trafficked in reversions, while "trusts" on its true construction means associations acting in or for Victoria.—ENGLAND *v.* WEBB, *P.C.*; [1898] A. C. 758; 79 L. T. 131.

3. *Pension—Right to—Victoria Public Service Act*, 1890 (54 *Vict. No.* 1133), *ss.* 3, 107—"*Prosecutor for the Queen*"—"*Prosecuting barrister*"—*Construction.*

Held, that the appellant was entitled under section 107 of the Public Service Act, 1890, to superannuation allowance by virtue of having held the office of "Prosecutor for the Queen" notwithstanding that he held during pleasure.

Held, further, that he was not excluded therefrom as a "prosecuting barrister" within the meaning of the excluding clause (section 3).

It appearing that the two classes of functionaries were totally distinct, there is no rule of construction to the effect that when one only is named the other is meant or included.—SMYTH *v.* REG., *P.C.*; [1898] A. C. 782; 79 L. T. 199.

WATER:—

1. *Artificial watercourse—Alteration of natural state of things—Sluice-gate—Obligation of owner to repair—Easement—Right to take water granted to owner of adjoining land—Damage by flood.*—Where the owner of land on the bank of a river, for the purpose of bringing water from the river to a mill which he erected, made a watercourse with a shuttle at the head of it to control the flow of the water from the river into the watercourse, and afterwards conveyed away a portion of his land adjoining, and

his successor in title subsequently granted to the owner of the adjoining land so conveyed a right to use the water for the purposes of a mill belonging to him.

Held, that the existence of that right did not affect the obligation of the owner of the watercourse towards the owner of the adjoining land to keep the shuttle in repair so as to prevent flood water from the river getting into the watercourse and overflowing on to his land.

Pomfret v. *Ricroft*, 1 Wms. Saund. 321, discussed. —BUCKLEY & SONS (LIMITED) *v.* N. BUCKLEY & SONS, *C.A.*; [1898] 2 Q. B. 608.

2. *House occupied by tenant—Water rate paid by owner—Pipe out of repair—Liability of owner—Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 17.—In the case of a house of the annual value of less than £10, the owner is liable to pay the water rate instead of the occupier. Such an owner comes within the meaning of the words "any person supplied with water" in section 17 of the Waterworks Clauses Act, 1863, and in a local Act, and was rightly convicted under the local Act, which made it an offence for any person supplied with water to wilfully or negligently do or suffer any act whereby the water supplied was wasted.—BROCK v. HARRISON, *Q.B.D.*, 541; [1899] 1 Q. B. 958; 68 L. J. Q. B. 730; 80 L. T. 568.

See also Local Government, 30.

WEIGHTS and MEASURES:—

1. *Sale of coal—Ticket or note—Seller's name—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 21; *Schedule III.*—In the ticket or note required by section 21 of the Weights and Measures Act, 1889, to be delivered by the seller of coal to the purchaser, the name under which the seller trades may be inserted instead of his real name.—CAMERON v. TYLER, *Q.B.D.*, 559; [1899] 2 Q. B. 94; 68 L. J. Q. B. 759; 80 L. T. 764.

2. *Sale of coal—Weight ticket or note—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 21.—Section 21, sub-section 1, of the Weights and Measures Act, 1889, enacts that, "where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver or cause to be delivered . . . to the purchaser or his servant, before any of the coal is unloaded, a ticket or note according to the form in the third schedule to the Act . . ."

A penalty for non-compliance with the section is provided by sub-section 2.

Section 22, sub-section 1, enacts that, where such coal is conveyed for delivery in bulk, the seller shall cause the weight of the coal and the vehicle containing it to be previously ascertained by a weighing machine duly stamped, being on or near to the place from which the coal is brought.

A quantity of coal exceeding two hundredweight was conveyed for delivery on sale in bulk in a vehicle belonging to the seller. The coal and vehicle were weighed by the seller's servant and the purchaser's servant on a weighing machine on the purchaser's premises, and a ticket in the form given in the third schedule of the Act was filled in by the purchaser's servant at the request of the seller's servant.

Before delivery of the coal was accepted, or any part of it was unloaded, the ticket was delivered by the seller's servant to another servant of the purchaser.

Held, that the seller, having complied with the requirements of section 21, sub-section 1, was not liable to a penalty under sub-section 2.—EDWARD *v.* PURNALL, *Q.B.D.*, 380; [1899] 1 Q. B. 449; 68 L. J. Q. B. 272; 79 L. T. 737.

WILL:—

1. *Absolute gift—"Any money . . . that may be in my possession"—Reversionary interest in personalty—Construction of will.*—Testatrix, who died in 1892, by her will dated in 1891, after making certain bequests of stock, declared as follows: "Any money not mentioned in the aforesaid bequests that may be in my possession at my death after the payment of my debts, funeral and testamentary expenses, I give absolutely" to P. She then made certain specific gifts of chattels. At her death she was entitled to a reversionary interest in personalty which fell into possession in 1897.

Held, that the reversionary interest passed under the bequest to P.—EGAN, RE, MILLS *v.* PENTON, *Ch.D. Stirling, J.*; [1899] 1 Ch. 688; 68 L. J. Ch. 307; 80 L. T. 153.

2. *Advancement—Power of—Expectant or presumptive interests—Possibility of issue—Woman past usual age of child-bearing.*—When property stands limited to A. if (and only if) B. should have a child, and B. is a childless woman above the usual age of child-bearing, the court will not treat A. as having no interest in the property.

Therefore, where property was given by will to certain persons if a childless woman of fifty-four should have children, a power of advancement to those persons in respect of their "expectant or presumptive shares" was exercisable by the trustees. —HOCKING, RE, MICHELL *v.* LOWE, *C.A.*, 114; [1898] 2 Ch. 567; 79 L. T. 164.

3. *Attesting witness taking benefit—Codicil—Republication—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 15.—The effect of a codicil to republish a will, and thus validate a gift under the will to a witness attesting such will, but not attesting the codicil, will not be rendered void by the attestation by such witness of a second codicil to such will, such witness being able to point to a proper instrument under which he takes the benefit, not attested by himself.—TROTTER, RE, TROTTER *v.* TROTTER, *Ch.D. Byrne, J.*, 477; [1899] 1 Ch. 764; 68 L. J. Ch. 363; 80 L. T. 647.

4. *Attestation—Evidence of execution—Denial by attesting witness—Testamentary capacity.*—Case in which probate of a will which had been originally granted on the evidence of the two attesting witnesses was confirmed, notwithstanding that one of them retracted his evidence and in effect swore to the signatures of testator and witnesses having been forged, and the other witness was not called. In the circumstances, the later evidence of the one was held to be incredible, and the absence of the other to be satisfactorily explained.

Testamentary capacity is not disproved by evidence of the testator's merely eccentric acts and conduct.—PILKINGTON *v.* GRAY, *P.C.*; [1899] A. C. 401; 68 L. J. P. C. 63.

5. *Children—Issue—Succession—Vesting.*—A testator bequeathed to his three daughters, in equal shares, the life-rent of a sum of £36,000, to be invested within five years after his decease. Until the investment was made, he bequeathed to each daughter an annuity of £200. In the event of a daughter dying without leaving issue, her life-rent interest was to accresce to her surviving sister or sisters, whilst the capital of the share life-rented by her lapsed into residue. In the event of her leaving issue, the trustees were directed "to divide equally

amongst the issue of each of my said daughters" one-third of the sum directed to be invested. Mrs. M., one of the daughters, died in March, 1895, leaving surviving two daughters. Mrs. M. had had also a son and a daughter, Mrs. H., who pre-deceased her childless, but died after the testator. The question was whether the representatives of the pre-deceasing issue were entitled to a share of the capital appointed to be divided amongst Mrs. M.'s issue.

Held, reversing the decision of the Second Division, [1896] 23 R. 598 (Lords Watson and Herschell dissenting), that all the children of Mrs. M. were entitled to share equally in the division of the fund in which their mother had a life-interest.—HICKLING *v.* FAIR, *H.L.* (*Sc.*); [1899] A. C. 15; 68 L. J. P. C. 12.

6. *Condition—Gift on marriage with consent—Condition precedent—Alternative gift.*—A condition of marriage with consent, attached to a gift of personal estate, is, as a general rule, void as far as the consent is concerned, even though it be a condition precedent. This rule, however, does not apply where there is a gift over or an alternative gift.

Accordingly, a testator, having given an annuity to his son for life, with an additional annuity in the event of his marriage with the consent of the trustees of the will,

Held, that the testator had provided for his son either way by means of an alternative gift, and that the condition, therefore, was good as falling within that class of exceptions to the general rule which was established in *Gillet* v. *Wray*, 1 P. Wms. 284.—NOURSE, RE, HAMPTON *v.* NOURSE, *Ch.D. Stirling, J.*, 116; [1899] 1 Ch. 63; 68 L. J. Ch. 15; 79 L. T. 376.

7. *Construction—Cross-remainders by implication—"Survivor or survivors," when to be construed "other or others."*—A testator, after making certain provisions for his widow and children during their respective lives out of the income of his estate, continued his will as follows: "In case of the death of my son C. leaving children, then one-third . . . of such annual income to such children as hereinafter mentioned . . . and upon the death of my said son C. and my said daughters E. and S. A." he gave one-third part of his property to the children of C. in equal shares, and as to the two remaining one-third parts respectively to the children of E. and S. A. respectively in equal shares. "Provided nevertheless that in case of the death of any of my said children without leaving lawful issue the share . . . so given . . . to his or her issue shall go and be divided by and between the issue of the survivor or survivors of my said children in the same manner and proportions, and under the same trusts as hereinbefore given and bequeathed *per stirpes*." The testator died in 1865. E. died in 1879 leaving issue. The widow died in 1887. C. died in 1893 without issue.

Held, that, "upon the death of my said son C. and my said daughters E. and S. A." must be construed to mean upon the death of the survivor of them, and that the corpus was distributable, as to one-third among the children of E., and as to two-thirds among the children of S. A.; and that the word "survivor" must be read in its natural sense.—RUBBINS, RE, GILL *v.* WORRALL, *C.A.*; 79 L. T. 313.

8. *Construction—Fee expectant on estate tail.*—A testator, being seized in fee of certain lands, devised them to trustees upon certain trusts by which his only child took an estate tail; and he directed his trustees that, on the death of his child, the lands should be "legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever."

His only child married, and died leaving one son who attained the age of twenty-one years.

Held, that the remainder in fee simple expectant on the determination of the estate tail granted to the testator's child was disposed of by the will of testator.—FOXWELL *v.* VAN GRUTTEN, *C.A.*; 79 L. T. 617.

9. *Construction—Forfeiture—"Do or suffer anything whereby income would become vested"—Garnishee order on income—Effect on life estate.*—Under a will the income of a certain sum was to be paid to L. G. "during his life or until . . . he shall do or suffer anything whereby the said income, if payable to him absolutely, or any part thereof, would become vested in any other person."

Held, that no forfeiture resulted from a garnishee order absolute attaching dividends accrued due in the hands of the trustees.—SUTTON *v.* GOODRICH, *Q.B.D.*; 80 L. T. 765.

10. *Construction—General words—"All other my real estate in the county of L."—Advowson in gross.*

Held, on the construction of a will, that, under the circumstances of the above case, two advowsons in gross passed to one of the testator's sons under a gift of "all other my real estate in the county of L.," those words, though not apt words for the purpose, being such words as might pass the advowsons.

Crompton v. *Jarratt*, 33 W. R. 913, 30 Ch. D. 298, distinguished.—HODGSON, RE, TAYLOR *v.* HODGSON, *Ch.D. Romer, J.*, 44; [1898] 2 Ch. 545; 79 L. T. 345.

11. *Construction—Gift to a class—Gift to A. and the children of B. in equal shares—Death of A. before testator—Lapse.*—A gift by will to a class properly so called (*i.e.*, a number of persons indicated by a general description) and A., a named individual, in equal shares, is *primâ facie*, in legal contemplation, a gift to a class; so that, on the death of A. in the testator's lifetime, the whole of the property will be divisible amongst the other legatees.

Decision of North, J., reversed.—MOSS, RE, KINGSBURY *v.* WALTER, *C.A.*, 642.

12. *Construction—Gift to wife of testator's son—Second wife.*—Where in a will a gift is made to the wife of a person married at the date of the will, in the absence of any context to show the contrary the wife in existence at that date is the person benefited.

A testator gave the income of a share of his residuary estate to his son for life, after his death to his wife for life, and after her decease to the children of his son living at the time of the son's death. The will also contained a clause that in the event of the son's bankruptcy the trustees should apply the income of the share thereinbefore directed to be invested for the said son and his family for the benefit of the said son, his wife, and children.

Held, that there was sufficient context to take the case out of the general rule, and that a second wife of the son could benefit under the gift.—DREW *v.* DREW, *Ch.D. Stirling, J.*, 265; [1899] 1 Ch. 336; 68 L. J. Ch. 157; 79 L. T. 656.

13. *Construction—Legacy to illegitimate children—Intention of mistaken testatrix—Domicil—Roman-Dutch law applicable in Demerara (British Guiana).*—Effect given to the express intention of a testatrix

to benefit a specified class of children, even where she was in error in believing that as a fact they had been legitimated by the Roman-Dutch law which legitimates children born out of wedlock when the parents are subsequently married by lawful ceremony.—PLANT, RE, GRIFFITH *v.* HILL, *Ch.D. Kekewich J.*, 183.

14. *Construction — Misdescription of legates — Extrinsic evidence—Former wills.*—A testator by his will bequeathed legacies to such of the daughters of his late friend, I. S., as should survive the testator and be unmarried. The testator's friend, I. S., survived the testator, and had never been married. I. S. had five unmarried sisters, daughters of J. J. S., deceased.

Held, on the construction of the will and on the evidence of a previous will of the testator, which gave legacies to the daughters of J. J. S. by a correct description, that those daughters were entitled to the legacies.

Decision of Kekewich, J. (*ante*, p. 182), reversed. —WALLER, RE, WHITE *v.* SCOLES, *C.A.*, 563; 68 L. J. Ch. 526; 80 L. T. 701.

15. *Construction—Order of payment to beneficiaries —Pecuniary legacy—Devised of mortgaged land free from mortgage—Gift of residue—Real Estate Charges (Locke-King's) Act*, 1854 (17 & 18 *Vict. c.* 113).—S., by his will, after giving four pecuniary legacies, made several specific devises freed and discharged from any mortgages there might be at the time of S.'s death on the respective properties devised; and S. declared that if he should sell any of certain houses comprised in certain of the said devises, his trustees should out of his residuary estate stand possessed of a sum equivalent to the proceeds of sale on similar trusts to those declared of the house. S. then gave to his trustees all other his real and personal estate upon trust to pay an annuity to each of his sons, and out of the balance of the income of his said residuary estate to pay off incumbrances upon his said estate, and after payment off thereof to assign his said residuary estate to his said sons equally. S. afterwards sold one of the houses for £9,800. S.'s estate proving insufficient for payment in full to the beneficiares under his will,

Held, (1) that the pecuniary legacies were charged on the entire residue, and had priority of all payments directed to be made out of the residue; (2) that the annuities were given to the sons in their capacity of residuary legatees, and were therefore not payable until the mortgage debts on the specifically devised realty and the sums representing houses sold were paid; (3) that the £9,800 was to be treated as an ordinary legacy made payable out of residue; (4) that as between the devisees of mortgaged realty and the pecuniary legatees, the rule in *Lutkins* v. *Leigh*, Cas. temp. Talb. 52, that the pecuniary legatee had priority over the devisee, must be applied, the testator having negatived the application of Locke-King's Act and the amending Acts.

Porcher v. *Wilson*, 14 W. R. 1011, followed.

Smith v. *Smith*, 10 Ir. Ch. Rep. 89, 461, not followed.—SMITH, RE, SMITH *v.* SMITH, *Ch.D. Romer, J.*, 223; [1899] 1 Ch. 365; 68 L. J. Ch. 333; 80 L. T. 113.

16. *Contract entered into by testator—Devise—Non-completion of contract at time of testator's death—Right of devisee.*—Where a testator devised land by his will and entered into a contract for the building of cottages on such land, which contract was unfinished at the time of his death.

Held (following *Cooper* v. *Jarman*, 15 W. R. 142, L. R. 3 Eq. 98), that the devisee was entitled to have the contract completed at the cost of the estate.

But this principle does not apply to land already conveyed to devisee before testator's death.—DAY, RE, SPRAKE *v.* DAY, *Ch.D. North. J.*, 238; [1898] 2 Ch. 510; 79 L. T. 436.

17. *Devise—Fee simple conditional—Possibility of reverter—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 3.—A possibility of reverter on failure of a fee simple conditional on the birth of male issue is within section 3 of the Wills Act, and is devisable.

Semble, that such a possibility of reverter is an estate.—PEMBERTON *v.* BARNES, *Ch.D. North, J.*, 444; [1899] 1 Ch. 544; 68 L. J. Ch. 192; 80 L. T. 181.

18. *Devise on death of life tenant without issue to right heirs—Females—Whether coparceners or joint-tenants—Inheritance Act*, 1833 (3 & 4 *Will.* 4, *c.* 106), *s.* 3.—A testator who died in 1858 devised real estate upon trust to pay the rents and profits to his niece S. N. for life, and afterwards for her children on their attaining twenty-one years. And if there should be no such child, then to his right heirs for ever. S. N., who, together with three other ladies who were still living, were the testator's coheiresses, died in 1898 without issue. A summons having been taken out to ascertain whether these coheiresses succeeded as joint-tenants or coparceners.

Held, that, having regard to section 3 of the Inheritance Act, 1833, they took as devisees and not by descent. That coparceny was an incident of descent, and that there was nothing in the Act to show an intention to annex it to the estate of devisees. That accordingly the three surviving ladies took as joint tenants.—BAKER, RE, PURSEY *v.* HOLLOWAY, *Ch.D. Stirling, J.*; 79 L. T. 343.

19. *Hotchpot clause—Covenant by testator—Settlement—Debt—Satisfaction.*—The testator had covenanted with the trustees of the son's marriage settlement that his executors would pay to them £10,000, to be invested and held upon trust for the son for life, with remainder to the son's wife for life, with remainder as to the capital for the children of the marriage, and in case of there being no child (as in the event happened) the capital was to be held in trust for the testator absolutely. By his will the testator directed his executors and trustees to convert his whole estate into money, and to stand possessed of the clear residue in trust for his two children in equal shares. And the testator by his will declared that any sum given "to or with any child" on his or her marriage was to be taken in or towards satisfaction of the share of such child, and brought into hotchpot. The son died, leaving a widow and no issue.

Held that the testator's trustees must specifically appropriate and allot to the son's share under the will the testator's contingent reversionary interest in the £10,000, so as to effect an equal division between the son and the daughter.

Decision of the Court of Appeal, 45 W. R. 376. 1897] 1 Ch. 325, affirmed, but on different grounds. — WHEELER *v.* HUMPHREYS, *H.L.*, 17; [1898] A. C. 506.

20. *Issue—Simple gift over of legacy to issue—Other gifts over restricting "issue" to children—Canon of construction.*—A testator bequeathed twelve distinct legacies, with gifts over to the issue of the legatee dying in his lifetime. In the case of eleven of the legacies the gifts over contained words restricting, either expressly or by the application of the principle of *Sibley* v. *Perry*, 7 Ves. 522, the

class of issue to children. The word "issue" in the gift over of the remaining legacy was not qualified by any such restriction.

Held, that, in the gift over of the remaining legacy, the word "issue" must be construed in its wider sense, on the following grounds: (1) That there was no expression of a general intention to limit the word "issue" to mean children throughout the will; (2) that no manifest inconsistency would arise from construing the word "issue" in its wider sense; and (3) that the court was not bound by the canons of construction laid down in *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84, and *Rhodes* v. *Rhodes*, 8 W. R. 204, 27 Beav. 413.—BIRKS, RE, KENYON *v.* BIRKS, *Ch.D. Kekewich, J.*, 374; [1897] 1 Ch. 703; 68 L. J. Ch. 319; 80 L. T. 257.

21. *Leaseholds — Mortgage — Interest — Rent — Covenants — Tenant for life — Remaindermen — Liability.*—The tenant for life of a leasehold house bequeathed to him directly without the intervention of trustees, and then over, is, in the absence of further provision, liable to keep down the interest on a mortgage made by the testator on the house, and also to pay the rent reserved by, and perform the covenants contained in, the lease.

In re Courtier, Coles v. *Courtier*, 35 W. R. 85, 34 Ch. D. 136, ought to be construed as merely deciding that the tenant for life under a bequest of leasehold property is not liable for any breach of covenant or condition occurring prior to the date of the testator's death.

In re Redding, Thompson v. *Redding*, 45 W. R. 457, [1897] 1 Ch. 876; *Kingham* v. *Kingham*, [1897] 1 Ir. Rep. 170, 45 W. R. Dig. 180; and *In re Betty, Betty* v. *The Attorney-General*, [1899] 1 Ch. 821, followed.

In re Baring, Jeune v. *Baring*, 41 W. R. 87, [1893] 1 Ch. 61, and *In re Tomlinson, Tomlinson* v. *Andrew*, 46 W. R. 299, [1898] 1 Ch. 232, not followed.—GJERS, RE, COOPER *v.* GJERS, *Ch.D. Kekewich, J.*, 535; [1899] 2 Ch. 54; 68 L. J. Ch. 442; 80 L. T. 689.

22. *Leasehold—Tenant for life—Repairs—Liability —Covenants—Insurance—Equitable tenant for life.*—An equitable tenant for life of leaseholds under a will is bound, during the continuance of his interest, as between himself and his testator's estate, to perform the tenant's continuing obligations under the lease; but he is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant which had arisen before the testator's death.

In re Courtier, (1886) 34 Ch. D. 136, considered.

In re Tomlinson, [1898] 1 Ch. 232, differed from. —BETTY, RE, BETTY *v.* ATTORNEY-GENERAL, *Ch.D. North, J.*; [1899] 1 Ch. 821; 68 L. J. Ch. 435; 80 L. T. 675.

23. *Perpetuity—Conditional devise—Direction to apply moneys in maintaining monument on part of devised real estate.*—A testator by his will devised two freehold farms to his nephew on condition that he should set apart the rents and profits thereof for the term of five years "for the use and purpose of erecting on some portion" (suggesting a particular situation) a monument to the memory of John Locke, and at the expiration of the five years he directed that his nephew should enjoy three-fourths of the rents and profits, but should devote the balance or remaining one-fourth towards the maintenance and keeping in order of the monument.

Held, that the erection of the monument was not intended as a mode of enjoyment of the property by the devisee, and that the application of one-fourth of the rents and profits was intended to perpetuate the memory of John Locke, and, therefore, as to such one-fourth there was an intestacy.—JONES, RE, PARKER *v.* LETHBRIDGE, *Ch.D. Stirling, J.*; 79 L. T. 154.

24. *Real estate—Charge of debts—Trustees—Devise of all testator's interest—Power to sell—Lord St. Leonard's Act* (22 & 23 *Vict.* c. 35), s. 14.—Testator appointed his wife sole executrix, and after a direction to pay debts and legacies, devised and bequeathed the residue of his real and personal estate to trustees upon trust to permit his wife to receive the rents and profits during her life; then for his niece for life for her separate use; then upon trust to pay two legacies, and subject thereto for the children of the niece.

Held, that the real estate was charged with payment of debts and legacies, but that as the trustees took no legal estate therein during the life of the wife, there was no devise of all the testator's interest in the realty, and consequently the trustees could not sell the real estate by virtue of section 14 of Lord St. Leonard's Act.—ADAMS & PERRY'S CONTRACT, RE, *Ch.D. Stirling, J.*, 326; [1899] 1 Ch. 554; 68 L. J. Ch. 259; 80 L. T. 149.

25. *Relevancy—Capacity—Insane delusions.*—In an action for reduction of a will the pursuers averred that the testator was "subject to insane delusions," and that "he believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communications on various occasions." That these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will.

Held, reversing the decision of the First Division of the Court of Session, [1896] 23 R. 513 (Lord Davey dissenting), that a relevant case for trial was averred.—HOPE *v.* CAMPBELL, *H.L.* (*Sc.*); [1899] A. C. 1.

26. "*Survivor*" — *Trust moneys — Gift of life interest to A.—After death of A. direction to pay and divide equally between two persons—"And if either of them shall be then dead for the survivor"—Death of both legatees before determination of life interest—Meaning of words "either" and "survivor."*—A testatrix gave residuary trust moneys upon trust to pay the interest to her sister Thirza during her life, and after her death to pay and divide the said trust moneys equally between the testatrix's two sisters Frances and Sarah, share and share alike, "and if either of my said sisters shall be then dead . . . upon trust for the survivor of my said sisters absolutely."

Held (Rigby, L.J., *dissentiente*), that the period of distribution was not the death of Sarah, who died first, or of Frances, who was the survivor of the two legatees, but the death of Thirza, to whom the life interest was given; and that both Sarah and Frances being dead at that time there was then no survivor, and the clear original gift to Sarah and Frances as tenants in common was not divested.

The decision of North, J., affirmed.

White v. *Baker*, 2 D. F. & J. 55, distinguished. —PICKWORTH, RE, SNAITH *v.* PARKINSON, *C.A.*; [1899] 1 Ch. 642; 68 L. J. Ch. 324; 80 L. T. 212.

See also Charity, 2, 6; Limitation Statutes, 8; Married Woman, 3; Power, 1, 2; Probate, 17-24; Trustee, 9.

[THE END.]

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